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APPELLATE PROCEDURE

A. EXTENSION OF TIME TO APPEAL

i. THE TEST

The appellate court has discretion to grant or refuse an extension of time to appeal: *R v Ansari,* 2015 ONCA 891 at para 21

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

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 at para 36

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

Even where there was no *bona fide* intention to appeal within the appeal period, the interests of justice may nonetheless justify an extension of time – for example, when there has been a new development in the law: see generally *R v Makara,* 2023 ONCA 707, at paras 7, 16

One important consideration against granting an extension of time is where the appellant has taken the advantage of the judgment that s/he now seeks to appeal: *R v Makara,* 2023 ONCA 707, at para 23

i. Examples from the Case Law

Extensions of time to appeal sentence may be granted where collateral consequences arise post-sentencing: *R v Ansari*, 2015 ONCA 891 *at paras 24-27; R v Chen*, 2016 ONCA 132

In *Onwubolu,* the Ontario Court of Appeal granted an extension of time to appeal a sentence already appealed and dismissed by the Summary Conviction Appeal Court, notwithstanding that the ground of appeal being advanced was being raised for the first time at the Court of Appeal. The Court reasoned that there appeared a strong argument that the sentence was illegal, and "an illegal sentence, if challenged, cannot stand": 2020 ONCA 342

In *Brooks,* the Court found that the Applicant had adequately explained 11 years of delay because there was no reason for him to challenge his conviction until it resulted in immigration consequences for him: 2020 ONCA 605, at para 8

Courts have granted an extension of time to allow an accused to attempt to set aside a guilty plea notwithstanding lengthy unexplained delay where there are unexpected consequences of the conviction, and there is good reason to doubt the validity of the conviction: *R v Brooks,* 2020 ONCA 605, at para 16; *R v Baig,* 2022 ONCA 129, at para 21

In *Bailey,* the court granted an extension of 12 years to appeal an NCR verdict in circumstances where the appellant provided uncontradicted evidence that his counsel did not advise him of the consequences of an NCR verdict, and that he was unaware of the right to appeal until recently based on conversations with his friend in the hospital: 2022 ONCA 507

B. APPEAL OF REFUSAL TO EXTEND TIME

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 at paras 5, 11

A panel review of a motion judge's decision is not a *de novo* determination. Intervention is warranted if the motion judge failed to identify the applicable principles, erred in principle or reached an unreasonable result. Absent legal error or misapprehension of evidence, discretionary decisions of a motion judge, such as the refusal to grant an extension of time, to order production, or to permit summons to witnesses, are entitled to deference: *R v Mohammad,* 2024 ONCA 494, at para 11

The court has jurisdiction to grant leave to appeal under s. 131 of the Provincial Offences Act from a judgment that denies an extension of time to appeal under s. 116. However, because of the strict requirements of s. 131(2) 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 at para 35

C. ABANDONING AN APPEAL

The decision to order an appeal dismissed as abandoned is a discretionary one that permits a court to control its own process: *R v Berhe,* 2022 ONCA 853, at para 11

The Court of Appeal has the discretion to reject a Notice of Abandonment if the appellant is lacking in capacity. The test for capacity in this situation is akin to the test for capacity when entering a guilty plea: *R v Esseghaier,* 2022 ONCA 340, at para 5

D. BIFURCATING AN APPEAL

It is preferable that the appeals be heard together. The advantages of this order of proceeding are clear. It enhances the efficient use of the court's resources, avoids the possibility of contradictory outcomes, and ensures that the panel hearing the sentence appeal has the benefit of the full context for the appeal. This rule is not absolute, however. Appeals from conviction and sentence should be bifurcated where there are compelling reasons to do so: *R v DL,* 2024 ONCA 908, at para 9

E. REOPENING AN APPEAL

The Court of Appeal has "extraordinary jurisdiction" arising from its inherent power, to reopen a dismissed appeal in the interests of justice, so long as the appeal has not been dismissed on its merits: *R v Hulme,* 2021 ONCA 887, at para 6; *R v Perkins*, 2017 ONCA 152 at paras 11-19

Appellate rights, procedures on appeal, and jurisdiction of appellate courts are wholly creatures of statute. From this principle, it follows that, if a power to re-open appeals exists, it must be anchored in some statutory authority, whether expressly stated or arising by necessary implication.

A potential source of authority to permit re-opening inhabits the inherent or ancillary jurisdiction of a court, including a statutory court like the court of appeal, to control its own process. This jurisdiction includes the authority to regulate the manner in which the parties exercise any statutory right of appeal:

An appellate court is prohibited from re-opening an appeal when the court is *functus officio*. The court is *functus officio* when:

i. the appeal has been argued and decided on the merits;
ii. the court has issued reasons for its decision; and
iii. a formal order has been entered or issued recording the disposition of the appeal.

Where an appellate court hears an appeal on its merits and issues reasons for its dismissal of that appeal, but does not issue a formal order recording that dismissal,

the court is not *functus officio*. The authorities support the existence of a discretion in those circumstances to permit re-opening.

The circumstances in which a court may exercise its authority to permit re-opening are closely circumscribed. The core question is whether the applicant has established a clear and compelling case that a miscarriage of justice will likely occur absent re-opening. Among the relevant factors a court might consider in deciding whether to permit re-opening of an appeal previously argued and decided on the merits are:

i. the principle of finality;
ii. the interests of justice including finality and the risk of a miscarriage of justice;
iii. whether the applicant has established a clear and compelling case to justify a re-opening;
iv. whether, in hearing and deciding the appeal on the merits, the court overlooked or misapprehended the evidence or an argument advanced by counsel; and
v. whether the error alleged concerns a significant aspect of the case: *R v Smithen-Davis,* 2020 ONCA 759, at paras 26-37

The core question is whether the applicant has established a clear and compelling case that a miscarriage of justice will likely occur absent reopening: *R v Prasad,* 2024 ONCA 601, at para 92

When the Court reopens an appeal, a single judge of the Court may entertain an order for bail pending appeal: *R v Smithen-Davis,* 2020 ONCA 834

The narrow and exceptional jurisdiction to reopen does not extend to an appeal that was heard on the merits but the panel deciding it allegedly failed to consider one of the arguments that was raised because it thought the argument had not been raised. The correctness of the panel's appreciation and assessment of the merits is irrelevant to the existence of jurisdiction to reopen. Put differently, there is no jurisdiction to reopen where there is an imperfect, or incorrect, concordance between the merit-based arguments made at the hearing of the appeal and the merits-based decision: *R v Scott*, 2023 ONCA 820, at paras 3-4, 34

[A party who believes a panel's reasons show it misunderstood that an argument was made has remedies. They may, before a formal order is issued, ask for the appeal to be reopened in the interests of justice under the principles in *Smithen-*

Davis. They may apply for leave to appeal to the Supreme Court of Canada: *R v Scott*, 2023 ONCA 820, at para 37

F. RESTORING A CLOSED APPEAL

The relevant factors to be used in assessing whether to restore an appeal as follows:

1. Whether the applicant intended in time to proceed with the appeal;
2. What explanation is offered by the applicant for the defect or delay which caused the appeal to be struck or deemed abandoned;
3. Whether the applicant moved with reasonable promptness to cure the defect and have the appeal restored;
4. Whether the appeal has arguable merit; and
5. Whether the respondents have suffered any prejudice, which includes consideration of the length of delay.

None of these factors are determinative.

When an appeal is struck due to the late filing of materials, those late materials should be appended to the application in order to demonstrate to the court that the applicants are in a position to immediately cure the defect: *Can v. Alberta Securities Commission*, 2023 ABCA 21

G. JURISDICTION TO APPEAL

i. General Principles

Any appeal route must be found in a statute: *R v Gong,* 2020 ONCA 587, at paras 14, 21

ii. After death of Appellant

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 at para 2

iii. 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 at para 5

iv. Civil Versus Criminal Matter

There are three categories of orders that would be considered to be criminal in nature. Those three categories are: (i) an order made in the course of a criminal proceeding, (ii) an order directly impacting on an ongoing or pending criminal proceeding, or (iii) an order rescinding or varying an order made in a criminal proceeding. The order of the application judge here clearly fits into the first and second categories: *R v Gong,* 2020 ONCA 587, at para 9

APPELLATE REVIEW

A. ACCUSED APPEAL

i. Accused Appeal and Curative Provisio under s.686(1)(b)(iv)

Section 686(1)(b)(iv) operates in tandem with s. 686(1)(b)(iii) 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 at paras 46-48

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:

The prejudice inquiry mandated by s.686(1)(b)(iv) 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

Factors such as the appearance of fairness are engaged when considering whether there has been prejudice to the due administration of justice, that is, whether there was a miscarriage of justice within the meaning of s. 686(1). A miscarriage of justice need not always be supported by the demonstration of actual prejudice to an appellant; sometimes, public confidence in the administration of justice is just as shaken by the appearance as by the fact of an unfair proceeding: *R v McDonald,* 2018 ONCA 369 at para 51

In *Gorges,* for example, the Court of Appeal found that the trial judge's categorical disregard of significant evidence adduced by the defence in cross-examination, without notice to the parties and without inviting an opportunity for further submissions, constituted an irregularity that gave rise to a miscarriage of justice. It undermined the appellant's right to procedural fairness as the evidence was critical to his defence. The improper exclusion of evidence does not always amount to a miscarriage of justice. In some cases, such an exclusion may be more properly characterized as an error of law. In those circumstances, appellate courts can consider whether the curative proviso in s. 686(1)(b) of the *Criminal Code* should apply, including whether the error is so minor that it would not be expected to affect the result or whether the evidence against the appellant is overwhelming. However, the legal error in *Gorges* was found to be compounded by the lack of procedural fairness. The case was held to be distinguishable from those in which cross-examination was improperly curtailed, but the reviewing court can still determine that further cross-examination on the areas that should have been permitted would have made no difference to the verdict: *R v Gorges,* 2024 ONCA 857, at paras 61-68

There are two situations where the curative proviso is appropriate: 1) where the error is harmless or trivial because the error relates to a minor aspect of the case, and thus could not have prejudiced the accused or affected the verdict; 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 at para 70; *R v Zoldi,* 2018 ONCA 384 at para 53; *R v Vorobiov,* 2018 ONCA 448 at para 70; *R v McKenna,* 2018 ONCA 1054, at para 42; *R v Cox,* 2020 ONCA 820, at para 6

Although, in substance, a "harmless error" inquiry under the curative proviso is also about the materiality of an error, clarity is best achieved by maintaining a distinction between the inquiries that form part of the rules an appellant is relying upon on appeal, and the application of the proviso at the behest of the Crown. The materiality of the reasoning errors is to be judged by examining their impact on the specific conclusion they support, not by examining the strength of the entire case. Once error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred". Therefore, the Crown's opportunity to rely on the whole of the case arises where the curative proviso is invoked, and not as part of the materiality inquiry. Even then, the examination is not of other reasons offered by the trial judge. In considering the curative proviso in s. 686(1)(b)(iii), the question is not whether this trial judge would have convicted: "The appropriate inquiry… is whether there is any possibility that a trial judge would have a reasonable doubt on the admissible evidence": *R v JC,* 2021 ONCA 131, at paras 101, 112

Appellate courts assess whether an error is harmless by considering it in the context of the entire case, although this assessment does not consider the strength of the Crown's case.

Tracing an error's impact can be more challenging in jury trials because juries do not provide reasons. It is easier in trials by judge alone if the reasons for judgment provide a roadmap for appellate review. By assessing those reasons, courts may be able to determine that a non-erroneous reasoning path was a sufficient basis for the decision and that any reasoning tainted by the error was not integral to the verdict. The reasons thus allow the court to assess whether the error is significant in the context of the entire case: *R v Layne,* 2024 ONCA 435, at paras 59-60

The risk of misuse of improperly admitted evidence is greater in a jury trial because jurors are not legally trained: *R v Jenkins,* 2025 ONCA 533, at para 45

The fact that juries do not provide reasons for their verdict can also militate against applying the proviso: *R v Jenkins,* 2025 ONCA 533, at paras 51-52

The term "prejudice" in the curative provision in s. 686(1)(b)(iv) of the *Code* includes prejudice in the broader sense of prejudice to the appearance of the due administration of justice: *R v Ochrym,* 2021 ONCA 48, at para 49

Because cross-examination is a key element of the right to make full answer and defence, a failure to allow relevant cross-examination will almost always be grounds for a new trial: *R v RV,* 2019 SCC 41 ; *R v AM,* 2024 ONCA 661, at para 130

However, while the curative proviso can only rarely apply in cases where cross-examination has been improperly curtailed, there is no categorical rule that any improper interference with cross-examination bars application of the proviso: *R v Samaniego,* 2022 SCC 9, at paras 71, 77

The 'overwhelming evidence' standard is a substantially higher one than the requirement that the Crown prove its case 'beyond a reasonable doubt' at trial. This high standard is appropriate because if the proviso is relied upon, the accused stands convicted based not on an actual jury verdict rendered according to law, but on an appellate court's assessment as to what the jury would have done had the legal error or errors not occurred: *R v Cole,* 2021 ONCA 759, at para 162; see *R v Gul,* 2021 SCC 41 (concurring reasons)

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 at para 31. The curative proviso also cannot be applied when the Crown has argued it in respect of one ground but not the ground that the courts allows the appeal on: *R v Cook,* 2020 ONCA 731, at para 112

The curative proviso could apply even though no explicit reference to s.686(1)(b)(iii) of the *Criminal Code* was made by the Crown, provided that the substance of the *proviso* point was raised: *R v Ajisle,* 2018 ONCA 494; aff'd at 2018 SCC 51

In other words, the curative proviso may be invoked by the Court if the Crown raises it implicitly: *R v Cole,* 2021 ONCA 759, at para 155

