GENERAL TOPICS OF LAW

TABLE OF CONTENTS

ABSCONDING

Section 475(1) of the Criminal Code provides as follows:

475 (1) Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, absconds during the course of his trial,

> (a) he shall be deemed to have waived his right to be present at his trial, and
>
> (b) the court may
>
> > (i) continue the trial and proceed to a judgment or verdict and, if it finds the accused guilty, impose a sentence on him in his absence, or
> >
> > (ii) if a warrant in Form 7 is issued for the arrest of the accused, adjourn the trial to await his appearance,
>
> but where the trial is adjourned pursuant to subparagraph (b)(ii), the court may, at any time, continue the trial if it is satisfied that it is no longer in the interests of justice to await the appearance of the accused.

(2) Where a court continues a trial pursuant to subsection (1), it may draw an inference adverse to the accused from the fact that he has absconded.

A trial against an accused is not rendered unfair when a co-accused absconds, provided that the jury is cautioned that they are not to draw an adverse inference against the remaining accused While it is preferable for a trial judge to caution the jury that an adverse inference should not be drawn against an accused by reason of the fact that his co-accused absconded during the trial, failure to do so does not necessarily result in a miscarriage of justice: *R v Akhtar,* 2022 ONCA 279, at para 57

ACTUS REUS

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

i. conduct (act or omission);

ii. circumstances or state(s) of affairs; and

iii. result.

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

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

The simultaneous principle holds that, at some point, the actus reus and mens rea must coincide in order to make out an offence. Yet, it is not always necessary for the guilty act and the intent to be completely concurrent. …The determination of whether the guilty mind or *mens rea* coincides with the wrongful act will depend to a large extent upon the nature of the act. If a sequence of acts form part of the same transaction, and if the requisite intent coincides at any time with the sequence of acts, this would be sufficient for contemporaneity purposes. The contemporaneity principle is applied flexibly: *R v Collins,* 2023 ONCA 394, at paras 36, 40

AGENTS

Accused persons have the right to choose their mode of representation as part of their constitutional right to control their own defence, namely, whether to be represented by a lawyer, an agent, or to represent themselves.

However, accused persons do not have a constitutional right to representation by the non-lawyer of their choice. On the contrary, the court has authority, by statute or pursuant to its inherent power to control its own processes, to bar any person from appearing as an agent who is not a barrister and solicitor if the court finds that the person is not competent to properly represent or advise the person for whom he or she appears as agent, does not understand and comply with the duties and responsibilities of an agent, or if competent, on whom the court cannot rely for their "integrity, honesty, or forthrightness" or ability "to conduct a trial ethically and honourably."

A court's power to deny audience to an agent whose participation in proceedings would either damage the fairness of those proceedings, impair the ability of the tribunal to perform its function or otherwise undermine the integrity of the process, is part of the court's obligation to protect the integrity of the proceedings, including the accused's right to a fair trial and the accused's right, within the limits of the law, to choose a representative.

These principles also apply in the context of the representation of accused persons by unlicensed representatives in provincial offences matters. The right of a representative to appear is subject to the court's authority to control its own process.

When a party does attend with an unlicensed representative, the court should inquire into whether the party has made an informed choice to be represented by the agent, and the propriety of the representation. These inquiries may include questions of competence, discreditable conduct, conflict of interest and a demonstrated intention not to be bound by the rules and procedures governing criminal trials.

Ultimately, disqualification of an accused's chosen representative is a serious matter and is justified only where it is necessary to protect the proper administration of justice: *R v Van Ravenswaay,* 2021 ONCA 393, at paras 7-11

No bright line rule bars the appointment of former counsel as *amicus*." The propriety of such an appointment is determined by the circumstances of the case: *R v Ibrahim,* 2021 ONCA 241, at para 97

AMICUS CURIAE

The power to appoint *amicus curiae* flows from the inherent jurisdiction of courts to manage their own procedure to ensure a fair trial. In specific and exceptional circumstances, a judge may appoint *amicus* when the judge believes doing so is required for the just adjudication of a case: *R v Kahasi,* 2023 SCC 20

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

In complex cases where an accused person is adamant about conducting the defence personally, but is hopelessly incompetent to do so, the court may need the assistance of *amicus curiae* to meet the court's obligation to protect the fairness of the proceeding: *R v Walker,* 2019 ONCA 765, at para 63

The role of *amicus* is highly adaptable and can encompass a broad spectrum of functions, including adversarial functions. However, the role is not without limits, as there are dangers that arise from blending the roles of defence counsel and *amicus*. The court may not appoint *amicus* with functions that would interfere with the right of the accused to represent themselves or undermine the duty of loyalty that an *amicus* owes to the court. Similarly, an *amicus* may not perform functions that would undermine the impartiality of the court, a provincial legal aid scheme or a judicial decision to refuse to grant state-funded counsel to the accused. These dangers preclude appointing *amicus* to assume all of the powers and duties of defence counsel, but they do not impose a bar on appointing *amicus* with defence-like functions when an adversarial perspective is needed to ensure a fair trial.

Appointing *amicus* with adversarial functions may be required in unusual cases, including when an unrepresented accused displays symptoms of mental health challenges but is fit to stand trial or where the unrepresented accused refuses to participate in the trial process: *R v Kahasi,* 2023 SCC 20

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

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

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

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

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

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

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

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

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

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

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

The trial judge has wide discretion to tailor the *amicus* appointment to the exigencies of a case. The trial judge should consider the circumstances of the trial as a whole, including the nature and complexity of the charges; whether it is a jury trial or judge alone; the attributes of the accused; whether assistance is needed to test the Crown's case or advance a meaningful defence; and what assistance the Crown and trial judge can provide. The judge should canvass the parties for their perspectives about an *amicus* appointment and should consider whether a limited appointment would suffice. The trial judge should consider whether the mandate assigned to an *amicus* will make a confidentiality order necessary for the *amicus* to effectively discharge their role: *R v Kahasi,* 2023 SCC 20

ANCILLARY POWERS DOCTRINE

A. GENERAL PRINCIPLES

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

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

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

BURDEN OF PROOF

The onus is always on the Crown to prove the essential elements of an offence: *R v Achilles,* 2022 ONCA 382, at para 13

The defence is not required to prove any contested facts even on a balance of probabilities, let alone beyond a reasonable doubt: *R v JE,* 2024 ONCA 801, at paras 20, 32

A. REASONABLE DOUBT

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

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

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

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

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

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

For an example of the difference between speculation on uncalled evidence, and considering gaps in the evidence when determining whether the case has been proved beyond a reasonable doubt, see *R v MacKenzie,* 2020 ONCA 646, at paras 48-60

In *Carbone,* the Court of Appeal found that the repeated use of the words "convince" and "persuade" in reference to the defence evidence suggested that the trial judge looked to the defence to satisfy him that he should not accept the complainant's version of events. This was found to constitute a reversal of the burden of proof: *R v Carbone,* 2020 ONCA 394

B. EXPLANATION OF INJURIES

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

C. EXPLANATION OF MOTIVE

There is no onus on the accused to comment on the credibility of the accuser. The concern with this line of questioning is two-fold. First, it is unfair to ask an accused to speculate about a witness's motives. Second, these questions risk shifting the burden of proof. The burden is on the Crown to prove beyond a reasonable doubt that a complainant's allegations are true. Yet questions to an accused about a complainant's motives may cause the trier of fact to focus on whether the accused can provide an explanation for why a complainant would make false allegations, and find the accused guilty if a credible explanation is not forthcoming: *R v MS,* 2019 ONCA 869, at paras 8, 10, 15; *R v GH,* 2020 ONCA 1, at paras 24-31; see *R v RI,* 2024 ONCA 185, at para 20

D. CORROBORATION

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

E. RIGHT TO SILENCE

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

COLLATERAL ATTACKS

An accused is not entitled to launch a collateral attack to the constitutionality or validity of a condition that he is charged with breaching: *R v Bird*, 2019 SCC 7 (note that Bird dealt with this issue in the context of LTSO breach hearings, but the principles appear equally applicable to breach of bail hearings).