Caution should be exercised prior to applying the *curative provisio* if credibility is the key issue at trial: *R v Alisaleh,* 2020 ONCA 597, at para 18; *R v Tran,* 2023 ONCA 11, at para 38; *R v UK,* 2023 ONCA 587, at para 138

This is especially so where the error may well have impacted the jury's credibility assessments: *R v Jenkins,* 2025 ONCA 533, at para 59

Any possible doubt must inure to the benefit of the appellant. In other words, if there is any possibility that the jury could, having regard to the entirety of the evidence, be left with a reasonable doubt on the appellant's testimony, the curative proviso cannot be mobilized to uphold a conviction: *R v Dawkins,* 2021 ONCA 113, at paras 71; see also para 78

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 at para 83

A breach of s. 650(1) by exclusion of an accused from a part of his or her trial is a procedural irregularity to which s. 686(1)(b)(iv) can apply. However, unless there are exceptional circumstances, s. 686(1)(b)(iv) will not save a breach of s. 650(1) caused by the absence of the accused during closing arguments at the conclusion of dangerous offender proceedings. This is precisely what occurs when exclusively written argument is ordered by the trial judge and an opportunity to provide oral argument by the offender is denied. Such circumstances impair the appearance of fairness, compromise the transparency of the trial proceedings and are at odds with the open court principle: *R v McDonald,* 2018 ONCA 384 at para 53

A. 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

ii. ACCUSED APPEAL OF CONVICTIONS BUT NO CROWN APPEAL

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 at para 82

While Crown cannot resile from the fact that it took a joint position before the sentencing judge, once the sentencing judge rejects that joint position, it is entirely open to the Crown to resist an appeal against that decision and to argue that the sentencing judge did not err by rejecting the joint submission: *R v RS,* 2019 ONCA 542, at para 13

The Crown is entitled in criminal appeals to raise any argument which supports the order of the court below: *R v Keegstra,* [1995] 2 SCR 381 (SCC)

iii. 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 at para 42

ii. ACCUSED APPEAL FROM CONVICTION ON INCLUDED OFFENCE:

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

Section 686(8) 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

iii. 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

iv. 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 at paras 90-93

B. CROWN APPEAL

Under s. 676(1)(a) of the Code, 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 at para 7; *R v George,* 2017 SCC 38

Jurisprudence establishes that such questions include the following: misinterpretation or misapplication of salient legal standards, including the elements of the offences; assessing evidence based on erroneous legal principles; making findings of fact not based on the evidence; failing to give legal effect to findings of fact or of undisputed facts; failing to consider all the evidence bearing

on guilt or innocence; failing to properly admit evidence; and, failing to provide adequate reasons: *R v Trachy,* 2019 ONCA 622, at para 68

A misapprehension of evidence does not raise a question of law alone; rather, It raises a question of mixed fact and law. As such, it is not within the scope of the Crown's right of appeal on questions of law alone, pursuant to s. 676(1)(a) of the Criminal Code: *R v Chu,* 2023 ONCA 183, at para 17

An appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof. Therefore, the Crown cannot appeal merely because an acquittal is unreasonable: *R v Chung,* 2020 SCC 8

While credibility findings are generally insulated from appellate review, an error in legal principle affecting that assessment is an error of law: *R. v. Luceno*, 2015 ONCA 759, at para. 34; *R v ABA,* 2019 ONCA 124, at para 4

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: *George; R v Sault,* 2018 ONCA 970, at para 4; *ABA* at para 13, 15

Where the trial judge commits legal error in rejecting a complainant's evidence, the court must still ask whether it can safely be said that the trial judge would have reached the same conclusion without the error – even when the trial judge finds that the accused's evidence on its own would raise a reasonable doubt. This is so because the trial judge is required to consider the accused's evidence in light of all the evidence, including the complainant's, and it may not be possible to divorce the trial judge's acquittal of the accused from his/her flawed reasoning: *R v GH,* 2024 ONCA 523, at paras 25-30

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

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

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 at para 4
The Crown is not entitled to appeal on the basis that the trial judge's weighing of the similar fact evidence was unreasonable: *R v LB,* 2024 ONCA 88, at para 25

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 at paras 6-12, 58-60; *R v Barton,* 2020 SCC 33, at para 47

Under s.676(1)(b), the Crown may appeal against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment. Under this provision, the Crown may appeal when a judge grants a mistrial following a conviction, whenever such a decision is done on a legally sound basis and in the clearest of cases: *R v Wilson*, 2024 ONCA 600, at paras 52-59

Section 676(2) gives the Crown a right of appeal on the main charge even if there is a conviction on the included offence.

The Crown is precluded from arguing that an acquittal is unreasonable. As a matter of law, the concept of unreasonable acquittal' is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt: *R v Scott,* 2021 ONCA 625, at para 44; see also *R v Sparks-Mackinnon,* 2022 ONCA 617, at para 20

BAIL PENDING APPEAL

See General Topics on Law: Judicial Interim Release: Bail Pending Appeal

CONCESSION ON APPEAL

A sentence-related concession made by the Crown on appeal is not binding. The court must be satisfied that the sentence is a fit and proper one based on the existing authorities: *R v Scholz,* 2021 ONCA 506, at para 36

FRESH EVIDENCE

A. THE RATIONALE FOR ADMISSION

Fresh evidence will be admissible where, even though the evidence was reasonably available at trial, the importance of the evidence could not reasonably have been anticipated prior to a reading of the trial judge's decisions: *R v. Collins*, 2015 ONCA561

Fresh evidence need not be directed at any issue litigated at trial, but may be evidence that seeks to shed light on the validity of the trial process: *R v Chen,* 2025 ONCA 168, at para 4

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, at para 118

The burden on the accused when admitting fresh evidence is on a balance of probabilities; *R v. Hartman*, 2015 ONCA 498, at para 37

When fresh evidence on appeal challenges a factual finding essential to the verdict reached at trial, admissibility will depend on: 1) whether it is generally admissible under the rules of evidence; 2) whether it is sufficiently cogent [relevant, credible,

probative]; 3) the explanation for failure to tender the evidence at trial: *R v. Hartman*, 2015 ONCA 498

There are essentially two categories of fresh evidence (1) on the basis of non-disclosure giving rise to a breach of the right to make full answer and defence (the "*Dixon* test"); or (2) on the basis that the cogency of the evidence is such that it warrants admission and the interests of justice require that it be received (the "*Palmer* test").

Where an appellant seeks to demonstrate that the trial process was unfair, fresh evidence is received to establish a fact which caused a miscarriage of justice: *R v Osborne,* 2024 ONCA 467, at para 43

B. THE PALMER TEST

There is no requirement that a party to a criminal proceeding first obtain leave before pursuing a fresh evidence application. Instead, the admission of fresh evidence is governed by the following test: *R v Forcillo,* 2018 ONCA 402 at para 94

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 at para 44; *R v MGT,* 2017 ONCA 736 at paras 100-102

This four-part test was recast into a three-part inquiry in *R v Truscott*, 2007 ONCA 575, at para. 92:

- Is the evidence admissible under the operative rules of evidence (the "admissibility component")?

- Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict ("cogency criterion")?
- What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence ("the due diligence" criterion)?

The "due diligence" criterion is not a precondition to admissibility. Instead, it is a factor to consider: *R v Plein,* 2018 ONCA 748 at para 57

The due diligence requirement is not an essential requirement of the fresh evidence test, particularly in criminal cases. This criterion must yield where its rigid application might lead to a miscarriage of justice. The failure to meet the due diligence criterion should not override accomplishing a just result: *R v Rajmoolie,* 2020 ONCA 791, at para 40; *R v RG,* 2023 ONCA 343, at para 105, see also paras 108-109

The due diligence requirement should not be enforced too strictly when the accused was self-represented at trial: see generally *R v He,* 2021 ONCA 240, at para 3

Evidence that arose post-conviction but before sentence should be brought forward before the trial judge on a motion to reopen the case, rather than on appeal pursuant to a Palmer application: *R v MP,* 2023 ONCA 123, at para 23

The cogency requirement asks three questions:

> 1) Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?
>
> 2) Is the evidence credible in that it is reasonably capable of belief?
>
> 3) Is the evidence sufficiently probative that it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result? *R v Plein,* 2018 ONCA 748 at para 63; see also *R v Dudar,* 2019 ONCA 115, at paras 32-39

The cogency component requires a "qualitative assessment of the evidence" to determine whether it "could reasonably be expected to have changed the result at trial" when considered in the context of the entirety of the evidence admitted at trial

and on appeal. Assessing the cogency of the evidence requires the court to identify the purpose or purposes for which it is admissible.

The second question arising under the cogency requirement – is the evidence "credible" in the sense of being "reasonably capable of belief" – is not intended to determine the ultimate credibility of the evidence, but rather to assess whether the evidence is sufficiently cogent to warrant admission on appeal.

For example, the cogency of fresh evidence sometimes arises in the context of post-conviction recantations. Given the ease with which recantations may be fabricated, an especially rigorous qualitative assessment is required.: *R v Dudar,* 2019 ONCA 115, at paras 33-34

The question is not whether the evidence is decisive or potentially decisive on its own. The question is whether the evidence bore upon a decisive or potentially decisive issue at trial and whether, if believed, the evidence could reasonably, when taken with the rest of the evidence adduced at trial, be expected to have affected the result.

When looking at the cogency of the evidence, it is necessary to apply a qualitative lens, one that does not concern itself with the ultimate reliability and credibility of the evidence. Rather, the court looks to the potential (not actual) value of the evidence and places it within the context of the trial evidence that is said to be undermined *R v RG,* 2023 ONCA 343, at paras 60, 78

When the cogency of fresh evidence offered on appeal depends on the use of that evidence to impeach a witness's credibility by cross-examination, the appellate court should not be left to speculate about the potential value of the fresh evidence for cross-examination purposes. The appellant can seek an order under s. 683(1)(b) of the *Criminal Code* permitting cross-examination of the witness in aid of his application to adduce fresh evidence on the appeal. The mere possibility that cross-examination on some newly discovered material might impact negatively on a witness's credibility falls far short of the kind of cogent evidence needed to justify the admission of fresh evidence on appeal. Absent some explanation for the failure to seek to cross-examine of the witness, any suggestion further cross-examination could have affected the result at trial amounts to speculation: *R v Freedland,* 2023 ONCA 386, at paras 20-21

Ultimately, the "interests of justice" govern whether fresh evidence is admissible on appeal. Importantly, while the "interests of justice" to be considered include the

interests of the accused, s. 683(1) of the *Criminal Code* also embraces broader interests, including the preservation of the integrity of the trial process and the finality of trial verdicts. Admission of such evidence is justified only in furtherance of the integrity of the process. Although there is an important interest in ensuring that unreliable verdicts are not allowed to stand, there is also a compelling interest in ensuring that the appellate process is not routinely used to re-write the trial record: *R v Dudar,* 2019 ONCA 115, at paras 40-41

Note that the Palmer criteria does not apply to fresh evidence to be admitted for the purpose of demonstrating that the trial itself was unfair: see caselaw cited at *R c Arsenault,* 2020 ONCA 118, at para 10; see also *R v Poonia,* 2014 BCSC 1526, at paras 24-27. This would arise, for example, in circumstances where the evidence is being tendered to demonstrate inadequate interpretation for the accused: *R v Saini,* 2023 ONCA 445, at para 34

Under the Court of Appeal's power to receive fresh evidence, the Court may receive the audio of trial proceedings: *R v Lloyd,* 2023 ONCA 619, at para 9

Evidence of a recanting witness is properly subject to strict scrutiny on fresh evidence applications because such evidence can be easily fabricated. A recanting witness who gave contradictory evidence under oath at trial will necessarily have lied under oath at least once. Moreover, recanting witnesses raise special concerns about the finality of trial verdicts: *R v Nnane,* 2024 ONCA 841, at para 124

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

C. THE DIXON TEST – DISCLOSURE BREACHES

The Dixon test is engaged when an appellant advances a disclosure breach on appeal. There are two components to the *Dixon* test. First, the court asks whether there has been a breach of the Crown's duty to disclose. A time-sensitive approach governs this inquiry as it would be unfair to consider allegations of failed disclosure through the lens of current day rules and practices. If the court concludes that, at

the relevant time, the Crown failed in its disclosure obligations, then *Dixon* requires that the court go on to consider whether there exists a "reasonable possibility" that the non-disclosure: (a) impacted the outcome of the trial; or (b) impacted the overall fairness of the trial process . Although a reasonable possibility must be more than "entirely speculative" in nature the "mere existence of such a possibility constitutes an infringement of the right to make full answer and defence": *R v Biddle,* 2018 ONCA 520 at paras 17-19

In the context of a witness recanting trial testimony, the cogency requirement is the controlling factor. This factor requires answers to three questions: (1) whether the proposed evidence is relevant; (2) whether the evidence is credible; and (3) whether the evidence is sufficiently probative: *Allen*, 2018 ONCA 498 (at paras. 92-95)

A recantation can be proffered or admitted: (1) as substantive evidence; and/or (2) as impeachment of trial testimony. In the former case, the fresh evidence must be credible. In the latter, the value of the fresh evidence is not dependent on credibility but on the inconsistency with the trial testimony. Nevertheless, credibility will still inform the analysis.

For a non-exhaustive list of factors to consider in assessing the credibility of a recantation, see *Allen* at paras 100-101.

Fresh evidence will not be admitted merely to add a "third voice" to the issues canvassed at trial: *R v Forcillo,* 2018 ONCA 402, at para 109

In *Willett,* the Court of Appeal permitted fresh evidence of the complainant's testimony in the co-accused's separate trial, on the basis that the evidence was significantly contradictory to the evidence the complainant gave in the appellant's trial. This evidence could have therefore undermined the credibility and reliability of the complainant's allegations: *R v Willett,* 2022 ONCA 886

GROUNDS OF APPEAL

Generally speaking, the trial judge is not required to refer to every submission and his failure to refer to this one does not mean it was overlooked: *R v Yaborowh,* 2023 ONCA 400, at para 71

A. UNDERSTANDING THE BASIS FOR CONVICTION

While it is expected that a trial judge sitting alone will clearly include all of his or her findings in the reasons for conviction, because the judge is not *functus officio* until the sentence has been imposed, a court of appeal may look at the reasons for sentence as well as the reasons for conviction to understand the basis for conviction: *R v BJT,* 2019 ONCA 694, at para 43

B. INCONSISTENT VERDICTS

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,* 2016 ONCA 376 at para 13

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, and that the strength of the evidence relating to each count may not be the same, leaving the jury with a reasonable doubt on one count but not on the other: *R v GJS,* 2020 ONCA 317, at para 36

The law does not require an otherwise unassailable conviction to be set aside in a judge alone trial because an inconsistent, demonstrably unsound acquittal has been entered on a functionally identical charge in the same proceedings. It is not an appropriate outcome to deem a demonstrably reasonable conviction to be unreasonable because of an inconsistent acquittal that is grounded in a clear legal error.

The Crown does not have to appeal and set aside an acquittal in order to resist an accused's challenge to the reasonableness of an allegedly inconsistent conviction. When an accused person asks to have an inconsistent conviction set aside, the reasons for that inconsistency are put in issue. Where, on an examination of those reasons, the acquittal shows itself to be defective, an appeal court must take the fact the acquittal is wrongful into account in deciding whether to grant the relief the appellant requests: *R v Plein,* 2018 ONCA 748 at paras 23, 42, 47, 48

By appealing on the basis that the verdicts are inconsistent the appellant necessarily puts the reasons for that inconsistency in issue. The integrity of the

legal process and the legitimacy of the appellant's conviction would be undermined if the Crown were precluded from responding to the appellant's appeal because it chose not to appeal his acquittal: *R v Bempong,* 2022 ONCA 298, at para 20

In other words, where an inconsistent verdict results from a legally unsound acquittal and the factual findings on the acquittal are not inconsistent with the factual findings on the conviction, an appellate court is not required to set aside the conviction, even if the Crown did not appeal the acquittal: *R v Horner,* 2018 ONCA 971, at para 19; see also para 25

That being said, the Crown would be well advised, if it wishes to resist an inconsistent verdict appeal, to cross-appeal an acquittal it wishes to call into question: *Plein* at para 48; *R v Bempong,* 2022 ONCA 298, at para 17

The Crown is entitled to defend apparently inconsistent verdicts resulting from jury trials as well as judge-alone trials. While it is more difficult to assess claims of inconsistency in the absence of the reasons that accompany a judge-alone trial, that simply goes to the Crown's burden in reconciling the verdicts: *R v Bempong,* 2022 ONCA 298, at para 26

In an appeal alleging inconsistent verdicts rendered by a jury, the ultimate inquiry for appellate courts is whether the verdicts are actually inconsistent and therefore unreasonable. The Crown can seek to reconcile apparently inconsistent verdicts on the basis that they were the result of a legal error in the jury instructions.

When doing so, the Crown must satisfy the appellate court to a high degree of certainty that there was a legal error in the jury instructions and that the error:

(1) had a material bearing on the acquittal;
(2) was immaterial to the conviction; and
(3) reconciles the inconsistency by showing that the jury did not find the accused both guilty and not guilty of the same conduct.

If these elements are satisfied, the verdicts are not actually inconsistent. In assessing whether the Crown has satisfied its burden, the appellate court must not engage in improper speculation about what the jury did and did not do. It must be able to retrace the reasoning of the jury with a sufficiently high degree of certainty to exclude all other reasonable explanations for how the jury rendered its verdicts.

When the court can isolate the legal error to the acquittal, that charge should be the only one sent back for a new trial and the conviction should stand. In some circumstances, the appropriate remedy may be to enter a stay of proceedings on the charge for which the accused was acquitted in application of a court of appeal's residual power under s. 686(8) of the *Criminal Code*: *R v RV,* 2021 SCC 10

C. UNREASONABLE VERDICT

i. General Principles

The power to overturn a verdict based on unreasonableness can be found in section 686(1)(a)(i) of the *Criminal Code.*

The reasonableness of the verdict is a question of law: *R v Ellis,* 2016 ONCA 358 at para 28

A determination that the jury's verdict was unreasonable is itself an error of law warranting appellate intervention: *R v Shlah,* 2019 SCC 56

The appellate court must determine is whether:

1. 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 at paras 72-73; *R v Smith,* 2016 ONCA 25 at para 71; *R v McCracken,* 2016 ONCA 228 at para 23; *R v Tsekouras,* 2017 ONCA 290 at para 225 OR
2. if the reasons reveal that it was reached by a flawed reasoning process – specifically, if it was reached "illogically or irrationally": *R v Case,* 2024 ONCA 900, at para 18

The appellate court may ask itself whether the verdict was beyond the reasonableness limit: *R. v. Lira*, 2017 ONCA 214, at para. 7

The test for unreasonableness imports not only an objective assessment, but also a subjective one: *R v AA,* 2015 ONCA 558 at paras 139-140; *R v Smith,* 2016 ONCA 25 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 at para 8 [quote]; *R v Pannu*, 2015 ONCA 677 at para 163; *R v Jones-Solomon,* 2015 ONCA 654 at para 67; *R v Smith,* 2016 ONCA 25 at para 73; *R v Dodd,* 2015 ONCA 286 at paras 56-58; *R v McCracken,* 2016 ONCA 228 at para 24

When a jury verdict that does not involve errors in the charge is perceived as unreasonable, the only rational inference is that the jury was not acting judicially. An appeal court must therefore engage in a limited weighing of the evidence. *R v Hafizi,* 2018 ONCA 2, at para 26

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 at para 19; R v. Pannu, 2015 ONCA 677 at paras 161-162; *R v Smith,* 2016 ONCA 25 at para 73;

Examining the verdict through the lens of judicial experience adds as an additional protection against an unwarranted conviction: *R v Heurta,* 2020 ONCA 59, at para 46

The "judicial experience" component to the analysis gains particular significance when the jury is called upon to make "subtle distinctions," for example, when considering the distinction between the mental state for murder and planning and deliberation: *Hafizi,* at para 28

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 at para 67

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; R v. Pannu, 2015 ONCA 677 at para 14; *R v Darrington,* 2025 ONCA 189, at para 9

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 at para 22

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 at paras 26-28

ii. In a Circumstantial Evidence Case

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; *R v George-Nurse,* 2018 ONCA 515 at para 26, 31; *R v Lights,* 2020 ONCA 128, at para 39; *R v Hafizi, ,* 2018 ONCA 2, at paras 29, 30

The circumstantial evidence does not have to totally exclude other "conceivable inferences". Nor is a verdict unreasonable simply because the alternatives did not cause a doubt in the jury's mind. It remains fundamentally for the trier of fact to decide whether any proposed alternative way of looking at the case was reasonable enough to raise a doubt: *R v Chacon-Perez,* 2022 ONCA 3, at para 80

To determine if the circumstantial evidence meets the required standard of proof, the trier of fact must keep in mind that it is the evidence, assessed as a whole, that must meet this standard of proof, not each individual piece of evidence that is but a link in the chain of proof. Inferences consistent with innocence need not arise from proven facts. Rather, they may arise from a lack of evidence. Accordingly, a trier of fact must consider other plausible theories and other reasonable possibilities inconsistent with guilt so long as these theories and possibilities are grounded on logic and experience. They must not amount to fevered imaginings or speculation. While the Crown must negate these reasonable possibilities, it need not negate every possible conjecture, no matter how irrational or fanciful, which might be consistent with an accused's innocence: *R v Lights,* 2020 ONCA 128, at paras 37, 38

iii. Unreasonable Verdict Based on Credibility Findings

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 at para 11; *R v JP,* 2023 ONCA 570, at para 36

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 at para 72; *R v Huerta,* 2020 ONCA 59, at para 48

In a jury trial, it is for the jury to decide, despite any difficulties that may appear in any witness' testimony, how much, if any, of that testimony the jury accepts. And an assessment of credibility is not a one-dimensional exercise dependent only on an appraisal of objective considerations, such as inconsistencies, motives for concoction, and the like, susceptible of reasoned review by an appellate court. The demeanour of the witness and the common sense of the jury are of vital importance and elusive of appellate review: *R v Chacon-Perez*, 2022 ONCA 3, at para 78

The appellate court will examine both credibility assessments and the propriety of the fact-finding exercise, as described for the jury in the final charge: *R v JP*, 2023 ONCA 570, at para 39

The high standard for appellate intervention is demonstrated in *JP,* where the Court of Appeal dismissed an unreasonable verdict appeal advanced on the basis of serious concerns with the complainant's credibility, reasoning that "Absent a demonstrable and deliberate lie, none of the concerns about the complainant's credibility rendered *all* of her evidence incapable of belief: *R v JP*, 2023 ONCA 570, at para 42

iv. Unreasonable Verdict 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 at paras 141

Note that in *Brunelle,* the SCC explained the two bases on which an appellate court can intervene because the verdict is unreasonable in these terms:

(1) where the verdict cannot be supported by the evidence; or
(2) where the verdict is vitiated by illogical or irrational reasoning:

R v Brunelle, 2022 SCC 5; *R v Nguyen,* 2023 ONCA 531, at para 30; *R v Case,* 2024 ONCA 900, at para 18

A verdict is unreasonable if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in support of that inference or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge: *R v CP,* 2021 SCC 19, at para 29

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 at para 64; *R v CP,* 2019 ONCA 85, at paras 12-13

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: *R v Ellis,* 2016 ONCA 358at para 29

The possibility that a verdict is unreasonable in the sense of being vitiated by illogical or irrational reasoning is not, however, an invitation to appeal courts to parse a trial judge's findings or to quibble with the reasons proffered for them. Appellate courts must show restraint in inquiring into a trial judge's findings and inferences: they are not to substitute their preferred findings of fact for those made by the trial judge. The inquiry into logicality and rationality is narrowly targeted: it is concerned only with fundamental flaws in the reasoning process, which means that the verdict was not reached judicially or in accordance with the rule of law.

The analysis does not involve this court substituting its own findings for that of the trial judge; nor does it provide free rein to interfere with a trial judge's credibility findings. Instead, this court's task it to examine whether there are fundamental flaws in the reasoning process such that the verdict was not

reached judicially or in accordance with the rule of law: *R v Ahmed*, 2025 ONCA 286, at para 35

The rule of law benchmark emphasizes the narrow scope of the analysis. The appellate court is concerned only with *fundamental* analytical flaws – basic errors that go to the heart of the analysis. An unreasonable verdict on the basis of illogicality or irrationality is exceedingly rare: *R v Case,* 2024 ONCA 900, at paras 20-21

Reasons that are manifestly bad or illogical on their face or contrary to the evidence cannot stand, regardless of the fact that another judge might have reached the same conclusion but for other reasons. A verdict that was reached illogically or irrationally is not made reasonable by the fact that another judge could reasonably have convicted *or* acquitted the accused: *R v Ahmed*, 2025 ONCA 286, at para 34

In *Case,* Dawe J in dissent found that the trial judge's reasons were illogical and irrational because she assumed the very fact that was the subject of the trial – whether the complainant's flashback was an actual memory of the alleged sexual assault: 2024 ONCA 900, at paras 47-138

Where the evidence of identity at trial was circumstantial and the trial judge has found that the only reasonable conclusion available on the totality of the evidence was the accused's guilt, an appellate court may only interfere if the trial judge's conclusion was itself unreasonable. It is fundamentally for the trier of fact to draw the line that separates reasonable doubt from speculation: *R v Butler-Antoine,* 2020 ONCA 354, at para 8

While deference is owed to findings of fact and findings of mixed fact and law made by trial judges, it is an error to render an unreasonable decision, even where the trial judge understands and applies the correct legal test and accurately identifies relevant legal principles.

While a trial judge may have the benefit of hearing and observing the testimony of witnesses, it may be important that the prosecution did not turn on whether the testimony of witnesses should be credited, but on the sufficiency of undisputed evidence, for example, DNA evidence, witness description evidence, and surveillance videos: *R v Spencer,* 2020 ONCA 838, at paras 41-45

Where an appeal court finds a trial judge's verdict unreasonable, the appeal court may be able to identify a flaw in the evaluation of the evidence, or in the analysis.