Generally, a collateral attack is defined as an attack on an order made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. The rule provides that, with limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose: R v Bird, 2019 SCC 7, at para. 21.

The rule protects the integrity of the justice system by prohibiting a party from avoiding the consequences of an order issued against it by proceeding in another forum. It prevents a person charged with violating a court order from saying, in his or her defence to that charge, that the order is invalid or unlawful.

In determining whether a collateral attack is permissible, the court must focus on whether the legislature intended to permit collateral attacks on the order. Relevant factors may include:

(1) the wording of the statute under the authority of which the order was issued;

(2) the purpose of the legislation;

(3) the existence of a right of appeal;

(4) the kind of collateral attack in light of the expertise or raison d'être of the administrative appeal tribunal; and

(5) the penalty on a conviction for failing to comply with the order

Because the rule was developed to advance the ends of justice, it should not be mechanically applied when court orders are attacked where doing so would result in an injustice.

The standard of review on applying the collateral attack rule is correctness: *R v Irwin,* 2021 ONCA 776, at paras 23-28, 42

CONFLICT OF INTEREST

A lawyer owes a duty to their client to avoid conflicts of interest. This is defined as a substantial risk that a lawyer's loyalty to, or representation of, a client would be materially and adversely affected by the lawyer's duties to a former client.

The rule against conflicts guards against two forms of prejudice: first, there is prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and second, there is prejudice arising where the lawyer 'soft peddles' his representation of a client in order to serve his own interests, those of another client, or those of a third person.

With respect to former clients, lawyers must refrain from misusing confidential information. Whereas, for current clients, lawyers must not misuse confidential information, nor place themselves in a situation that jeopardizes effective representation.

A lawyer can render effective assistance only when that lawyer champions the accused's cause with undivided loyalty. Effective representation may be

threatened where a lawyer is tempted to prefer other interests over those of their client. There should be no room for doubt about counsel's loyalty and dedication to the client's case. A lawyer's duty of loyalty to their client is foundational to the adversarial system and "essential to the integrity of the administration of justice.

To determine where a conflict of interest causes a denial of the accused's constitutional right to make a full answer and defence, and results in a miscarriage of justice, the applicant must show:

an actual conflict of interest between the respective interests represented by counsel; and

as a result of that conflict, some impairment of counsel's ability to represent effectively the interests of the appellant.

If both criteria are established, then the applicant has been denied the right to make full answer and defence and a miscarriage of justice has occurred.

It is not enough simply to have an appearance of a conflict. The court must determine whether counsel's representation was, in fact, adversely affected. The concern on appeal must be with what happened and not what might have happened.

If the trial counsel's representation of an accused may be compromised by a duty to a former client, counsel should first advise the new client and obtain their consent. If counsel believes that the duty to the former client actually will compromise the new retainer, then the lawyer should decline to accept the case: *R v Faudar,* 2021 ONCA 222, at paras 55-62; see also *R v JJ,* 2021 ONCA 788, at paras 70-72

Where an allegation of conflict of interest is raised on appeal, the appellant is required to demonstrate two things: (i) that trial counsel was in an actual conflict of interest; and (ii) that the conflict impaired trial counsel's representation, in the sense that counsel's representation was, in fact, adversely affected. The latter question is judged by what happened, not what might have happened. The Court will find that a miscarriage of justice occurred only if both branches of this test are met: *R v Marrone,* 2023 ONCA 742, at para 39

CORBETT APPLICATIONS

A. GENERAL PRINCIPLES

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

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

Another potential factor identified in *Corbett* is the need to maintain a balance between the position of the accused and that of a Crown witness who has been subjected to a credibility attack on the basis of his or her criminal record or otherwise, although this factor should not override the concern for a fair trial. Any attack on the integrity of a Crown witness is not sufficient to make the accused's entire record admissible; rather, what is contemplated is an attack on the Crown witness's credibility based on his or her character, especially as disclosed in his or her criminal record: *R v McManus,* 2017 ONCA 188 at paras 81-83; *R v Laing,* 2016 ONCA 184 at para 19; *R v MC,* 2019 ONCA 502, at paras 53-60; *R v Pascal,* 2020 ONCA 287, at para 108

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

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

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

While trial judges have the discretion to exclude prejudicial evidence of prior convictions, in exercising their discretion, judges should err on the side of inclusion because concealing a witness' prior criminal record deprives the jury of information relevant to credibility: *R v Asante,* 2022 ONCA 657, at para 23

One approach to mitigate prejudice, followed by the trial judge in *Asante*, was to read the jury the convictions, dates, and sentence, without giving them a copy of that portion of the jury charge: 2022 ONCA 657, at para 24

Even crimes which are not typically associated with dishonesty may have some relevance to the trustworthiness of a witness: *R v Nagy,* 2023 ONCA 184, at para 58

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

In *Rose,* the Court of Appeal held that, while the appellant's prior convictions were admissible, the reasons for conviction underlying those convictions were overly prejudicial and should not have been admitted: *R v Rose,* 2020 ONCA 306, at paras 42-50

In *Akthar,* the Court of Appeal held that there was prejudice to the jury's instruction on the accused's prior highway traffic act offences, given their similarity to the street racing charges before the court: 2022 ONCA 279, at para 73

Convictions that show a disregard or contempt for the law are always relevant to credibility. This includes possessing a firearm knowing its possession is unauthorized, and possession of a firearm contrary to a weapons prohibition order: 2022 ONCA 657, at para 25

B. ON APPEAL

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

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

C. STANDARD OF REVIEW

A decision on a *Corbett* application is a matter of broad discretion, entitled to a high degree of deference: *R v Nagy,* 2023 ONCA 184, at para 58

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

Appellate intervention is also warranted where the trial judge misapprehends the material facts, or exercises discretion unreasonably: *R v Asante,* 2022 ONCA 657, at para 21

D. EXAMPLES FROM THE CASE LAW

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

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

COSTS AS A REMEDY

A. JURISDICTION TO AWARD COSTS

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

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

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

The general rule is that no costs are awarded in a proceeding under the *Provincial Offences Act*: *R v Topol,* 2021 ONCA 217, at para 5

B. GENERAL PRINCIPLES

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

1. where there has been a *Charter* violation

2. where there has been Crown misconduct

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

i. Costs as a Charter Remedy

See Chapter on Charter, Section 24(1)

ii. Costs for Crown Misconduct

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

In criminal cases, the purpose of a costs award is not primarily punitive or compensatory, but rather to ensure that an accused is not deprived of the opportunity to advance a defence because of the cost associated with Crown misconduct: *R v Villanti,* 2020 ONCA 436, at para 117

a) Costs for Bystanders

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

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

iii. Costs for Defence Misconduct

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

iv. Appeal of Costs Award

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

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

THE CROWN

A. ROLE OF

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

Canadian courts have repeatedly stressed that Crown prosecutors are not simply advocates; they are ministers of justice. Crown prosecutors are expected to press their position firmly and advance their position effectively, even with a degree of rhetorical passion:. Crown prosecutors must, however, temper their advocacy. They are not to appeal to emotion by engaging in "inflammatory rhetoric,

demeaning commentary or sarcasm". Nor are they to corrupt the fair reach of evidence in their submissions by suggesting that there are inconsistencies when there are not: *R v Roberts,* 2018 ONCA 411 at para 120

Nor is counsel for the Crown entitled to advance legally impermissible submissions that invite legally prohibited reasoning or effectively undermine trial fairness: *R v JH,* 2020 ONCA 165, at para 92

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

B. CROWN MISCONDUCT

i. General Principles

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

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

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

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

Courts have authority to award *Charter* damages against the Crown for prosecutorial discretion absent proof of malice. For example, "a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence

and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence." *Henry v BC (Attorney General),* 2015 SCC 24