Where this is so, the court should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion: *R v Spencer,* 2020 ONCA 838, at para 52

A. 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 at paras 142

Ground #2: verdict inconsistent with factual conclusions

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:

i. plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding; or
ii. incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge

This alternative route to unreasonable verdict is also known as the *Beadry* error. *Tsekouras* at para 226; *R v Fuller,* 2021 ONCA 408, at para 35. See, for example, *R. v. Burke*, [1996] 1 S.C.R. 47; *R v Wolynec,* 2015 ONCA 656 at para 74; *R v Smith,* 2016 ONCA 25 at para 74-75; *R v Issa,* 2022 ONCA 167, at paras 22-24

The scope of review under *Beaudry* is not an invitation for reviewing judges to substitute their preferred findings of fact for those of the trial judge. Rather, it is an inquiry into the logic or rationality of the judge's essential findings that is "narrowly targeted at 'fundamental flaws in the reasoning process: *R v Firlotte,* 2023 ONCA 854, at para 38

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:

i. clearly wrong;
ii. unsupported by the evidence; or
iii. 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

While 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 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 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 at para 143; *R v Jones-Solomon,* 2015 ONCA 654 at para 67; *R v Sinobert*, 2015 ONCA 691 at para 109: *R v Benson,* 2015 ONCA 827 at para 21; *R v George-Nurse,* 2018 ONCA 515 at para 26; *R v Brunelle,* 2022 SCC 5

The question is whether findings rooted in credibility are sufficiently supported by the evidence and involve no palpable and overriding error. [t]he mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *R v Brunelle,* 2022 SCC 5

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 at para 5

v. UNREASONABLE VERDICT IN 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 at para 20 [quote]; *R v Tyler,* 2015 ONCA 599 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 at para 20 [quote]; *R v Tyler,* 2015 ONCA 599 at para 8 [quote]

The Crown cannot rely on improper instructions to which it acquiesced to reconcile unreasonable verdicts: *R v Walia,* 2018 ONCA 197 at para 16

vi. The Remedy

The remedy available to an appellant who successfully challenges a trial verdict as unreasonable depends on the circumstances of the case and the basis upon which the argument succeeds. Where the appellate court is satisfied that the verdict is unreasonable because no properly instructed jury, acting judicially, could reasonably have reached such a verdict, the appellate court should enter an acquittal. The same result would follow when the court determines that a finding or inference drawn by the judge is contradicted by the evidence or incompatible with evidence not otherwise contradicted or rejected and the verdict is unavailable on the evidence. But when the verdict is unreasonable but available on the evidence, the remedy is a new trial: *R v Lights,* 2020 ONCA 128, at para 34

Where a conviction is set aside on the ground that the verdict is unsupported by evidence, the court of appeal, absent legal errors in respect of the admissibility of evidence, will usually enter an acquittal: *R v RS,* 2019 ONCA 832, at para 46

vii. Examples from the Case Law

R v Dodd, 2015 ONCA 286 [insufficient identification of alleged murderer]

R v Phillips, 2018 ONCA 651 [insufficient identification of alleged assailant]

R v Robinson, 2017 ONCA 645; *R v Hafizi,* 2019 ONCA 2 [insufficient evidence of mens rea for first degree murder]

R v RS, 2019 ONCA 832 [conviction unreasonable where accused was acting in self defence]

R v Donoghue, 2019 ONCA 534: Insufficient evidence connecting appellant to crime where only evidence was glove with his DNA deposited by perpetrator at the scene.

R. v. Ellis, 2008 ONCA 77: the conviction was unreasonable because the evidence was too generic and insufficient to establish identity.

R v Quercia: [1990] OJ No 063 (CA) and *R v Heurta,* 2020 ONCA 59, the appellant did not fit the description given at trial

R v Campbell, 2020 ONCA 221: insufficient evidence of planning and deliberation to sustain verdict of first degree murder

R v Phillips, 2020 ONCA 323: appellant's possession of stolen vehicle shortly after vehicle was used in break-ins and thefts was insufficient to infer beyond a reasonable doubt that he was a party to those break-ins and thefts

R v Daponte, 2023 ONCA 572: the appellant being a registered owner of a residence was insufficient to prove knowledge and control of drugs and money hidden in a shed on the property. There was another occupant of the residence, and the appellant was not present during police surveillance on the residence or during the execution of the warrant.

R v Metzger, 2023 SCC 5: the evidence of the appellant's DNA on a cigarette butt found in the victim's car prior to its discover, which was some time after a robbery, combined with frail evidence of the victim hearing the appellant's last name during the robbery, was insufficient to prove that the appellant was a participant in the robbery beyond a reasonable doubt. See paragraph 14 for a review of other authorities were DNA or fingerprint evidence was insufficient to establish guilt.

D. CIRCUMSTANTIAL EVIDENCE

An unreasonable verdict may be established where, in a circumstantial case, there were reasonable inferences available other than guilt.

An appellate court's review of circumstantial evidence turns on "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence": *R v Jackson,* 2018 ONCA 460 at para 27; *R v Villaromen,* 2016 SCC 33 at para 55

Under s. 686(1)(a)(i) and s. 822(1) of the *Criminal Code*, the jurisdiction of the appeal court to review a trial judge's finding as to sufficiency of the evidence is limited. An appeal court is not entitled to retry the case or to substitute its own view of the evidence for that of the trial judge. An appeal court cannot interfere with a trial judge's factual findings unless they are unreasonable or unsupported by the evidence, or contain palpable and overriding error: *Jackson* at paras 29-30

Appellate courts may refer to an accused's silence as indicative of an absence of an exculpatory explanation when considering an unreasonable verdict argument on appeal. However, the accused's failure to testify is generally relevant only in cases where the Crown has adduced a compelling body of evidence. No adverse inference can be drawn if there is no case to answer. A weak prosecution's case cannot be strengthened by the failure of the accused to testify: *R v George-Nurse,* 2018 ONCA 515 at paras 17-18, 33

E. MISAPPREHENSION OF EVIDENCE

i. 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 at para 39;

ii. BURDEN TO MEET

The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge.

Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction": *R v Spence,* 2018 ONCA 427 at para 54;

Put another way, 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 – which embraces any error that deprives an accused of a fair trial

> *R v. Wolynec*, 2015 ONCA 656 at paras 88-91; *R v. Pannu*, 2015 ONCA 677 at paras 90-91; *R v Milliken*, 2015 ONCA 897 at para 6; *R v. Abdullahi*, 2015 ONCA 549 at para 6; *R v Hemsworth,* 2016 ONCA 85 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 at para 10

A misapprehension of the evidence will give rise to a miscarriage of justice when it undermines the trial judge's actual reasoning process, even if a different judge who did not made the error could still have reasonably convicted: *R v Saunders,* 2024 ONCA 552, at para 14

Determining whether a misapprehension of evidence has caused a miscarriage of justice requires that the appellate court assess the nature and extent of the error and its significance to the verdict. It is a stringent standard, met only where the misapprehension could have affected the outcome.

While testimonial inconsistencies may be relevant when assessing a witness's credibility and reliability, only some are of such significance that failing to consider them will meet this standard: *R v Smith,* 2021 SCC 16

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 at para 27

Failure to mention evidence is only a misapprehension of the evidence if that evidence is significant enough to impact the resolution of the live issues at trial. Accordingly, trial judges are not required to address more peripheral evidence that does not meet this threshold: *R v Layne,* 2024 ONCA 435, at para 31

The impact of a misapprehension of evidence is particularly marked in cases where the principle issue is credibility. In such cases, "it is essential that the findings be based on a correct version of the actual evidence", as "wrong findings on what the evidence is destroy the basis of findings of credibility: *R v WM,* 2020 ONCA 236, at para 22

Where the alleged misapprehension is respecting evidence used to assess credibility, the decision whether a miscarriage of justice has occurred turns on the extent to which the misapprehended evidence played a role in the trial judge's credibility assessment. If the trial judge mischaracterized parts of the accused's evidence that were central to the assessment of credibility, there is more likely to be a miscarriage of justice as the conviction is therefore not based on the evidence and not a true verdict: *R v SR,* 2022 ONCA 192, at para 15; *R v SG,* 2022 ONCA 727, at para 12

If the misapprehension did not go to a material part of the evidence and did not play an essential role in the reasoning process leading to conviction, the appellant may alternatively succeed by showing that the misapprehension amounted to an error of law to which the curative provisio cannot apply: *R v BTD,* 2022 ONCA 732, at para 26

Treating, as facts, "information derived from sources extraneous to the trial" is a type of misapprehension of evidence. For example, if an expert's report has not been entered into evidence as an exhibit, it has no evidentiary value, even if provided to the trial judge as an *aide memoire*: *R v Kwok,* 2023 ONCA 458, at para 57

iii. Examples from the Case Law

- Misapprehension of evidence leading to miscarriage of justice: *R v AS,* 2020 ONCA 229

- Misapprehension of substance of accused's evidence on critical point, and failure to give it proper effect. This error was the basis for rejecting the accused's evidence: *R v GV,* 2020 ONCA 291, at paras 54-55

iv. REMEDY

If the appellant establishes an unreasonable verdict, 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). If the Crown cannot do so, the Appellant is usually entitled to a new trial: *R v Vant*, 2015 ONCA 481 at paras 108-109.

F. PROCEDURAL UNFAIRNESS

It is an error of law to make central credibility findings in a procedurally unfair manner – that is, to make such findings based on an issue the Crown did not raise in submissions and on which the Crown did not question witnesses on: *R v Tran,* 2023 ONCA 11.

G. UNEVEN SCRUTINY OF THE EVIDENCE

In *Mehari*, the Supreme Court questioned, without deciding, whether uneven scrutiny of the evidence can amount to an independent ground of appeal or a separate and distinct error of law: 2020 SCC 40; see also *R v GF*, 2021 SCC 20, at para 100

i. THE TEST

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 at para 96; *R v JA,* 2015 ONCA 754 at para 35

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 at para 10; *R v. Andrade*, 2015 ONCA 499 at para 39; *R v AF,* 2016 ONCA 263 at para 6

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 at para 24

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

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 at para 47

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

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 at para 38

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 at para 43; *R v BTD,* 2022 ONCA 732, at para 56

In *Barnes*, 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.

H. INSUFFICIENT REASONS

i. GOVERNING PRINCIPLES

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,* 2015 ONCA 656 at paras 52-60

The trial judge's duty to give reasons applies to both convictions and acquittals: *R v Sliwka,* 2017 ONCA 426 at para 26

Appellate courts must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error: *R v GF,* 2021 SCC 20, at paras 69-70

The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred. That being said, a trial judge is under no obligation to expound on

features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application. Conversely, legal sufficiency may require more where the trial judge is called upon to settle a controversial point of law: *R v R v GF,* 2021 SCC 20, at paras 71-74

Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. It is not enough to say that a trial judge's reasons are ambiguous — the appeal court must determine the extent and significance of the ambiguity: *R v GF,* 2021 SCC 20, at para 79

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 at para 59

Although trial judges are presumed to know the law and need not recite basic principles of law such as *W(D),* the appellate court may be required to take a more exacting review of the reasons when the law in question is not a routine part of a trial judge's work, and is fairly complex, such as the co-conspirator's exception to the hearsay rule: *R v Burgess,* 2022 ONCA 577, at para 24

Although trial judges are presumed to know the law, this presumption does not entitle appellate courts to ignore what trial judges actually say in their reasons. A corollary of the judicial duty to give reasons is that when reasons are given, they should generally be taken seriously and at face value, as an accurate reflection of their author's thought processes: *R v Morin,* 2024 ONCA 562, at para 41; see also *R v JE,* 2024 ONCA 801, at para 31

While a trial judge is not obliged to give all the reasons that led her to the conclusion that an accused is guilty, it is imperative, that the trial judge should give a decision upon all the points raised by the defence which might be of a nature to bring about the acquittal of the accused: *R v BTD,* 2022 ONCA 732, at para 71

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

Where judges simply announce verdicts and fail to provide reasons for the conclusions reached, it is impossible to know whether justice has been done and, without a doubt, it cannot be seen to have been done: *R v Artis,* 2021 ONCA 862, at para 12

Where the offence is not adequately particularized, and there are no submissions on the offence by the parties, 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, at paras 4-5

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 at para 27

A trial judge is not required to refer to every piece of evidence or argument made by counsel: *R v Brownlee,* 2018 ONCA 99 at para 37

While it is expected that a trial judge sitting alone will clearly include all of his or her findings in the reasons for conviction, because the judge is not *functus officio* until the sentence has been imposed, a court of appeal may look at the reasons for sentence as well as the reasons for conviction to understand the basis for conviction: *R v BJT,* 2019 ONCA 694, at paras 43-44

A trial judge is not required to discuss all the evidence related to a particular point or to answer each and every argument advanced by counsel: *R v Alexozai,* 2021 ONCA 633, at para 65

Where it is apparent from the record, even without being articulated how the trial judge arrived at her decision, no error will be found. The reviewing court must examine the evidence and determine whether the reasons for conviction are, in fact, patent on the record: *R v Lloyd,* 2023 ONCA 613, at para 15

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 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 at paras 39-40, rev'd at 2018 SCC 10

Reasons may be insufficient where a trial judge simply expresses general agreement with the Crown and it is not possible on the record to discern the pathway the judge took in preferring the Crown submissions: *R v Aragon,* 2022 ONCA 244, at para 146

i. EXAMPLES FROM THE CASELAW

In *DG,* the Court of Appeal set aside a conviction for sexual assault where the trial judge found serious credibility concerns with the complainant's evidence, but nonetheless convicted the accused without adequate explanation. The insufficient reasons left both the Court and the Appellant without an understanding of how and why he reached that conclusion: 2023 ONCA 588

In *IA,* the Court of Appeal set aside a conviction for sexual assault where the trial judge did not provide reasons that articulated the basis for a finding that the appellant was a party to the offence. The trial judge's reasons thereby precluded appellate review, since there must be a factual finding that supports the conclusion that the appellant was either a principal, aider, or abettor: *R v IA,* 2023 ONCA 589, at para 10

In *Leonard,* the Court of Appeal set aside firearm convictions where the trial judge's *Charter* rulings amounted to a perfunctory adoption of the Crown's submissions, precluding the appellate court from understanding the factual findings that underlay the *Charter* rulings, as well as the legal analysis applied to those facts: *R v Leonard,* 2025 ONCA 63

ii. Convictions versus Acquittals

While the duty to give reasons applies generally to both reasons for convictions and reasons for acquittals, particular caution must be exercised in relation to this ground of appeal when it is raised in the context of an appeal from acquittals.

The difference between these situations lies in the fact that while a conviction requires satisfaction of proof beyond a reasonable doubt of every element of the offence, an acquittal can simply rest on the absence of proof. While this difference does not excuse a failure to provide intelligible reasons for an acquittal, it does inform an assessment of whether the reasons are so deficient as to preclude effective appellate review. The different approach to the adequacy of reasons for an acquittal guards against Crown appeals that are nothing more than claims of an unreasonable acquittal under the guise of claims of inadequacy of reasons: *R v Aiken,* 2021 ONCA 298, at paras 33-34

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: *R v Sliwka,* 2017 ONCA 426 at para 27

iii. Sentencings

Trial judges are obliged, including when sentencing offenders, to provide reasons that explain what they have decided and why they have decided that way. The reasons must disclose the pathway the trial judge took to reach their decision and must enable the unsuccessful party to discern if any errors have occurred, so that they can meaningfully exercise their right to appeal: *R v Husband,* 2024 ONCA 238, at para 16; see *R v Covil,* 2024 ONCA 292, at para 13

iv. Credibility Cases

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, at para 37; *R v JL,* 2018 ONCA 756, at para 40; *R v Slatter, 2019 ONCA 807, at para 59*

When a trial judge finds a witness to be credible without referring to important evidence that bears on this issue, a reviewing court cannot simply assume that this evidence must have been tacitly considered: *R v Watson,* 2024 ONCA 397, at para 17

The degree of detail required to explain findings of credibility will vary with the evidentiary record and trial dynamics: *R v DES,* 2018 ONCA 1046, at para 9

Determinations of credibility are inherently discretionary and absent a palpable and overriding error an appellate court should not interfere. Rarely will deficiencies in the trial judge's credibility analysis as expressed in the reasons for judgment merit intervention on appeal: *R v JE,* 2018 ONCA 1045, at para 5; see also *R v Vining,* 2018 ONCA 1078first, at para 15

A trial judge's findings of credibility deserve particular deference. Credibility findings must also be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between reliability and credibility: *R v GF,* 2021 SCC 20, at paras 68-82

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

In *BTD,* the Court held that the trial judge erred by failing to explain her reasons for accepting the complainant's evidence and rejecting the appellant's evidence on a critical piece of evidence: *R v BTD,* 2022 ONCA 732, at para 76

In *JL,* the Court of Appeal found that the trial judge's reasons consisted of little more than a description of the complainant's evidence in-chief and a conclusory statement that the trial judge found her to be a credible witness. By approaching the reasoning process in this way, the trial judge's reasons did not allow for meaningful appellate review because it was not possible to discern whether he grappled with two important issues in the case: 1) significant inconsistencies in the complainant's evidence and 2) the complainant's alleged motive to lie. The court reasoned that "to be capable of review, the reasons must nevertheless show that

the trial judge grappled with the essential issues at trial." *R v JL,* 2024 ONCA 36, at paras 28, 39

The court rejected an invitation by the Crown to look into the record for reasons to support the conviction. The Court reasoned that appellate courts are not required to conduct credibility assessments afresh, "particularly ones that require the reconciliation of multiple inconsistencies that go to material issues and ones that require the reconciliation of alleged motives to fabricate, none of which was even acknowledged by the trial judge." Further, "to resolve the issue would require the court to step into the shoes of the trial judge, weigh the evidence, and redo his assessments of credibility and reliability," which is not the role of the appellate court: *R v JL,* 2024 ONCA 36, at paras 40-41

In *Lincoln,* the Court found that the trial judge's bottom line conclusion convicting the Appellant failed to demonstrate how the trial judge reconciled issued with the complainant's credibility, which he found was problematic enough to acquit the Appellant of several other offences, noting that "there would have been a miscarriage of justice on that allegation had it not been for the effective cross-examination conducted by defence counsel:" *R v Lincoln,* 2024 ONCA 143, at paras 4-5

v. REASONS ADDRESSING INCONSISTENCIES

While a trial judge need not resolve every inconsistency that arises on the evidence, reasons a acquire particular importance where the trial judge must "resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record." A trial judge's failure to explain significant inconsistencies in the evidence may give rise to reversible error: *R v JJ,* 2018 ONCA 756 at para 41; *JL* at para 41; *R v LM,* 2019 ONCA 945, at para 56

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; *R v Slatter,* 2019 ONCA 807, at para 59 [overturned at 2020 SCC 36 but not on this point]; *R v AM,* 2014 ONCA 769, at para 14

While a trial judge is not required to deal with every piece of evidence in a trial, where, as here, there are aspects of the evidence of a witness that contradict the complainant's evidence and support the evidence of the accused, the trial judge

should demonstrate that he has taken such evidence into account in his *W.(D.)* analysis: *R v SR,* 2022 ONCA 192, at para 28

vi. Evidentiary Rulings

Subject to a duty of procedural fairness, there is no general duty to provide reasons for an evidentiary ruling. The failure to give reasons on an evidentiary ruling is not fatal provided that the decision is supportable on the evidence or the basis for the decision is apparent from the circumstances. The importance of the subject-matter of the ruling also has a bearing on whether procedural fairness compels reasons: *R v Brooks,* 2018 ONCA 587 at para 20; *R v Charlton,* 2019 ONCA 400, at para 22

Although the standard for reasons in evidentiary rulings is more relaxed, an overarching duty of procedural fairness nevertheless remains. The subject matter of a ruling will necessarily inform the determination of whether procedural fairness requires that more detailed reasons, as opposed to bottom line rulings, be given. Where an evidentiary ruling is pivotal to one of the parties' positions, and especially where it carries the weight of that party's case, the duty of procedural fairness is heightened and there will sometimes be a requirement for reasons that are more akin to those expected in the context of a judgment: *R v Atwima,* 2022 ONCA 268, at para 68

In *Atwima,* the trial judge's failure to provide reasons on a similar fact application pivotal to the Crown's case constituted an error of law: *R v Atwima,* 2022 ONCA 268, at para 80; see also *R v Jackman,* where, in a similar case, the Court of Appeal noted that "the failure of a judge to give any reasons for a decision is an error of law: 2023 ONCA 99, at para 15

In *Brooks*, the Court of Appeal held that the admission of hearsay was a critical part of the Crown's case, and that the appellant had a right to understand the basis for the admission of the evidence. As a result, the Court held that, as a matter of fairness, the trial judge was obliged to provide reasons, and it was an error of law to fail to do so: *Brooks* at para 21.

vii. Standard of Review

An appellate court, proceeding with deference, must ask whether the reasons considered with the evidentiary record, the submissions of counsel, and the live issues at trial reveal the basis for the verdict. The question is whether the reasons were so deficient as to foreclose meaningful appellate review: *R v DES,* 2018 ONCA 1046, at para 13

A trial judge's failure to provide reasons respecting a defence is a reviewable error, where there is an air of reality to the defence and the reasons are insufficient to allow the verdict to be properly understood and scrutinized: *R. v. Wobbes*, 2008 ONCA 567, at paras 33-54

viii. Delay in Issuing Reasons

When verdicts are announced with reasons to follow, those reasons should follow as quickly as possible.

Reasons are not meant to be after-the-fact justifications for verdicts reached, but explanations for how those verdicts were actually arrived upon. When reasons are delivered long after verdicts are announced, it can cause reasonable people to question whether the judge has engaged in result-driven reasoning, the very antithesis of the trial judge's duty to consider the matter with an open mind and an indifference to the result. In cases of sufficient delay, the reasons must be disregarded on appeal because the presumption of integrity and impartiality will have been rebutted: *R v Artic,* 2021 ONCA 862, at paras 14-18

I. MISSING TRANSCRIPTS

While there are limited gaps in the transcript of the reasons for judgment, incomplete transcripts do not lead to a new trial. The question is whether there exists a "serious possibility" that there was an error in the missing portion of the transcript or that the missing transcript deprives the appellant of a ground of appeal: *R v AY,* 2022 ONCA 864, at para 6

INTERVENTIONS

Interveners play a vital role in our justice system by providing unique perspectives and specialized forms of expertise that assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it but, even so, interveners should not be permitted to "widen or add to the points in issue: *R. v. Barton*, 2019 SCC at paras. 52-53.

Interventions in criminal matters, where the liberty of the accused is at stake, should be granted sparingly. The court will consider, among other things, the nature of the case, the issues that arise and the likelihood that the applicant can make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

Subsection 7.2.10.4 of the Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario sets out the materials that must be filed on a motion to intervene:

After the date for the hearing of the motion to intervene is confirmed, the moving party must file a notice of motion, motion record, factum, and other material for use by the court. [Emphasis added.]

Injustice can occur where the intervener is not simply offering a new perspective on the issues, but is raising new issues. It can also occur where the intervener's perspective is no different from the perspective being advanced by one of the parties. Deciding whether an intervener meets the conditions for intervention frequently requires a careful analysis of the submissions of the parties to the appeal and the arguments the intervener proposes to advance.

Where the material before the court is that the proposed intervener might be able to make a useful contribution to the appeal without prejudice to the parties, that is not sufficient to permit the party to intervene: *R v MC,* 2018 ONCA 606 at paras 3-11, 16

While it is rare to permit an intervention in a criminal case unless a constitutional issue is raised, there is no rule against such interventions. It remains a question of whether the proposed intervener will make a useful contribution beyond that

offered by the parties without causing an injustice to the parties: *R v Doering,* 2021 ONCA 924, at para 10

The simple fact that interveners support one side or the other is not in and of itself inappropriate. The difficulty arises where interveners, as friends of the court, weigh in on the actual merits of the appeal: *R v Doering,* 2021 ONCA 924, at para 21

Interveners are not typically granted the ability to supplement the record. Nor are they permitted to raise issues beyond those raised by the parties to the litigation: *R v NS,* 2021 ONCA 605, at para 44

MOOTNESS

A. GENERAL PRINCIPLES

The test to be applied in this case is a two-part test. The test requires the court to first determine whether the case is moot. If the matter is moot, the court may nevertheless choose to exercise its discretion to hear the case on the merits based on the factors set out in *Borowski* and *Smith*: *R v Thanabalasingham,* 2019 SCC 21; *R v Beaton,* 2018 ONCA 924, at para 10.

These five (non-exhaustive) factors include:

1. whether the appeal will proceed in a proper adversarial context;

2. the strength of the grounds of the appeal;

3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:

    (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;

    (b) a systemic issue related to the administration of justice;

(c) collateral consequences to the family of the deceased or to other interested persons or to the public;

4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;

5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the Court in free-standing, legislative-type pronouncements more properly left to the legislature itself

R v Poulin, 2019 SCC 47, at para 19

B. WHERE THE ACCUSED HAS DIED

The general test an appellate court should apply when considering whether to proceed with an appeal rendered moot by the death of an accused, is whether there exist special circumstances that make it "in the interests of justice" to proceed:

This discretion should be exercised only in exceptional circumstances where the appellant's death is survived by a continuing controversy which requires resolution in the interests of justice.

Three principal rationale underlie the policy or practice governing the continuance of moot appeals and inform the exercise of the circumscribed discretion to determine the appeal despite the party litigant's death:

i. the existence of a truly adversarial context;
ii. the presence of particular circumstances which justify the expenditure of limited judicial resources to resolve the issue; and
iii. the respect shown by courts to limit themselves to their proper adjudicative role, as opposed to making freestanding legislative-type pronouncements.

R v Beaton, 2018 ONCA 924, at paras 9-11; *Queen v Mosher et al,* 2015 ONCA 72*; R v Slingerland,* 2020 ONCA 417, at paras 10-12

In *Monney,* the Court of Appeal held that the stigma associated with a conviction of second-degree murder was insufficient on its own to engage the exception to the above general rule: 2020 ONCA 6

C. WHERE THE ACCUSED HAS BEEN DEPORTED

The mere fact that an individual has been deported, even if he has been deported to a country with which Canada does not have an extradition treaty, does not render a case moot where the underlying basis for the criminal proceedings has not disappeared and there remains a live controversy even if the accused's return to Canada is unlikely: *R v Thanabalasingham,* 2019 SCC 21

NEW ISSUES RAISED ON APPEAL

A. 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 at para 45; *R. v. Reid*, 2016 ONCA 524

This rule also applies to constitutional arguments: *R v Vu,* 2018 ONCA 436 at para 88;

It is generally problematic to consider a basis for the admission of evidence that was not dealt with at trial, especially when the basis for admission rests on necessary factual findings that were not fully explored: *R v Borel,* 2021 ONCA 16, at para 49

That being said, it is the role of this court to correct errors of law regardless of who bore the responsibility for raising the issue in first instance. An error of law that can be identified in the trial judge's reasons without concern for the adequacy of the

factual record before the appellate court does not engage the concerns in *Reid*: *R v McMorris,* 2020 ONCA 844, at para 87

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 at para 4; *Vu* at para 89

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 at para 9; see also *R v Mian,* 2014 SCC 54

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

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; *R v Ruthowsky,* 2018 ONCA 552 at para 27

That being said, despite the fact that the appellate court is not the place to develop an evidentiary record, the court will hear a constitutional argument raised for the first time on appeal where the problems with assembling an appropriate record are outweighed by the appellant's legitimate interest in advancing the constitutional issue: *R v JD,* 2018 ONCA 947, at para 3-7

It is arguable that the discretion also 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 at para 8

Factors that will influence a court's discretion to hear a new constitutional issue on appeal include: the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice: *R v Sharma,* 2021 ONCA 478, at para 136

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 at para 5 (citations ommitted)

Where an appellant makes a tactical decision not to pursue an issue at trial, it is not a miscarriage of justice to deny him the right to pursue that argument on appeal: *R v NC,* 2019 ONCA 484, at para 31

An unforeseen, fundamental change in the law of the type considered by the Supreme Court in *Wigman* may warrant an exercise of discretion to hear a new issue on appeal. The inadequacy of the record to support consideration of the impact of that change is an absolute bar to the issue being raised on appeal: *R v NC,* 2019 ONCA 484, at paras 13, 19

it will be rare to allow a new argument raised for the first time on appeal where the evidentiary foundation is based on fresh evidence record: *R v Charity,* 2022 ONCA 226, at para 34

In *Thi Do,* the Court of Appeal exercised the discretion to hear a previously abandoned issue on appeal where subsequent jurisprudence "changed the law sufficiently to warrant this court considering an argument previously abandoned at trial: *R v Thi Do,* 2019 ONCA 482, at para 6

In *Braithwaite,* the Court of Appeal permitted the appellant to raise entrapment for the first time on appeal where recent developments in the law, not in place at the time of trial, established "clearer parameters for the use of internet sting operations than existed at the time of trial," and where it was arguable that the police operation amounted to entrapment in light of those new parameters. The Court remitted the matter back to the trial court for determination of the issue, as the evidentiary record was insufficient to determine the issue on appeal: *R v Braithwaite,* 2023 ONCA 180

B. 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

It is an error of law for an appellate court to make a finding of fact that the trial judge declined to make: *R v Wakefield,* 2019 SCC 26

CONTRADICTORY POSITION ON APPEAL

Counsel on appeal cannot resile from concessions and admissions made on behalf of the appellant at trial without first satisfying the court that the interests of justice require that counsel be permitted to advance a contradictory position on appeal: *R v Doering,* 2022 ONCA 559, at para 132

SELF REPRESENTED LITIGANTS

Appellate courts ought not to take a rigid or technical approach when identifying the grounds of appeal that a self-represented litigant is raising.