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

It is improper for the Crown to make submissions to the jury as being their own opinion. It adds the stature of Crown counel's opinion to what should be a submission: *R v SK,* 2025 ONCA 149, at para 10

ii. Appellate Intervention

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

C. PROSECUTORIAL DISCRETION

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

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

Drawing a negative inference from the withdrawal of charges would require the court to engage in speculation, because the Crown is not obliged to give reasons

for the exercise of its prosecutorial discretion. Such speculation cannot establish arbitrary or improper motives for which a s. 24 Charter remedy would lie: *R v Thompson*, 2015 ONCA 800 at para 50

It is the Crown's discretion to determine which witnesses it will call and will not call – provided the Crown does not abuse that discretion: *R v HAK*, 2015 ONCA 905 at para 13; *R v Yaborow,* 2023 ONCA 400, at para 65

The Crown is generally free to exercise her discretion to determine who are material witnesses essential to the unfolding of the narrative. This discretion will not be interfered with unless the Crown has exercised it for some oblique or improper motive. The Crown need not call all witnesses who may have relevant testimony if such testimony is not essential to the narrative: *R v Lo*, 2020 ONCA 622, at para 155

Core prosecutorial discretion is reviewable only for abuse of process: *R v Glegg,* 2021 ONCA 100, at para 40

Abuse of process refers to Crown conduct that is egregious and seriously compromises the fairness of trial proceedings or undermines the integrity of the justice system: *R v Glegg,* 2021 ONCA 100, at para 41

D. THEORY OF LIABILITY

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

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

However, the trial judge would be in error to convict an accused based on a theory of of liability disavowed by the Crown, without giving the accused notice and the opportunity to respond: *R v Ochrym,* 2021 ONCA 48, at para 38; see also paras 46-48w

DEFENCE COUNSEL

The trial judge must be wary of second-guessing tactical decisions made by defence counsel: *R v Bushiri,* 2019 ONCA 797, at para 52

DECLARATORY RELIEF

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

DIRECTED VERDICTS

When counsel for an accused applies for a directed verdict at the end of the Crown's case, the trial judge must decide whether there is some evidence on the basis of which a reasonable jury, properly instructed, could return a verdict of guilty for the offence in question: *R v Al-Enzi,* 2021 ONCA 81, at para 148

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

For a trial judge to make this finding, the Crown must adduce evidence on every essential element of the offence for which the Crown has the evidential burden: Hayes, at para. 65; Tomlinson, at para. 151. If the Crown's case is circumstantial, as was the case here, the trial judge must engage in a limited weighing of the evidence to determine whether it is "reasonably capable of supporting the inferences the Crown seeks to have the jury draw: *R v Al-Enzi,* 2021 ONCA 81, at para 149

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

DISCLOSURE REGIMES

i. First Party Disclosure

First party disclosure under *Stinchcombe* imposes a duty on the Crown to disclose all relevant, non-privileged information in its possession or control, whether that information is inculpatory or exculpatory, unless disclosure of that information is governed by some other regime. This duty is ongoing and corresponds to the accused's constitutional right to the disclosure of all material which meets the *Stinchcombe* standard: *R v Pascal,* 2020 ONCA 287, at para 101

An investigating police service is in possession or control of a prospective witness' criminal record if that force has access to records of criminal convictions through CPIC. While those records may not be fruits of the investigation, they may nonetheless be disclosable as obviously relevant: *R v Pascal,* 2020 ONCA 287, at paras 124-133

ii. Third Party Disclosure

Crown entities other than the prosecuting Crown – including the police – are third parties for the purposes of disclosure. They are not subject to the *Stinchcombe* regime. The prosecuting Crown's disclosure duty under *Stinchcombe* is triggered upon a defence request for disclosure: *R v Pascal,* 2020 ONCA 287, at para 103

When put on notice of potentially relevant material in the hands of the police or other Crown entities, the prosecuting Crown has a duty to make reasonable inquiries. Correspondingly, the police have a duty to disclose to the prosecuting

Crown all material pertaining to its investigation of the accused. This material is often termed "the fruits of the investigation": *R v Pascal,* 2020 ONCA 287, at para 104

The "fruits of the investigation" refers to the police investigative files, not their operational records or background information. In other words, "fruits of the investigation" refers to information "generated or acquired during or as a result of the specific investigation into the charges against the accused": *R v Pascal,* 2020 ONCA 287, at para 105

However, the police obligation of disclosure to the prosecuting Crown extends beyond the "fruits of the investigation". The police should also disclose to the prosecuting Crown any additional information that is "obviously relevant" to the accused's case: *R v Pascal,* 2020 ONCA 287, at para 106

iii. First versus Third Party Disclosure

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

i. the information sought is in the possession or control of the prosecuting Crown; and

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

The second question will be answered affirmatively where the information is part of "the fruits of the investigation" or is "obviously relevant". An affirmative response on either of these issues means that the first party or *Stinchcombe* disclosure regime applies: *R v Pascal,* 2020 ONCA 287, at para 107

EXTRAORDINARY REMEDIES

The jurisdictional foundation for applications for *certiorari* and other prerogative writs is the inherent jurisdiction of the Superior Courts. The procedure for an application for a prerogative writ in criminal matters is governed by Part XXVI of the *Criminal Code* and rules made by superior courts, enacted under the authority of s. 482 of the *Criminal Code*. Section 774 of the *Criminal Code* provides that: "This Part applies to proceedings in criminal matters by way of *certiorari*, *habeas corpus*, *mandamus*, *procedendo* and prohibition." In Ontario, rule 43 of the *Criminal Proceedings Rules for the Superior Court of Justice* governs the procedure for applications for extraordinary remedies.

Given that Parliament has legislated in relation to the procedure for applications for prerogative writs in criminal matters, it is difficult to see any jurisdictional space left for a role for the Federal Court: *R v Mivasair,* 2025 ONCA 179, at paras 65-66

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

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

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

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

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

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

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

A erroneous decision by a trial judge as to which disclosure regime governs what is sought – i.e., first the party or third party disclosure regime – would not, as a general rule, amount to a jurisdictional error, but only an error of law in the exercise of jurisdiction. Unless the error were to amount to a failure to observe a mandatory

statutory provision or a breach of the principles of natural justice, the error would fall beyond the reach of *certiorari* at the instance of any party to the proceedings, but not a third party: *R v Stipo,* 2019 ONCA 3, at paras 46-52; *R v Awashish,* 2018 SCC 45, at paras 10-12, 20, 23; see *R v MN,* 2022 ONCA 358, at paras 17-20

There is a critical difference between a challenge to jurisdiction and a challenge to the merits of a decision. Where the applicant's complaint is grounded in the dissatisfaction with the merits of a decision, the remedy lies not with what effectively amounts to an interlocutory appeal, but with an appeal brought after the trial has ended: *R v MN,* 2022 ONCA 358, at para 25

In *MN,* the Court of Appeal held that "broadening the use of extraordinary remedies to challenge a decision of a trial judge in the Ontario Court of Justice to refuse a re-election in the middle of a trial, where no such remedy would be available if that same decision were made in the Superior Court of Justice, creates an unprincipled distinction between trial courts that should not be encouraged:" 2022 ONCA 358, at para 28

Certiorari is available to review the exercise of Crown prosecutorial discretion to intervene in a private prosecution and stay the charges. The informant/private prosecutor advancing the application must establish an abuse of process to invoke the Court's jurisdiction to intervene.

The reason why the appropriate mechanism of review is *certiorari* is because the underlying issue of whether the Crown's exercise of prosecutorial discretion was tainted by abuse of process is fundamentally a criminal law problem. It is also fundamentally an issue of the criminal courts of Ontario controlling their own process. The forum to conduct the review should be the criminal courts, so long as the review can reasonably fit within existing criminal procedures. It should be dealt with by criminal procedures, not through an admixture of civil procedure.