The Canadian Judicial Council's *Statement of Principles on Self-Represented Litigants and Accused Persons* has been endorsed by the Supreme Court of Canada in *Pintea v. Johns*, 2017 SCC 23, at para. 4, and by the Court of Appeal in *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, at paras. 42-45, and in *R. v. Tossounian*, 2017 ONCA 618, at paras. 36-39. According to these principles, self-represented persons are expected to familiarize themselves with relevant legal practices and to prepare their own case. However, self-represented persons should not be denied relief on the basis of minor or easily rectified deficiencies in their case. Judges are to facilitate, to the extent possible, access to justice for self-represented persons.

Appellate judges should therefore attempt to place the issues raised by a self-represented litigant in their proper legal context: *R v Morillo,* 2018 ONCA 582 at paras 10-12

STAY PENDING APPEAL

The test for granting a stay pending appeal requires consideration of three factors:

1. Whether there is a serious question to be tried
2. Whether the applicant suffer irreparable harm if the application is refused
3. Which party would suffer greater harm from granting or refusing the stay pending a decision on the merits: *R v NS,* 2021 ONCA 694, at para 5; *Weir's Construction Limited v. Warford Estate*, 2016 NLCA 65, at para 3; *R v Reimer,* 2024 ONCA 641, at para 17

Pursuant to s.320.25, there is a statutory right for an appellate judge to stay a driving prohibition pending an appeal of an enumerated driving offence.

Under s. 65.1(2) of the *Supreme Court Act*, or by analogy to that provision, the court may grant a stay prior to a leave application being filed if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice: *R v Reimer,* 2024 ONCA 641, at para 37

PRECEDENT

A. 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 at para 18

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

B. PRECEDENT UNDER APPEAL

In *MacMillan,* the Ontario Court of Appeal dismissed the Crown's argument on bail pending appeal that the Court should consider that the law that the appellant was relying on was under appeal at the Supreme Court of Canada. The Court held that the law as it stood was the law in Ontario, and that any assertion that the law could be overturned on further appeal was speculative: 2020 ONCA 141, at paras 19-22

RE-ARGUING AN APPEAL

The request to reargue an appeal is an extraordinary remedy that is rarely granted. Appeals may be reargued, but only in exceptional circumstances. The purpose of re-argument is to address situations in which the Court has been misled, where it appears the Court misapprehended the evidence, or where there are patent errors in the decision: *Piikani Nation v Kostic*, 2018 ABCA 275, at para 2

RULES OF THE COURT

Section 482(1) of the *Criminal Code* permits a court of appeal to make rules of court not inconsistent with the *Criminal Code* or any other Act of Parliament. Rules may be made under s. 482(3)(d) to carry out the *Code's* provisions relating to appeals. However, this rule-making authority cannot be invoked to extend the substantive jurisdiction of the court: *R v JM,* 2021 ONCA 735, at para 27

STANDARD OF REVIEW

A. 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 at para 18; *R v CKD,* 2016 ONCA 66 at para 22

B. APPELLATE REVIEW OF CONSTITUTIONAL QUESTIONS

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 at para 54

C. APPELLATE REVIEW OF REGULATORY BOARDS

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 at paras 24-25

D. APPELLATE REVIEW OF WRITTEN RECORD

The principle of appellate deference to a trial judge's fact-finding and inference-drawing applies even when the entire trial record is in writing: *R v Wawrykiewicz,* 2019 ONCA 21, at para 13

SUMMARY DISMISSAL

Under s. 685(1) of the *Criminal Code* and r. 17 of the *Criminal Appeal Rules*, the Registrar of the Court of Appeal for Ontario may refer an appeal to a panel of judges if the appeal purports to raise a question of law alone, but does not show a substantial ground of appeal. A panel of the court may summarily dismiss the appeal if it is frivolous or vexatious and can be determined without being adjourned for a full hearing: *R. v. Amiri*, 2021 ONCA 902, at paras. 3-5; *R v Tohidy,* 2022 ONCA 287, at para 5

POWERS OF THE COURT OF APPEAL

A. 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 at para 11

B. PROCEDURAL POWERS

Section 683(1) 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.

Section 683(3) 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

S. 679(10) of the *Criminal Code* authorizes the Court of Appeal to order that an appeal be expedited: see, for example, *R v Ruthowsky,* 2018 ONCA 552 at para 48

The Court of Appeal does not have jurisdiction to stay a driving prohibition for a conviction appeal to the SCC, absent leave to appeal being granted: *R v Coates,* 2024 ONCA 216

C. SUBSTANTIVE POWERS

i. POWER TO ORDER REPORT BY JUDGE: S.682(1) OF CRIMINAL CODE

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."

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 at paras 33-34

ii. Power to Order Production : s.683(1)(a)

The Court of Appeal can order the production of a "writing" in support of a fresh evidence application if the court "considers it in the interests of justice" to do so under s 683(1)(a).

In an application for production of a document in aid of a fresh evidence, the moving party must demonstrate two things:

- There is a reasonable possibility that the production of the document could assist on the motion to adduce fresh evidence; and
- There is a reasonable possibility that the evidence may be received as fresh evidence on appeal: *R v Jaser,* 2023 ONCA 24, at para 16; *R v Swaine,* 2025 ONCA 117, at para 9

It is not uncommon when a party seeks production of a document under s. 683(1)(a) that the contents of the documents will not be known to the parties or the court. When the contents are unknown, the court can draw reasonable inferences as to the likely content from the circumstances: *R v Jaser,* 2023 ONCA 24, at para 21

iii. Power to Order the Examination of a Witness: s.683(1)(b)

Under s. 683(1)(b) of the *Criminal Code* an appellate court can order the examination of a witness. However, it may do so only in respect of evidence that may be relevant to an issue on a pending appeal: *R v Reyes,* 2018 ONCA 607 at para 9

The same test that applies to the exercise of discretion to order production of records set out above applies to the exercise of discretion to order the examination of a witness: *R v Jaser,* 2023 ONCA 24, at para 16; *R v Swaine,* 2025 ONCA 117, at para 9

iv. Power to Order Costs: Section 683(3)

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

v. Power to Amend Indictment: Section 683(1)(g)

The power to amend a count in an information or indictment on appeal provided by s. 683(1)(g) is broad. An appellate court has the discretion to amend the indictment or information to conform to the evidence at trial, including by substituting a different charge. The court of appeal may amend an indictment where it considers it in the interests of justice. This power will not be exercised if, the court is of the opinion that the accused has been misled or prejudiced: *R v Emery,* 2016 ONCA 204 at para 3; *R v Robinson,* 2018 ONCA 741 at para 14; *R v SJ,* 2024 ONCA 899, at para 11

Prejudice may arise where, for example, the accused has made a tactical decision to testify on the charge on the indictment, which incriminated him on the charge proposed to be substituted by the appellate court: *Robinson* at para 15

This broad amendment power at the appellate stage promotes the determination of criminal cases on their merits. It permits an amendment on appeal where the amendment cures a variance between the charge laid and the evidence led at trial regardless of whether the amendment materially changes the charge, substitutes a new charge for the initial charge, or adds an additional charge.

The burden is on the Crown to convince the court that the accused "had a full opportunity to meet all issues raised by the charge as amended" and that "the conduct of the defence would have been the same": *R v Wilson,* 2022 ONCA 857, at paras 31-32

vi. Power to Impose Mandatory Ancillary Orders on Sentence Appeal: s.683(3) or 687(1)

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, pursuant to s.683(3) or s.687(1): *R v Versnick,* 2016 ONCA 232 at para 2; see also *R v Sabir,* 2019 ONCA 92, at paras 4-8

vii. Power to Suspend Orders under s.683(5)

Sections 683(5)(f) and 683(5.1) do not apply when a conditional sentence order has been terminated under s. 742.6(9)(d) of the *Criminal Code* and the offender has been directed to be committed to custody until the expiration of the sentence. In such cases, the test for bail pending appeal as set out in s. 679 of the *Criminal Code* applies: *R v Bardwell,* 2024 ONCA 384, at para 19

viii. Power to Summarily Dismiss an Appeal

Section 685(1) of the *Criminal Code* allows the Court of Appeal court to dismiss an appeal summarily, without calling on any person to attend the hearing or appear for the respondent on the hearing, if it considers that the appeal is frivolous or vexatious and can be determined without being adjourned for a full hearing.

An appeal is "frivolous", if it is completely devoid of merit: *R v Beseiso,* 2020 ONCA 686, at paras 6-7

ix. Power to Appoint Counsel: Section 684(1)

Pursuant to s. 684, 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), 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?

In order to demonstrate indigence, the applicant must demonstrate that s/he has exhausted all other means of paying for counsel, including family members and the legal aid process, and s/he must be clear and transparent in disclosing his/her financial affairs. The applicant cannot satisfy his/her burden of showing that s/he have exhausted the legal aid process when his/her rejection was due to his/her own incomplete financial disclosure. Bald statements of impecuniosity contained in an affidavit does not satisfy the Applicant's burden: *R v Vuong,* 2020 ONCA 516, at paras 8 and 9

The financial eligibility requirement in s. 684(1) of the *Criminal Code* reflects two values. First, the government's resources to fund legal representation are limited. Second, if it is in the interests of justice for an appellant to have a lawyer to argue the appeal, yet the appellant cannot afford to retain one, then the denial of a s. 684(1) order will adversely affect the appellant's fair appeal rights: *R v Campbell,* 2020 ONCA 573, at para 7

That it may be better or easier if the applicants had counsel is not the test. The question is whether the applicants cannot effectively present their case on an appeal without the help of a lawyer or the court cannot properly decide the case on appeal without assistance from counsel: *R v Vuong,* 2020 ONCA 516, at para 6.

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 at paras 31-34

Some examples of successful applications include: *R v McCullough,* 2017 ONCA 315

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. Pro bono duty counsel are not a substitute for fully-funded counsel, whether through Legal Aid or a s. 684 order, where circumstances warrant such assistance: *R v Griffith,* 2021 ONCA 368, at para 23

The Court may impose a required contribution agreement, as a term of a 684 order: *R v Josipovic,* 2018 ONCA 199 at para 15

a) Appeal of s.684 Order

A judge and a panel of judges of the Court of Appeal have equivalent or concurrent jurisdiction to determine whether an order for state-funded counsel is desirable in the interests of justice under s. 684(1) of the *Criminal Code*. In an appropriate

case, a panel of the court may exercise its s. 684 jurisdiction even though a judge of the court has refused to do so, provided that circumstances have changed sufficiently from those before the single judge to warrant a reassessment: *R v JM,* 2021 ONCA 735, at paras 29-34

x. Power to Order New Trial: Section 686(1)(a)

Where an appeal court allows an appeal of an acquittal on the basis that the trial judge did not instruct the jury on a second, alternative way of committing the same offence (e.g., assault under s.265(1)(a) and 265(1)(b)), the appropriate remedy is to vacate the acquittal on the one count put to the jury and to order a new trial on both counts. The appellate court cannot simply order a new trial on the count that was not put to the jury, as the verdict may not necessarily have been the same had both avenues to conviction: *R v Ferdinand,* 2018 ONCA 836, at para 7

xi. Power to Order New Trial under s.696(1)(a)(ii)

The power to order a new trial where there has been a wrong decision on a question of law includes any legal decision, but also an improper omission. In other words, failing to apply a legal rule may itself constitute an error of law. In short, the jurisprudence indicates that an error in the application of a legal rule may involve either a decision that is wrong in law or an unjustified failure to comply with a legal rule.

For a presumption of prejudice to arise, it is not necessary that the legal rule erroneously applied be substantive in nature. The prejudice presumed as a result of an error of law under s. 686(1)(a)(ii) which makes it possible to quash the conviction, may arise from a breach of either a substantive or a procedural right.

The erroneous application of a legal rule must be related to the proceedings leading to the conviction and must be attributable to a judge. Only where these two criteria are met can it be concluded that the error tainted the trial court's judgment, with the result that prejudice can be presumed and the conviction quashed: *R. v. Tayo Tompouba*, 2024 SCC 16

xii. Power to Order New Trial under s.686(1)(a)(iii)

Pursuant to s.686(1)(a)(iii), the Court of Appeal may allow a conviction appeal where the court is of the opinion that there was a miscarriage of justice: *R v Johnson-Lee,* 2018 ONCA 1012, at para 73

Miscarriages of justice under s. 686(1)(a)(iii) are a residual category of errors that exists to ensure that a conviction can be quashed where a trial was unfair, regardless of whether the error was procedural or substantive in nature. The question is whether the irregularity was so severe that it rendered the trial unfair or created the appearance of unfairness. The miscarriage of justice standard is a high bar, which "is even higher when claimed based on perceived unfairness instead of actual prejudice: *R. v. Tayo Tompouba*, 2024 SCC 16

If an error deprives the accused of a fair trial, it constitutes a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii) and a reversible error will have occurred.

A court of appeal should carefully weigh the whole of the circumstances of the case in determining whether the trial has been rendered unfair. However, the trial cannot be held to a standard of perfection, provided it remains fair in reality and in appearance.

There is no limit on the particular type of error that will constitute a miscarriage of justice. An error or misconduct that could well have affected the jury's assessment of guilt or innocence will suffice. So, too, will conduct that is so egregious so as to bring the administration of justice into disrepute or to lead reasonable people to believe that the appearance of justice has been undermined: *R v Johnson-Lee,* 2018 ONCA 1012, at paras 71-73

xiii. Power to Substitute Verdict and Pass Sentence: s.686(1)(b)(i), s.686(3), and s.686(4)(b)(ii)

Pursuant to s. 686(1)(b)(i), the appellate court may dismiss an appeal where the appellant was not properly convicted of one count on the indictment but was properly convicted on another. In such circumstances, the appellate court may, pursuant to s.686(3), affirm the sentence imposed by the trial judge, impose a new sentence, or remit the matter for sentencing before the trial judge: *R v Kelsie,* 2019 SCC 17

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 at para 61; *R v Trachy,* 2019 ONCA 622, at paras 86, 92

The Court's power to substitute a conviction in the place of an acquittal on appeal pursuant to s.686(4)(ii) should only be used in the clearest of cases: *R v Leclair,* 2020 ONCA 230, at para 9

The power to substitute a verdict pursuant to s.686(3) includes the power to lift a conditional stay imposed pursuant to *Kienapple*: *R v RM,* 2023 ONCA 859, at para 40

In order to substitute a conviction on an appeal from acquittal, all the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue: *R v AE,* 2022 SCC 4

The fact that an appellant has served a portion of the sentence is not a stand-alone basis to substitute an acquittal for a new trial, however, it may be a factor to consider: *R v Vickerson,* 2020 ONCA 434, at paras 5-8

xiv. Power to Order New Trial and Direct Order: s.686(2) and 686(8)

Section 686(2) of the *Criminal Code* provides that when the court allows an appeal from conviction, it shall quash the conviction and either order a new trial or direct a judgment or verdict of acquittal to be entered. Section 686(8) provides that when the court exercises any of the powers conferred by s. 686(2), it may make any order, in addition, that justice requires.

The quashing of the formal order of conviction under s.686(2). does not, without more, entail the quashing of the underlying verdict of guilt. In most successful appeals against conviction, the court of appeal which quashes the conviction will also overturn the finding of guilt; however, the latter is not a legally necessary consequence of the former. Under s. 686(8), the court of appeal retains the jurisdiction to make an "additional order" to the effect that, although the formal order of conviction is quashed, the verdict of guilt is affirmed, and the new trial can be limited to, for example, a post-verdict entrapment motion or an 11(b) motion: *R v Imola,* 2019 ONCA 556, at paras 26, 29

If an appeal in relation to a charge stayed under *Kienapple* is allowed and a new trial is ordered, the conditional stay dissolves and the stayed count is also remitted back to the trial court. Otherwise, the stay becomes permanent: *R v DN,* 2023 ONCA 561, at para 97

xv. Additional Powers: s.686(8)

Under s.686(8), an appellate court may make any order, in addition to those set out in the preceding provisions under s.686, that justice requires.Ffor an appellate court to issue an additional order under its s. 686(8) residual power, three conditions must be met. First, the court must have exercised one of the triggering powers conferred under s. 686(2), (4), (6) or (7). Second, the order issued must be ancillary to the triggering power in that it cannot be at direct variance with the court's underlying judgment. Third and finally, the order must be one that "justice requires": *R v RV,* 2021 SCC 10; *R v Cowan,* 2021 SCC 31

When exercising its power to order a new trial, an appellate court cannot restrict the new trial to certain modes of liability pursuant to s.686(8): *R v Cowan,* 2021 SCC 31, at paras 53-56

That being said, appellate courts do have the power to limit the scope of a new trial to a lesser and included offence where it is satisfied that the reversible error only tainted the verdict on that offence and it sets aside the verdict on that charge only: *R v Cowan,* 2021 SCC 31, at para 66

In some circumstances, the appropriate remedy may be to enter a stay of proceedings on the charge for which the accused was acquitted in application of a court of appeal's residual power under s. 686(8) of the Criminal Code: *R v RV,* 2021 SCC 10

xvi. Power to Vary Sentence: s.687

On a sentence appeal under s.687, the Court of Appeal does not have the authority to remid the matter to the sentencing judge. Rather, if the court allows the sentence

appeal, it may only vary the sentence itself: *R v Abdelrazzaq,* 2023 ONCA 231, at para 3.

D. INHERENT JURISDICTION

The Court of Appeal has no inherent jurisdiction to entertain an appeal in criminal cases. Section 683(3) cannot reasonably be read as extending the appellate jurisdiction of a court of appeal beyond the jurisdiction the Criminal Code expressly grants it. On its own, s. 7(5) CJA cannot ground a right of appeal in criminal proceedings. The province lacks the constitutional competence to create rights of appeal in criminal cases. Nor does the combination of sections 683(3) of the Criminal Code and 7(5) of the CJA fare any better as a source of appellate jurisdiction. To decide otherwise would be to encroach on Parliament's exclusive jurisdiction to determine rights of appeal in criminal proceedings*: R v JM,* 2021 ONCA 735, at para 20-26

The Court of Appeal has inherent jurisdiction to vary or revoke an order made at trial where the circumstances that were present at the time the order was made have materially changed.

For example, the Court of Appeal may exercise inherent jurisdiction to exercise its discretion concerning publication of reasons under s.278.93(4) and s.278.94(4), based on the same factors that the court below is entitled to permit publication of its reasons, pursuant to s.278.95. This extends to permitting publication of any portion of the reasons of the court below that refer to the content of the underlying application and the evidence and representations made in relation to it or at a hearing. The Court noted that the development of the jurisprudence surrounding s. 276 applications and evidence of extrinsic sexual activity will benefit from the publication of the court's decision: *R v NH,* 2021 ONCA 646, at paras 17, 24-25, 27; see also *R v OF,* 2022 ONCA 679, at para 75

Every court has a supervisory and protecting power over its own records, which includes its own reasons: *R v NH,* 2021 ONCA 636, at paras 19-21

The Court of Appeal has inherent jurisdiction to proceed *in-camera* on an appeal raising issues in respect of the trial judge's s.276 ruling: *R v OF,* 2022 ONCA 679, at para 73

An appellate court's implied jurisdiction to control its own processes includes the discretionary ability to make orders for *in camera* hearings, sealing orders and publication bans. This discretion should be exercised in a way that maintains court openness as far as practicable while protecting the complainant's personal dignity and privacy and the accused's fair trial rights: *R v JOP,* 2025 ONCA 121, at para 6

PROVINCIAL OFFENCES APPEALS

i. CERTIORARI

Subsection 141(4) of the *Provincial Offences Act* requires a court to find that a substantial wrong or miscarriage of justice has occurred before granting relief by way of *certiorari: R v Singh,* 2018 ONCA 506 at para 13

ii. APPEALS

The relevant parts of s.131 of the *POA* state:

> **Appeal to Court of Appeal**
>
> **131** (1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a judge of the Court of Appeal on special grounds, upon any question of law alone or as to sentence.
>
> **Grounds for leave**
>
> (2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers 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.
>
> **Appeal as to leave**

(3) No appeal or review lies from a decision on a motion for leave to appeal under subsection

The relevant parts of s. 139 of the *POA* state:

> **Appeal to Court of Appeal**
>
> 139(1) An appeal lies from the judgment of the Ontario Court of Justice in an appeal under section 135 to the Court of Appeal, with leave of a judge of the Court of Appeal, on special grounds, upon any question of law alone.
>
> **Grounds for leave**
>
> (2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers 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.

The threshold for granting leave to appeal under ss. 131 and 139 of the *Provincial Offences Act* requires the Applicant to establish:

i. Special Grounds
ii. on a question of law alone
iii. 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

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: *R v El-Kasir,* 2017 ONCA 531 at paras 21-22; *R v Morillo,* 2018 ONCA 582 at paras 5-8

In order to meet this standard, the legal issue raised should be significant and have some broad importance. Generally speaking, the implications of the legal issue should go beyond the case at hand. The strength of the proposed grounds of appeal is also a material consideration if there is a real risk that there may have been a miscarriage of justice or a denial of procedural fairness: *Morillo* at para 9

The focus is not on whether the subject-matter of the case is of interest or importance to the public, but whether the proposed appeal raises significant legal issues that should be resolved by the court of appeal: *R v Consolidated Homes Ltd.,* 2025 ONCA 41, at para 18

First-level *POA* appeal judgments are intended to be final, and leave to appeal to the Ontario Court of Appeal should be granted only in exceptional cases raising issues of broad public importance. The threshold for granting leave is very high. It is not enough for a party seeking leave to demonstrate that it has a strong argument that the decision below was wrong. There must be special grounds on a question of law and it must be essential in the public interest or for the due administration of justice that leave be granted. No matter how wrong the judgment under appeal may be, these other criteria must be met: *R v Consolidated Homes Ltd,* 2025 ONCA 41, at para 19

Motions for leave to appeal under s.131 of the *PoA* are to be conducted orally: *R v Becker Bros Trucking Inc.,* 2020 ONCA 316, at paras 1, 8

There is no jurisdiction to order costs on motions brought under s. 131: *R v Consolidated Homes Ltd,* 2025 ONCA 41, at para 47

SENTENCE APPEALS

A. STANDARD OF REVIEW

Appellate courts must generally defer to sentencing judges' decisions and can only intervene to vary a sentence if (1) the sentence is demonstrably unfit or (2) the sentencing judge made an error in principle that had an impact on the sentence. Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. If appellate intervention is justified, the court will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Where an appellate court has found that an error in principle had an impact on the sentence, it is not a further precondition to appellate

intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past: *R v Friesen,* 2020 SCC 9; *R v Lacasse,* 2015 SCC 64

This standard of review applies equally to ancillary orders and probation orders: R v MC, 2020 ONCA 519, at para 41

The choice of a sentencing range, or of a category within a sentencing range, falls within the discretion of the sentencing judge and cannot in itself constitute a reviewable error: *R v Sidhu,* 2019 ONCA 880, at para 3

Even where the trial judge made an error in identifying the proper range of sentence, such an error would only justify appellate intervention if the sentence imposed is demonstrably unfit: *R v PM,* 2022 ONCA 408, at para 19

i. Deference: Trial or Sentencing Judge?

Where the sentencing judge is different than the trial judge, the trial judge's opinion as to the appropriate sentence may be entitled to deference. If the sentencing judge wishes to depart from the trial judge's opinion, s/he must, in fairness, provide notice to the parties and allow them to make further submissions: *R v Owen*, 2015 ONCA 462 at paras 47-58

B. CROWN RIGHT OF APPEAL

Crown's right of appeal is from the sentence imposed and not from any ruling that may have been made in the course of the sentencing proceedings: Criminal Code, s. 687 For example, the Crown does not have a stand-alone a right of appeal under Part XXI of the Criminal Code from a finding that a mandatory minimum sentence is unconstitutional: *R v Safieh,* 2021 ONCA 643, at para 7

C. ERROR IN PRINCIPLE

If the sentencing judge commits an error in principle, the sentence imposed is no longer entitled to deference and an appellate court may impose the sentence it

thinks fit, provided the error had an impact on the sentence imposed: *R v Carreira*, 2015 ONCA 639 at para 25; *Lacasse*

Weighing or balancing factors can constitute an error in principle only if the sentencing judge exercises their discretion unreasonably by emphasizing one factor or not giving enough weight to another: *R v Lis,* 2020 ONCA 551, at para 69

D. MANIFESTLY UNFIT SENTENCE

The court of appeal can overturn a sentence where it is manifestly unfit – e.g., if the accused has significant mitigating factors and the sentence violates the parity principle: *R v Baks*, 2015 ONCA 560 at paras 2-6; see generally *Lacasse*

The threshold of "demonstrably unfit" is meant to be "very high", and synonymous with "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure": *R v Sousa,* 2023 ONCA 100, at para 23

In Hillbach, the SCC commented that the imposition of a sentence that was one year below the starting point for an armed robbery was demonstrably unfit: 2023 SCC 3

E. ERROR IN PRE-TRIAL CUSTODY CALCULATION

On a sentence appeal, the Appellate court is entitled to consider, and if necessary vary, any of the information which s. 719(3.3) requires included as part of the formal record of the sentence imposed.

The appeal court may vary the information recorded by virtue of s. 719(3.3) and not vary the actual sentence imposed, where it is necessary in the interests of justice: *R v Marshall,* 2021 ONCA 334, at paras 35-36

F. PROCEDURAL FAIRNES

Judges owe an elevated duty of procedural fairness to every litigant. This duty originated and applies with greatest force in criminal law and at sentencing because the stakes to the defendant and society are the highest.