The interest of the person who lays a private Information before a Justice of the Peace (the private prosecutor) is sufficient to give them standing to seek review by way of *certiorari* to challenge the Crown's decision to intervene in and withdraw a private prosecution as being tainted by abuse of process. *R v Mivasair,* 2025 ONCA 179

A private prosecutor who brings an application for *certiorari* to review the Crown's exercise of prosecutorial discretion to withdraw or stay an Information must serve

the application on the accused person or persons. Given the interest of an accused in whether the charge(s) proceeds, they would have a right to respond and be heard on the application: *R v Mivasair,* 2025 ONCA 179, at para 74

Certiorari is available to third parties in a wider range of circumstances than for parties, given that third parties have no right of appeal. In addition to having *certiorari* available to review jurisdictional errors, a third party can seek *certiorari* to challenge an error of law on the face of the record, such as a publication ban that unjustifiably limits rights protected by the *Charter*, or a ruling dismissing a lawyer's application to withdraw. The order has to have a final and conclusive character vis-à-vis the third party: *R v Mivasair,* 2025 ONCA 179

Where a presiding justice has no discretion but to make an endorsement on the information – for example, to withdraw charges at the request of the Crown – the decision is still subject to judicial review. The discretion of the Crown to intervene in and withdraw or stay a prosecution is not immune from review for abuse of process. It would be unduly formalistic to hold that because the presiding justice was required to endorse on the Information that it was withdrawn at the request of the Crown, there is no decision or order. The presiding justice's endorsement is the means by which the withdrawal is implemented and officially recorded for the public and the parties. Further, in such circumstances, the Crown's exercise of prosecutorial discretion in intervening in and withdrawing the private prosecution is the true object of the appellants' abuse of process claim. The implementation of the withdrawal or stay in circumstances tainted by abuse of process would constitute error of law on the face of the record *R v Mivasair,* 2025 ONCA 179, at paras 52-53, 57

Another example arose in *Dagenais*, where Lamer C.J. held that an order implementing a publication ban that is not authorized by the common law rules in relation to publication bans would constitute error of law on the face of the record, grounding a *certiorari* remedy: *R v Mivasair,* 2025 ONCA 179, at paras 52-53, 57

In regards to the issue of standing, our law recognizes the fundamental and historical right of a citizen to lay an Information before a justice. Although that right is not absolute, the Crown's exercise of discretion to intervene in and withdraw the private prosecution has a sufficient impact on the right to come within the meaning of *Awashish* as having a final and conclusive character vis-à-vis the private prosecutor. It ends the prosecution commenced by them. Other than ceriotirari seeking a review of prosecutorial discretion under the doctrine of abuse of process,

there is no alternative remedy such as a statutory right of appeal: *R v Mivasair,* 2025 ONCA 179, at para 55

FITNESS TO STAND TRIAL

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

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

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

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

(c) communicate with counsel.

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

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

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

Where fitness concerns arise after a finding of guilt has been made, the proceedings cannot continue until the accused's fitness has been assessed and

determined. Some have suggested that jurisdiction at the sentencing stage lies in the common law; others have suggested that it lies in the Canadian Charter of Rights and Freedoms; and still others have suggested that it lies in reading into the relevant statutory provisions by way of affording a constitutional remedy: *R v Walker,* 2019 ONCA 435, at paras 40-44, 54

INFORMATION / INDICTMENT

A. Amending The Information Or Indictment

a) Power to amend under s.601

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

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

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

The power to amend an information or count within an information is a broad one. Provided there is no irreparable prejudice to the accused, and the fairness of the trial will not be adversely impacted, the trial judge may exercise her or his power in favour of making an amendment: *R v Bidawi*, 2018 ONCA 698, *R v McGaw,* 2019 ONCA 808, at para 18; *R v RS,* 2023 ONCA 626, at paras 23-24

Such amendment may be made at any stage of the proceedings, pursuant to s.601(3): *R v KR,* 2025 ONCA 330, at para 17

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

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

Section 601(6) of the *Criminal Code* provides that the question of whether to amend an indictment is a question of law. Nevertheless, where the decision to amend is based upon a finding as to whether the amendment will cause irreparable prejudice to the defence, such a finding should not be interfered with lightly…keeping in mind the trial judge's privileged position as regards the effect on the fairness of the trial of events taking place in the courtroom: *R v RS,* 2023 ONCA 626, at para 25

A decision to amend that is based on a determination of whether there is prejudice to the accused should not be interfered with lightly, since the trial judge is in a privileged position to determine the effect on the fairness of the trial of events happening in the courtroom: *R v KR,* 2025 ONCA 330, at para 17

b) Under the Provincial Offences Act

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

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

(a) fails to state or states defectively anything that is requisite to charge the offence;

(b) does not negative an exception that should be negatived; or

(c) is in any way defective in substance or in form.

R v Singh, 2018 ONCA 506 at paras 7, 8, 10

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

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

B. THE SINGLE TRANSACTION RULE

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

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

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

A series of acts that are sufficiently connected will make up a single transaction for the purposes of s. 581(1). The sufficiency of the connection will depend on the circumstances. The requisite connection may be established by the proximity in

time or place of the acts, the identity of the parties to the acts, the similarities of the conduct involved in the acts, the ongoing relationship of the parties to the acts, or other factors tending to show that each act is properly viewed as part of the larger whole: *R v Rocchetta,* 2016 ONCA 577 at para 44; see generally *Kenegarajah;* see also *R v Schoer,* 2019 ONCA 105, at paras 62-65; *R v Theriault,* 2021 ONCA 517, at para 186

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

C. Particularizing The Charge

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

D. NUMBER OF COUNTS

There risks associated with including multiple counts in an indictment that arise out of the same conduct. It would benefit the conduct of prosecutions generally if the Crown identified the key offences involved and prosecuted only those offences: *R v Akhi,* 2022 ONCA 264, at para 13

INEFFECTIVE ASSISTANCE OF COUNSEL

A. DECISIONS THAT BELONG TO A CLIENT

There are several decisions, relating to the accused person's fundamental right to control his or her own defence, that belong to the client alone. Trial counsel cannot make these decisions for the accused person, but can and should provide competent advice and act on proper instructions. These decisions include: how to plead, the mode of election of trial, whether to testify, and whether to advance a defence of not criminally responsible on account of mental disorder.

When counsel's advice is not competent, it effectively deprives the accused of a meaningful decision. That denial goes to the appearance of the fairness of the trial, if not the actual fairness of the trial. Either results in a miscarriage of justice, regardless of the impact of the ineffective representation on the reliability of the verdict: *R v Trought,* 2021 ONCA 379, at paras 47-50.

Accused persons also have a constitutional right to choose their mode of representation, namely, whether to be represented by a lawyer, an agent, or to represent themselves: *R v Van Ravenswaay,* 2021 ONCA 393, at para 7

Counsel's failure to discuss and obtain instructions on fundamental decisions relating to an accused's defence may in some circumstances raise questions of procedural fairness and the reliability of the result leading to a miscarriage of justice. However, the loss of those decisions does not alone warrant a new trial on ineffective assistance grounds. The accused must, in most cases, demonstrate more than the loss of choice. S/he must demonstrate subjective prejudice – that is, that there was a "reasonable possiblity" that they would have acted differently: *R v White,* 2022 SCC 7

B. THE TEST AT TRIAL

The test to assess ineffective assistance claims on appeal does not apply at trial. An incompetence of counsel claim, brought during the course of a trial, should be approached within the principled framework for mistrial applications. A mistrial is a remedy of last resort, and it falls squarely within the discretion of the trial judge who is in the best position to assess whether such a remedy is needed in order to avoid miscarriages of justice. No new test is required.

C. TEST ON APPEAL

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

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

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

In order to succeed, the Appellant must establish:

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

Once the facts that underpin the claim have been established, the ineffective assistance analysis begins with the prejudice component. This component engages a determination of whether a miscarriage of justice has occurred. Either because of some procedural unfairness in the proceedings, a compromise of the reliability of the verdict or some combination of both consequences. Where the reviewing court does not make a finding of prejudice, it is undesirable for the court

to conduct an inquiry into and render a conclusion upon the performance component: *R v Girn,* 2019 ONCA 202, at para 92

i. Prejudice Component

Before considering the performance component, the court must consider prejudice – whether there has been a miscarriage of justice as a result of either (1) an unreliable verdict or (2) procedural unfairness or the appearance of unfairness: *Nwagwu* at paras 6-7 (citations omitted); *R v Bayliss,* 2015 ONCA 477 at para 61; *R v Trudel,* 2015 ONCA 422 at para 34; *R v Trought,* 2021 ONCA 379, at paras 74-75

The unreliability of the verdict is made out where the appellant can establish that there is a reasonable probability that the verdict would have been different had he received effective legal representation. A reasonable probability is a probability that is sufficiently strong to undermine the appellate court's confidence in the validity of the verdict: *R v Cubillan,* 2018 ONCA 811, at para 8

Although a reasonable possibility is inadequate, the appellant need not establish with certainty that the verdict would have been different: *R v McDonald,* 2022 ONCA 574, at para 78

The trial/procedural fairness branch of the prejudice component is concerned with the adjudicative fairness of the process used to arrive at the verdict. Some of the decisions that must be made during the course of a trial, such as the mode of trial, whether to testify or plead guilty, or whether to advance the defence of not criminally responsible, are so fundamental to procedural fairness that counsel's failure to permit the appellant to make the decision, or to provide effective advice on the matter, can raise questions of procedural fairness: *R. v. Fiorilli*, 2021 ONCA 461, at paras 55-56

The standard for establishing a miscarriage of justice on the basis of appearance of fairness alone is high; the defect must be so serious that it shakes public confidence in the administration of justice: *R v White,* 2022 SCC 7

Courts may consider both branches of the prejudice component simultaneously: *R v McDonald,* 2022 ONCA 574, at para 53

ii. Performance Component

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

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

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

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

Counsel's conduct is measured against the standard of reasonable professional judgment and by reference to the circumstances as they existed when the decision was made. Hindsight has no role to play. Advice and representation that were reasonable when provided cannot be made unreasonable by virtue of an adverse verdict: *R v KKM,* 2020 ONCA 736, at para 63

In applying the reasonableness standard, courts recognize different lawyers can reasonably give different advice in the same circumstances, and can reasonably take different approaches when conveying that advice to the client. For the purposes of determining an ineffective assistance of counsel claim, the question for the appellate court is not what should trial counsel have said or done, but rather was what trial counsel said or did reasonable in the circumstances? *R v KKM,* 2020 ONCA 736, at para 66

Common sense dictates a cautious approach to allegations against trial lawyers made by convicted persons who are seeking to avoid lengthy jail terms: *R. v. Fiorilli*, 2021 ONCA 461, at para 51

It is critical to keep in mind that, during the course of criminal proceedings, defence counsel make many decisions in good faith and in the best interests of his or her client. The appellalte court ought not look behind every decision counsel makes, except where it is essential to prevent a miscarriage of justice. Defence counsel

need not always obtain approval for each and every decision they make in the conduct of an accused's defence.

On the other hand, some decisions, like whether to enter a plea of guilty or whether to testify, require instructions from the client. It is for the client, not for counsel, to make these decisions. The failure to discuss these issues with the client and to obtain the necessary instructions may raise questions of procedural fairness and the reliability of the trial result and lead to a miscarriage of justice: *R v G(DM),* 2011 ONCA 343, at paras 108-109

The failure to obtain written instructions is a question of professional prudence, not incompetence, but noted that the failure to do so is ill-advised and contrary to counsel's best interests. The lawyer who fails to obtain written instructions risks exposure to unfounded allegations of unprofessionalism. And although not indicative of ineffectiveness itself, the failure to obtain instructions may undercut trial counsel's attempts to defend against claims of ineffectiveness: *R v Trought,* 2021 ONCA 379, at paras 76-78

Proper trial preparation ordinarily includes speaking to potential witnesses. But failing to do so does not automatically warrant a finding of incompetence. The court must consider the factual context including what information defence counsel had about the witnesses, about their likely testimony and about how the testimony would likely assist or harm the defence: *R v McDonald,* 2022 ONCA 574, at para 22

iii. Evidentiary Foundation

The appeal record on a claim for ineffective assistance of counsel typically includes the affidavit and cross-examination of trial counsel. While the Practice Direction does not specifically require it, an affidavit is expected because it will almost certainly become the central document in any ineffective assistance claim:

Either the Crown or the defence might elicit trial counsel's affidavit. However, this responsibility will often fall to the Crown as a practical matter because trial counsel is not a party to the appeal. Part of the court's concern is to ensure that trial counsel

whose professional conduct is being impugned has an opportunity to explain the strategic and other decisions made during the course of the trial.

The Protocol contemplates that the court will have before it all available information relating to the allegations of ineffective assistance of trial counsel. Trial counsel's version of the relevant events is obviously crucial. This court expects that trial counsel will fully address the allegations made by the appellant.

However, the Crown is not compelled to seek out and file trial counsel's affidavit. To the contrary, an appellant's failure to fully engage in the process established by the Practice Direction permits the court to draw an adverse inference about the true value of the evidence that the appellant argues would have changed the course of the trial. The appellant's reluctance to follow the procedure can be seen as an admission that the more robust fact-finding process of the Practice Direction, including an affidavit by trial counsel and cross-examination, might weaken rather than strengthen the claim of ineffective assistance: *R v Earle,* 2021 ONCA 34, at paras 66-69

iv. Examples from the Case Law

- In *Sararas,* the Court of Appeal found that trial counsel was ineffective in that he:

  (a) did not pursue in depth the nature and extent of the communications between the complainants as a precursor to an examination of any possible collusion;

  (b) did not pursue the issue of the appellant's opportunity to commit the offences;

  (c) did not challenge the complainants' inconsistencies between their police statements, their preliminary inquiry evidence, and their trial evidence;

  (d) did not challenge the complainants on their memories despite the historical nature of the allegations; and

  (e) did not adequately prepare for trial and prepare the accused to testify: *R v Sararas,* 2022 ONCA 58, at paras 50, 53

The court concluded that there was no real effort to test the complainants' credibility and reliability, and the ineffective assistance of counsel undermined the analysis carried out by the trial judge in his reasons for conviction: paras 59, 61

- Where a victim of ongoing domestic abuse has been effectively tethered to the perpetrator of that abuse by virtue of a joint indictment, a failure of counsel to explore severance for the abuse victim is a fundamental deficiency that undermines the fairness of the abuse victim's trial. It is also so serious that it shakes public confidence in the administration of justice: *R v McDonald,* 2022 ONCA 574, at para 72

- The failure to cross-examine a crown witness: *R v Joanisse,* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.)

- The failure to cross-examine on prior inconsistent statements: *R. v. M.B.*, 2009 ONCA 524, at para. 67

- By preparing a defence statement and disclosing it to the Crown before disclosure came in, and without obtaining settlement privilege, and without obtaining instructions on the accused's waiver of his right to silence. "It was essential that the appellant understand that he enjoyed the right to silence and that he did not have to provide any information to the Crown." *R v McDonald,* 2022 ONCA 838

- Representing an accused while having a conflict of interest, and proceeding by way of a *nolo contendere* procedure without instructions: *R v Leroux-Blake,* 2021 ONCA 868

- The failure to give meaningful advice about whether or not to testify, and to properly prepare an accused to testify: *R v DA,* 2020 ONCA 738; *R v KKM,* 2020 ONCA 736, at paras 62-66, 83, 91.