Sentencing judges observe the duty of procedural fairness by respecting criminal defendants' rights to be heard. This right entitles defendants to know the case against them and respond to it by making submissions, calling evidence, and challenging any evidence against them. It bars sentencing judges from finding aggravating facts that the Crown did not advance and the defence did not admit without notifying the parties and giving them an opportunity to make submissions and call responsive evidence. To be clear, sentencing judges sometimes can and should raise new issues, but they must respect the right to be heard if they do so.

Sufficient reasons, while important, are not a substitute for a fair process. Rather, judges issue reasons after hearing from the parties to show that they have considered their evidence and arguments: *R v Habib,* 2024 ONCA 830, at paras 21-22, 26

Where a sentencing judge breaches the right to be heard, the appellate must sentence the appellant afresh and without deference to the existing sentence. The appellant need not show that the breach impacted the sentence, because breaching the right to be heard invalidates decisions even if a new hearing is unlikely to lead to a different result. The right to be heard is an "independent, unqualified" entitlement to fair treatment that is distinct from the decision's substantive appropriateness. The only exception to this rule is where it is inevitable that the result would be the same if a fair process was followed. When considering this exception, however, the appellate court should not speculate about what the result of a fair process might have been: *R v Habib,* 2024 ONCA 830, at para 27, 28

G. RE-SENTENCING ON APPEAL

Pursuant to s.687 of the *Criminal Code*, where the appeal court finds the sentencing judge committed an error in principle, the 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 at para 25

Where the court of appeal substitutes a conviction on appeal, both the appellate court and the trial court have jurisdiction to sentence the appellant, pursuant to s.

686(3)(b). There is no presumption in favour of either forum. *R v Cargioli*, 2023 ONCA 749, at para 2

H. POST-SENTENCING CONSIDERATIONS ON APPEAL

A sentence which is nonetheless fit *may* be reduced on appeal on the basis of changed circumstances post-sentencing: *R v Fratia*, 2015 ONCA 460 at paras 8-10 [on consent]

This can include, for example, where the offender experiences significantly harsher conditions in custody than was expected at the time of sentencing. In *Robinson,* the Court of Appeal reduced the appellant's sentence by 18 months when he plead guilty on the eve of the onset of the Covid-19 pandemic, resulting in incarceration that was much more onerous than anticipated: *R v Robinson,* 2023 ONCA 205, at para 8

An appellate court has the authority to reduce an otherwise fit sentence based on the progress an offender has made while awaiting their appeal: *R. v Ghadban*, 2015 ONCA 760

The court cannot, however, act as a *de facto* parole board. It will vary a sentence based on changes in circumstances relevant to sentence that occurred between the imposition of sentence and the hearing of the appeal only exceptionally: *R v EMM,* 2021 ONCA 436, at para 37

An offender's post-sentencing rehabilitative efforts and prospects will only exceptionally meet the fresh evidence test, and will generally be a matter for correctional authorities who administer the sentence: *R v Bourdon,* 2024 ONCA 8, at para 31

Where there has been an intervening change in the law between sentencing and appeal, it is as though the sentencing judge has committed an error in principle, albeit for reasons beyond his or her control, because relevant principles have not been considered. In such circumstances, the Court of Appeal need not defer to all of the trial judge's findings, and can proceed to re-sentence in light of the new principles: *R. v. Bunn*, 2000 SCC 9, at para 21; but see *R v Lavergne,* 2023 ONCA 592

Section 687(1) of the *Criminal Code* allows the court to receive evidence it thinks "fit to require or receive": *R v SB,* 2023 ONCA 369, at para 44

Fresh evidence addressing events that have occurred between the time of sentencing and the time of appeal may raise difficult issues which bring competing values into sharp relief. There are clear institutional limitations placed upon appellate courts, such that deciding sentencing appeals based upon after-the-fact developments could both jeopardize the integrity of the criminal process by undermining its finality and surpass the appropriate bounds of appellate review: *R v Reeve,* 2020 ONCA 381, at para 55

The criteria for admitting fresh evidence on appeal of sentence are the same as those that apply on appeal of conviction: *R v Wolynec*, 2015 ONCA 656 at para 115

Convictions entered after the accused was sentenced cannot be received on appeal as they could not have affected the result at the time of sentencing: *R v SB,* 2023 ONCA 369, at para 52

A sentence may be reviewed on the basis of fresh evidence in the form of a gladue report that was not available to the sentencing judge. In reconsidering the sentence, this court is still required to pay deference to aspects of the sentencing judge's analysis, and reconsideration of the sentence does not necessarily result in a different outcome: *R v McNeil*, 2020 ONCA 595, at paras 26-31

Fresh evidence of mental illness may be admissible to show that the appellants' mental health has deteriorated or would deteriorate significantly in jail and that an appropriate sentence would be a conditional sentence: *R v AE,* 2016 ONCA 243 at para 50

Fresh evidence showing that the appellant suffers from mental illness that has a detrimental effect on his ability to earn money to pay the fines, may demonstrate to the appeal court that it is in the interests of justice that the total amount of the fines be reduced: *R v AE,* 2016 ONCA 243 at para 57

Evidence of post-sentence breaches of a probation order, even if unrelated to the offence for which the sentence was imposed, may be relevant to a party's character, conduct, and attitude, and thus rehabilitative prospects: *R v Lis,* 2020 ONCA 557, at paras 51, 71

A sentence that is otherwise fit may be stayed on appeal where the offender has been on bail pending appeal and the circumstances during the intervening period demonstrate that he has made significant strides towards rehabilitation, such that reincarcerating him would serve no genuine societal interest, and is unnecessary to achieve the objectives of denunciation and general deterrence: *R v Gray,* 2021 ONCA 86, at para 54-58

When considering whether to stay a sentence on appeal in these circumstances, the court will consider whether the appellant has sought to "game the system", deliberately delayed their appeal or not pursuing it with reasonable dispatch: *R v Sauve,* 2023 ONCA 310, at para 8

The confirmation of an appropriate sentence followed by a stay of the execution of the remainder of the custodial portion, rather than a reduction of the sentence to time served or a conditional sentence, will be an appropriate disposition where the court seeks to affirm the fitness of the sentence that was originally imposed: *R v Sauve,* 2023 ONCA 310, at para 10

It may be that when a *Gladue* Report is admitted on appeal of a sentence reached through a joint submission, that sentence may be found to be unfit in light of the fresh evidence: *R v Mercier,* 2023 ONCA 98, at para 25

I. REINCARCERATION ON APPEAL

Review of governing principles on when it is appropriate to stay a sentence that has been increased on appeal rather than reincarcerate the accused (with v. good dissent): *R v Dufour*, 2015 ONCA 426 at paras 11-29; *R v HE*, 2015 ONCA 531 at paras 56-57; *R v Shi*, 2015 ONCA 646at para 13; see also e.g. in *R v Huh*, 2015 ONCA 356; see generally, *R v Clouthier,* 2016 ONCA 197 at para 63; *R v Davatgar-Jafarpour,* 2019 ONCA 353, at para 50;

The Court of Appeal has generally been reluctant to reincarcerate an offender who has served the sentence originally imposed and has been released in the community. This is particularly the case where any period of incarceration would be relatively short, and a substantial period of time has passed since the offender was released.

Nonetheless, where the original sentence was far below that which was required, re-incarceration has been often found to be necessary: *R v WV,* 2023 ONCA 655, at para 48-49

When a fit sentence is determined to be higher than that already served, denunciation and general deterrence may be achieved without re-incarceration: *R v Plange,* 2019 ONCA 646, at para 46

Relevant factors include:

- the risk of distorting the sentencing process and the parity principle
- the length of the sentence left to be served;
- rehabilitative steps taken by the offender, both before and after sentencing, and the degree to which those steps may be adversely affected by re-incarceration;
- the time that has elapsed from the imposition and completion of the sentences at trial
- responsibility for any delay in the appellate process;
- the potential for injustice if the sentence is served; and
- the seriousness of the offences in issue
- the fact that treatment available in the community suprasses that available in custody
- the fact that the offender is of low risk of reoffence
- the likelihood of early parole if there was reincarceration
- the likelihood of considerable additional hardship upon reincarceration: *R v Clouthier,* 2016 ONCA 197: *R v TJ,* 2021 ONCA 392

Where imposing a higher sentence and staying it would have the effect of ending an ongoing conditional sentence and subsequent probation, the court can denounce the sentence imposed below as unfit but nevertheless dismisses the appeal: *R v Burke-Whittaker,* 2025 ONCA 142, at para 62

Where specific deterrence and rehabilitation will not figure prominently in this appeal, the court has increased a sentence to address general deterrence considerations, but then stayed the balance of the custodial sentence imposed on appeal: *R v Marchant,* 2022 ONCA 406, at para 22

Where the accused is being reincarcerated, time spent on parole can be counted towards time served: *R v HE*, 2015 ONCA 531 at para 61

Where a conditional sentence is replaced with a custodial sentence on appeal, the accused is entitled to one-to-one credit for time served on his conditional sentence to the date of release of the appellate court's reasons: *R v. Rafiq,* 2015 ONCA 768

An Appellant may be entitled to added credit for the added hardship of imposing a custodial sentence on appeal: *R v Spencer*, 2014 OJ No 3262, at para 50

J. VARIATION OF PROBATION ORDER ON APPEAL

The failure to apply to the sentencing judge for a variation of the probation order under s.732.2(3) of the *Criminal Code* does not disentitle an appellant, as a matter of law, to the same relief on an appeal from sentence; however, the failure to apply under s. 732.2(3) is a factor the appellate court will consider on the appeal from sentence: *R v Hromek,* 2016 ONCA 109 at para 7

On appeal, fresh evidence showing that the appellant suffers from mental illness that has a detrimental effect on his ability to earn money to pay the fines, may demonstrate to the appeal court that it is in the interests of justice that the total amount of the fines be reduced: *R v AE,* 2016 ONCA 243 at para 57

In *Markos,* the Court of Appeal gave the Appellant some credit against his driving prohibition for the 22 months he was subject to a driving prohibition while on bail pending appeal: 2019 ONCA 80, at para 28

An Appellant may be entitled to added credit for the added hardship of imposing a custodial sentence on appeal: *R v Spencer*, 2014 OJ No 3262, at para 50

K. CREDIT FOR BAIL TERMS ON APPEAL

In *Markos,* the Court of Appeal gave the Appellant some credit against his driving prohibition for the 22 months he was subject to a driving prohibition while on bail pending appeal: 2019 ONCA 80, at para 28

SUMMARY CONVICTION APPEALS

A. 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 at para 9

B. 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 at paras 7-8; *R v Lam,* 2016 ONCA 850 at para 9

The jurisdiction to grant leave is vested in both a panel of the appellate court as well as a single judge thereof: *R v Sears,* 2021 ONCA 522, at para 6

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; *R v Khanna,* 2016 ONCA 39 at para 4; *Balogun-Jubril* at para 8; *Lam* at para 10

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

The second category arises where there appears to be a "clear" legal error, even if it doesn't have significance to the broader administration of justice - especially where the conviction is serious and the applicant faces a significant deprivation of

liberty: *Khanna* at para 5; *R v Khalil Mohammadk*, 2021 ONCA 301, at para 6; *R. v. Lam*, 2016 ONCA 850, at paras. 9 and 10

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

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

In *Sears,* the Court was "not persuaded that a challenge to a procedural decision made within the jurisdiction of a summary conviction appeal judge raises 'a question of law alone' within the meaning of s. 839(1) of the Criminal Code": *R v Sears,* 2021 ONCA 522, at para 26

C. APPEALING A SUMMARY CONVICTION ABANDONMENT

The decision to order an appeal dismissed as abandoned is a discretionary one that permits a court to control its own process. The appellate court may grant leave to appeal a decision of a SCACJ dismissing an appeal as abandoned. However, an applicant in these circumstances must identify an error of law in the decision to dismiss the appeal as abandoned: *R v Berhe,* 2022 ONCA 853, at paras 10-11

D. APPEALING A SUMMARY CONVICTION SENTENCE

Appeals from sentence, which are not heard by trial *de novo* under s. 822(4), are governed by s. 687 of the *Criminal Code*. This is so because s. 822(1) incorporates s. 687 by reference. As a result, the authority of an appeal judge on appeals from sentence under s. 813(a)(ii), unless the sentence is one fixed by law, is to consider the fitness of the sentence and:

i. vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
ii. dismiss the appeal.

The summary conviction appeal court has no authority to remit a sentencing determination to the trial court on appeals from sentence under s. 813(a)(ii): *R v Montesano,* 2019 ONCA 194, at paras 17-18

SUPREME COURT APPEALS

A. JURISDICTION

The Supreme Court has jurisdiction to decide on the correctness of a s.24(2) analysis done afresh by the Court of Appeal: *R v Reilly,* 2021 SCC 38

B. CONVICTION APPEALS

Appeals to the Supreme Court of Canada are governed by s.691 of the Criminal Code. Pursuant ti s.691(1)(a), the Appellant has a right of appeal where an acquittal is set aside on appeal "on any question of law in which a judge of the court of appeal dissents." A dissent within the meaning of s. 691(1) (a) of the Criminal Code means a disagreement which affects the result: *R v D'Amico,* 2019 SCC 23

The phrase "enters a verdict of guilty" under s.691(2)b) includes making an order that sets aside a permanent stay where that order is tantamount to entering a verdict of guilty, thus securing the purpose of this provision, which is to ensure that an accused person has one level of appeal to raise a question of law arising from their conviction: *R v Li,* 2020 SCC 12

Where an accused, having been convicted of an indictable offence at trial, is granted a new trial, s. 691 does not provide a route of appeal to the Supreme Court of Canada: *R v Sullivan,* 2022 SCC 19

C. 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 because 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 at paras 14-15