    - An accused is denied a right to choose whether to testify when counsel provides advice that is so wanting as to preclude the accused from making a meaningful decision about testifying: *R v McDonald,* 2022 ONCA 574, at para 50

In *McDonald,* the Court held that "the advice given by [counsel] on whether the appellant should testify was unreasonable and the circumstances surrounding the giving of that advice were wanting." The Court reasoned that, in the circumstances of that case, it was incumbent on counsel to properly prepare the accused in advance so that she could understand and assess the factors that would be at play when deciding whether to testify: *R v McDonald,* 2022 ONCA 574, at para 81

- The failure to interview a defence witness before she testified, and the decision to call a defence witness where there was no compelling reason to do so – where, in fact, the testimony hurt the accused: *R v McDonald,* 2022 ONCA 574, at para 84

- Where trial counsel failed to spend enough time preparing, to secure an expert witness, and to effectively cross-examine Crown witnesses: *R v Green,* 2018 ONSC 2912

- Where trial counsel denied the accused his opportunity to testify, failed to properly cross-examine the complainant, and failed to adduce potentially significant evidence in his defence: *R v Cubillan,* 2018 ONCA 811

- The relevant test laid out and applied in the context of an appeal to strike a guilty plea: *R v Baylis*, 2015 ONCA 477

- The relevant test laid out and applied in the context of an appeal to strike an NCR order: *R v Trudel*, 2015 ONCA 422

- The failure to advise a client of the effect of a guilty plea on the client's immigration status prior to plea is discussed – but not decided: *R v Shiwprashad*, 2015 ONCA 577

- The failure to advise a client of the criminal consequences of a guilty plea and aggravating factors contained in the summary of facts acknowledged by the accused at a plea: *R v Simard,* 2017 ONCA 149

- The failure to advise a client of the consequence that, upon pleading guilty for social assistance fraud, she would have to pay restitution and would be

unable to access Ontario Works payments in the future: *R v Yasotharan,* 2019 ONCA 568

- The failure to authenticate evidence necessary to raise a reasonable doubt, after having been invited to do so by the trial judge: *R v Gadam,* 2019 ONCA 345

- The failure to give a client an adequate opportunity to consider his election as to mode of trial: *R v Stark,* 2017 ONCA 148. Note that, in *White,* the SCC held that trial counsel's failure to advise an accused of his choices on election only fulfills the performance component of ineffective assistance. To succeed, an accused must also demonstrate prejudice – that is, evidence that he would have elected differently if given proper advice: 2022 SCC 7

- The failure to review an accused's statement to police where the accused was cross-examined on that statement at trial, and the concession of voluntariness despite the failure to discuss with the accused the circumstances surrounding the giving of the statement: *R v EH,* 2017 ONCA 423

- Counsel's failure to attempt to bring a 276 constituted ineffective assistance of counsel and caused a miscarriage of justice where the credibility of the complainant was central and the 276 would have allowed the defence to explore a major contradiction in her evidence: *R v Walendzewicz*, 2018 ONCA 103

- Counsel's falsification of an affidavit containing information inconsistent with the accused's evidence at trial, and relied on by the trial judge to convict, did not amount to ineffective assistance of counsel because of the overwhelming Crown case, the incredibility of the accused generally, and the adequate performance of trial counsel: *R v LHE,* 2018 ONCA 362

- Counsel's failure to obtain proper instructions on proceeding to an NCR verdict: *R v JF,* 2019 ONCA 432

- Amicus' failure to render assistance necessary to ensure a fair trial: *R v Walker,* 2020 ONCA 765, at paras 73-78

- The failure to advice the client about the concept of constructive possession and the consequences of a blended voir dire before the client testified and admitted his ownership of drugs in his home: *R v Trought,* 2021 ONCA 379, at paras 69-74

- In *Szostak,* 2012 ONCA 503, at paras 77-80, the Court of Appeal held that it is the client's decision whether to advance the defence of not criminally responsible on account of mental disorder under s. 16 of the Criminal Code; counsel cannot advance this defence without instructions

- The failure to adequately prepare for trial, conducting an ineffective cross-examination, distancing counsel from the client and his defence with remarks in cross-examination and closing, failing to adequately advance the client's defence, and failing to adequately challenge the Crown's case: *R v Nnane,* 2024 ONCA 609

INTERESTS OF JUSTICE

In Canadian criminal law, the concept of the "interests of justice" has come to be understood as encompassing the interests of the accused, the interests of the Crown, broad-based societal concerns, and the integrity of the criminal process: *R v Cowan,* 2021 SCC 31, at para 63

ISSUE ESTOPPEL

Issue estoppel is a legal doctrine which estops the re-litigation of disputed issues and prevents a party against whom an issue has been decided from proffering evidence to contradict the earlier result. The doctrine is concerned with whether an issue to be decided in proving the current action is the same as an issue decided in a previous proceeding: *R v Wilson,* 2024 ONCA 600, at para 19

Issue estoppel is confined to precluding the Crown from leading evidence which is inconsistent with findings made in the accused's favour in a *previous* proceeding. Issue estoppel does not operate retrospectively to require the ordering of a new trial where an accused is subsequently acquitted of charges – the evidence of which was admitted in a prior trial that resulted in a conviction. For example, the acquittal of an accused in a second trial cannot render similar fact evidence inadmissible in an earlier trial: *R v Wilson,* 2024 ONCA 600, at paras 32-33, 38

These limitations in the doctrine of issue estoppel apply whenever an accused has been convicted – even when the accused has yet to be sentenced: *R v Wilson,* 2024 ONCA 600, at paras 39-43

In a trial involving similar fact evidence, the trier of fact may use the evidence from one count on which there was an acquittal to assess an accused's liability on other counts once an improbability of coincidence is established: *R v Wilson,* 2024 ONCA 600, at para 23

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

There is no final decision made in a prior proceeding where an appellate court finds that a verdict of acquittal on a single criminal charge was tainted by legal error and, accordingly, renders that verdict invalid as a whole by setting it aside and ordering a new trial on the relevant charge: *R v Cowan,* 2021 SCC 31, at para 68

JUDICIAL INTERIM RELEASE

A. BAIL

i. General Principles

For a review of the ladder principles in bail and the requirements of cash bail, see *R v Antic,* 2017 ONCA 27, at para 67

A trial judge has exclusive jurisdiction over bail once the trial has commenced: *R v Passera,* 2017 ONCA 308

A bail judge has inherent jurisdiction to strike a bail proceeding: *R v Murray,* 2024 ONCA 916, at para 4

Bail judges are not engaged in a task of rubber stamping a Crown consent and should reject Crown concessions where appropriate. At the same time, joint proposals for bail should not be "routinely" second-guessed: *R v Akram,* 2025 ONCA 158, at para 58

ii. Evidence at Bail Hearings

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

The court should not have regard to withdrawn charges at a bail hearing. As a matter of fairness, it would be improper to have regard to unproved allegations that will not be determined in court: *R v Mare,* 2023 ONCA 640, at para 3

However, a court may have regard to charges that are still pending: *R v AS,* 2023 ONCA 649, at para 8

Sometimes synopses are aspirational in terms of the facts the Crown can prove: *R v Sithravel,* 2023 ONCA 748, at para 26

Police synopses are often prepared at the time of arrest, or in the early stages of a criminal prosecution. A fuller appreciation of the facts often emerges later, such that the facts set out in the synopses will often diverge from the facts proven at trial or admitted on a guilty plea: *R v Williams,* 2018 ONCA 437, at para 42; *R v Gibson,* 2012 ONSC 5527, at para 8

It is difficult to conclude that a Crown synopsis, standing alone, is an accurate reflection of events. The court noted that the sources of information contained in the synopsis may not be specified and an assessment of the reliability and trustworthiness of the information contained within may be difficult or impossible. *R. v. J.K.L.*, 2012 ONCA 245, at paras 88-94

iii. Primary Ground Concerns

Relevant primary ground concerns include: the nature of the offence and the potential penalty; the strength of the Crown's case; the respondent's ties to the community; criminal record and history of compliance with court orders; the respondent's behaviour prior to arrest; and the plan of release: *R v JA,* 2020 ONCA 660, at para 59

Before trial, an accused person might reject flight because of the role optimism and hope play in the decision-making process. However, once convictions are entered, for the accused … the reality of lengthy incarceration must be a bitter pill to swallow. When optimism and hope recede, thoughts of flight might well advance: *R v UK,* 2022 ONCA 21, at para 6

iv. Secondary Ground Concerns

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

v. Tertiary Grounds

See *R v St. Cloud,* 2015 SCC 27

On a retrial, the bail judge may be entitled to take into account the previous conviction in assessing the strengh of the Crown's case: *R v Jasper*, 2020 ONCA 606, at para 85

In most cases, if all four factors clearly favour detention, bail will be refused on the tertiary ground, especially if the accused has the onus to show cause why he should be released: *R v Jasper,* 2020 ONCCA 606, at para 89

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

vi. WHERE NEW INDICTMENT PREFERRED

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

vii. THE "WHYTE" CONCERN

Where the amount of time an accused has spent in pre-trial custody is close to the likely sentence s/he would receive after conviction, this becomes a serious liberty issue, militating in favour of release and/or warranting a bail review: *R v Whyte,* 2014 ONCA 268 at paras 42-43; see, for example, *R v Codina,* 2017 ONCA 93 at paras *26-29*

viii. GLADUE PRINCIPLES

Gladue principles apply to bail hearings: *R v Hope,* 2016 ONCA 648 at para 9

ix. Outstanding Charges

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

x. Peace Bond Hearings

The arrest and bail provisions in the *Criminal Code* apply, with necessary modifications, to peace bond proceedings: *R v Penunsi,* 2019 SCC 39

xi. Revocation of Bail

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

xii. Suitability of Sureties

A functional approach to identifying a suitable surety emphasizes that: the proposed surety be a person of good character to whom the duties of surety may be entrusted; the person has meaningful links to the applicant; the proposed surety has the ability and authority to discharge the obligations and exercise the powers of a surety; and the individual has the financial resources sufficient to meet any monetary conditions of the release order: *R v Nygard,* 2024 ONCA 744, at para 26

The fact that sureties maintain a belief in the accused's innocence is not connected to their ability to properly fulfill their obligations as a surety. Many individuals, prepared to assume the significant obligations of a surety, do so because they firmly believe the accused person is innocent: *R v Jasper,* 2020 ONCA 606, at para 73

Generally, a victim of a bail applicant's violence should not serve as surety: *R v KK,* 2021 ONCA 929, at para 25

B. BAIL REVIEW

i. SECTION 520 BAIL REVIEWS

See *R v St. Cloud,* 2015 SCC 27

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

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

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

The "clearly unwarranted" standard does not invite a reviewing court to simply ask what it might have done had it made the original bail decision. Rather, the question is whether the original bail decision, when considered in its proper legal and factual context, is one that no reasonable judge could have made: *R v Martin,* 2025 ONCA 317, at para 28

ii. THE COVID 19 PANDEMIC

The COVID-19 pandemic constitutes a material change warranting a new bail hearing where the circumstances of the pandemic are "relevantly material" to *this* respondent in *these* circumstances. The effect of COVID-19 must be "significant" in the sense that when considered along with the other evidence on

the bail proceeding, it could reasonably be expected to have affected the result: *R v JA,* 2020 ONCA 660, at para 55

The COVID-19 pandemic may be relevant to the primary, secondary, and tertiary grounds: *R v JA,* 2020 ONCA 660, at paras 63-65

The relevance and materiality of the COVID-19 pandemic requires a review of:

a) The accused's age and health;

b) The conditions at the institution in which the accused would be detained;

c) The effect of COVID-19, if any, on whether the accused will attend court as required; and

d) The effect of COVID-19, if any, on the threat posed to public safety by the accused's release: *R v JA,* 2020 ONCA 660, at para 66

iii. Section 680 Bail Reviews

Where an applicant challenges the s. 515(11) denial of bail on the basis of the correctness of a bail decision, the proper course is to seek review by a court of appeal under s. 680 of the Code. This second procedure does not however, foreclose consideration of a change in circumstances on a s. 680 application. In such cases, the Superior Court of Justice and the Court of Appeal have concurrent jurisdiction to decide whether there has been a material change in circumstances warranting judicial interim release: *R v JA,* 2020 ONCA 660, at para 24

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

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

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

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

i. absent palpable and overriding error, the review panel must show deference to the judge's findings of fact.

ii. the review panel may intervene and substitute its decision for that of the judge where it is satisfied the judge erred in law or in principle and the error was material to the outcome. This includes cases where the justice under review gave excessive weight to one relevant factor or insufficient weight to another.

iii. in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted or unreasonable

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

The approach to fresh evidence outlined in *St. Cloud* applies to fresh evidence offered on a s. 680 review: *R v Jasper,* 2020 ONCA 606, at paras 40-55; *R v JA,* 2020 ONCA 660, at paras 27-28

C. 90 DAY REVIEW

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

application from the jailer, the judge must fix a date and give notice for the hearing. The hearing must be held at the earliest opportunity.

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

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

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

The expiration of the 90-day time period does not automatically lead to release by way of habeas corpus. To obtain relief by way of habeas corpus, the accused must also demonstrate oppressive or unreasonable delay in bringing the matter to court or a delay of such magnitude that one could infer deliberation or design on the part of the custodian: *R v Momprevil,* 2022 ONCA 56, at para 14

A jailer unwilling to proceed with the required s. 525 hearing could be compelled to proceed by way of mandamus: *R v Momprevil,* 2022 ONCA 56, at para 17

D. BAIL BEFORE THE TRIAL JUDGE: S.523(2)

There is no mechanism to review a trial judge's bail decision: *R v Passera,* 2017 ONCA 308; *R v Ali,* 2020 ONCA 566

E. BAIL PENDING APPEAL TO THE COURT OF APPEAL

i. General Principles

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

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

Second and subsequent applications for release pending appeal require an appellant to demonstrate a material change in circumstances. A material change in circumstances requires information that could alter the assessment of one or more of the statutory factors governing release pending appeal: *R v Dyce,* 2016 ONCA 397 at para 2

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

The words "release an appellant from custody" as they appear in s. 679 of the *Criminal Code* do not necessarily mean that a person seeking a release order must be physically incarcerated to found jurisdiction under that section and that the term, "custody", as it appears in s. 679 of the *Criminal Code*, should be interpreted contextually: *R v Charizanis,* 2023 ONCA 350, at para 7

ii. The Merit and Unnecessary Hardship Requirement

The first prong of the test for bail pending appeal requires the applicant to show that his appeal has sufficient merit or is "not frivolous."

Where the proposed ground of appeal is almost certain to succeed, this is a strong factor in favour of release: *R v MacMillan,* 2020 ONCA 141, at paras 17, 23

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

Bail takes on a greater significance where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided. Bail prevents the appellant from serving more time in custody than might subsequently be determined fit in the circumstances.

Where a bail order is out of the question, appellate judges should consider ordering the appeal expedited under s.679(10): *R v Oland,* 2017 SCC 17, at para. 48; see also Trotter notes in *The Law of Bail in Canada*, loose-leaf (2017-Rel. 2), 3d ed. (Toronto: Carswell, 2010), at pp. 10-39 to 10-40

iii. The Flight Risk Assessment Requirement

The second prong of the test involves consideration of whether the applicant will surrender into custody in accordance with the terms of the order. The absence of flight or public safety risks will attenuate against the enforceability interest: *R v Oland,* 2017 SCC 17 at para 39

To be successful at this stage of the analysis, the applicant must be prepared to demonstrate sufficient roots in the community: *R v Nygard,* 2024 ONCA 744, at para 25

iv. The Public Interest Criterion

The third prong of the test involves consideration of whether detention is necessary in the public interest.

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

There are two components to the public interest requirement: public safety and public confidence in the administration of justice: *R v Nygaard,* 2024 ONCA 744, at para 29

Public safety concerns the protection and safety of the public if the applicant is released pending the hearing of the appeal. To be denied bail based on public safety considerations, an applicant must: (1) pose a “substantial likelihood” of committing an offence or interfering with the administration of justice; (2) the “substantial likelihood” must endanger the “protection of the public”; and (3) the individual’s detention must be “necessary” for public safety: *R v Nygaard,* 2024 ONCA 744, at para 30

In terms of public confidence in the administration of justice, the stronger the appeal, the more likely it is that the reviewability interest will overcome the enforcement interest. At the same time, the more serious the crime, the greater the risk that the public’s confidence in the administration of justice will be undermined if the person convicted is released on bail pending appeal: *R v Nygaard,* 2024 ONCA 744, at para 34

The two prongs of the public interest test – public safety and public confidence in the administration of justice – are not to be treated as silos, independent of one another. Rather, there is some natural cross-over. For instance, public safety concerns that fall short of the substantial risk mark may well still inform the enforceability component of the public confidence in the administration of justice test. To this end, there is nothing wrong with considering the seriousness of the crime for which a person has been convicted when determining the enforceability interest and, indeed, it may well play an important role in determining that interest. At the same time, other factors should also be taken into account where appropriate: *R v Akram,* 2025 ONCA 158, at para 41

An offence must be at the serious end of the spectrum before release is likely to raise significant public concern about the administration of justice, it stands to reason that the degree of seriousness needed to warrant detention on this basis may be reduced where there are additional public confidence considerations at

play, such as residual public safety concerns, or compliance concerns: *R v JP,* 2024 ONCA 700, at para 17.

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

A reasonable member of the public would consider the strength of the release plan and whether it is consistent with the just and proper functioning of the criminal justice system: *R v Papasotiriou,* 2018 ONCA 719, at paras 46-47

The enforceability criterion applies with particular force in cases involving convictions for gun trafficking: *R v Abdullahi,* 2020 ONCA 350, at paras 27-29

Outstanding criminal charges are important for bail purposes, especially those that point to bail compliance issues". Though the applicant for bail pending appeal is presumed innocent of any unresolved charges that does not detract from their relevance and importance to bail pending appeal on charges on which the applicant has been convicted. Among other reasons, new charges may undermine confidence in the applicant's future compliance with bail conditions: *R v IW,* 2021 ONCA 628, at para 17

The public's interest in the immediate enforcement of the custodial sentence imposed by the trial judge is higher in the case of a person who committed the offence while in violation of an existing release order: *R v KF,* 2025 ONCA 134, at para 19

The fact that a person on bail pending appeal is charged with uttering a threat to kill someone can also raise concerns about public safety and public confidence in the justice system: R. v. D. L., 2021 ONCA 538, at para. 5.

The concept of public safety is not limited to violent crimes. It can include, for example, the public interest in being secure from serious frauds that can affect the physical and mental health of victims: *R v Reyes,* 2024 ONCA 854, at para 17

Where public safety or flight concerns are negligible, and where the grounds of appeal clearly surpass the 'not frivolous' criterion, the public interest in reviewability may well overshadow the enforceability interest, even in the case of very serious offences: *R v Akram,* 2025 ONCA 158, at para 63

It is more difficult in a leave to appeal situation for an appellant to meet the public interest requirement than it is pending a first, as of right, appeal. Nonetheless, no presumptive outcome is in place and the balance between the enforceability and reviewability remains case specific.: *R v Scott,* 2022 ONCA 659, at para 13

Offences related to drug importing and trafficking are on the higher end of the gravity spectrum in the context of bail pending appeal applications, which militates in favour of detention: *R v Allen,* 2023 ONCA 185, at para 22

The commission of another offence while on bail release is a serious matter, raising concerns about how governable the individual is. Although the accused is presumed innocent of this newly acquired but pending charge, outstanding criminal charges are important for bail purposes: *R v JP,* 2024 ONCA 700, at para 19

v. Sentence Appeals

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

In respect of applications for bail pending appeal when the appellant is appealing sentence alone, s/he must demonstrate that the appeal has sufficient merit and that, in the circumstances, it would cause unnecessary hardship if he were detained in custody

The two factors are inter-related: the weaker the merits of a pending appeal, the harder it will be for an applicant to show that hardship caused by continued incarceration is "unnecessary". An applicant cannot establish "unnecessary" hardship simply by pointing to possible hardship, such as the appeal being moot by the time it is heard. An appellant can show unnecessary hardship if he is able to demonstrate that his appeal is sufficiently meritorious such that, if judicial interim release is not granted, he will have spent more time in custody than what is subsequently determined to be fit: *R v McIntyre,* 2018 ONCA 210 at paras 31-34; *R v Hassan*, 2017 ONCA 1008 at para 32; *R v Francois,* 2025 ONCA 177, at paras 10-11

An applicant, however, cannot obtain bail pending sentence appeal simply by pointing to possible hardship – s. 679(4)(a) requires an applicant to establish "unnecessary" hardship. Whether potential hardship suffered by the applicant is "unnecessary" must be determined with reference to the merits of the pending appeal: *McIntyre*, at para. 34. There is no unnecessary hardship in serving an appropriate sentence: *R v Francois,* 2025 ONCA 177, at para 12

Similar to the test for bail pending appeal in respect of conviction appeals, the second prong of the test inquires into whether the applicant will surrender himself

into custody in accordance with the terms of the order. The third prong of the test inquires into whether detention is necessary in the public interest.

vi. Conditional Sentence Orders

Some appellate courts recognize that there are two potential methods of addressing the impact of a CSO pending an appeal when the accused person is the applicant – s. 679 and s. 683(5). However, the more appropriate avenue for relief is under the specific section that addresses CSOs – 683(5). Under s. 683(5), the animating concept is the "interests of justice." The factors that drive bail pending appeal applications would be reflected in the "interests of justice" standard in s. 683(5). The apparent strength of the appeal against sentence is a relevant factor in the application of the "interests of justice: *R v Marchant,* 2022 ONCA 406, at paras 13-14, 18

In *Merchant,* the Court of Appeal expressed reservations about whether s.683(5) provided for authority to grant a Crown request to suspend a CSO to prevent a sentence appeal becoming moot: paras 15-18

vii. Successful Examples

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

viii. Variations

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

ix. Review of Bail Pending Appeal Denial: s.680

In order to succeed on a review of a denial of bail pending appeal, the Applicant. bears the onus of establishing that the motion judge's decision was "clearly

unwarranted" or that s/he committed an error in principle that was material to the outcome or committed a palpable and overriding error. Failing that, the reviewing must defer to the motion judge's decision, even if the panel disagrees with any of the specific conclusions the motion judge reached or the outcome: *R v JP,* 2024 ONCA 700, at para 2

The first stage of a s. 680 application requires that the Chief Justice or acting Chief Justice decide whether to direct a review of the order made by the bail judge. If a review is directed, either a panel of the court or, on consent of the parties, a single judge will review the order.

The first stage is akin to a motion for leave to appeal. There are three core principles that guide the scope and nature of the review. First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.

A s. 680 review does not present an opportunity for a reviewing court to simply substitute its own opinion for that of the bail judge. Rather, the reviewing court may only intervene where it is arguable that the judge committed material errors of fact or law in arriving at the impugned decision" or where the bail decision was clearly unwarranted.

In assessing the strength of an appeal, the reviewing court must have regard to the grounds addressed in the Notice of Appeal with an eye to their general legal plausibility and their foundation in the record.

An inquiry into whether a bail decision was clearly unwarranted is closely analogous to an inquiry into whether a decision is so contrary to the facts and law that it could not have been reasonably arrived at 3. The "clearly unwarranted" standard demands deference to fact finding, but allows the reviewing court to consider whether there was a clearly inappropriate weighing of the competing factors resulting in the bail decision. If the reviewing court is satisfied the bail judge's weighing of those factors was sufficiently skewed to produce a 'clearly inappropriate' order, the court will intervene on the bail review: *R v Akram,* 2025 ONCA 158, at paras 28-34

F. BAIL PENDING APPEAL TO THE SUPREME COURT OF CANADA

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

The pendulum must swing towards enforceability and away from bail pending further review after the correctness of the convictions entered at trial has been affirmed on appeal: *R v Kazman,* 2020 ONCA 251, at para 10

G. BAIL PENDING NEW TRIAL

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

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

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

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

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

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

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

R v Manasseri, 2017 ONCA 226 at paras 27-43; see also *R v Durani,* 2019 ONCA 553

Where an appellant is not in custody and a new application for release on bail pending appeal is heard at the same time as the Crown's application to revoke bail, the "modifications that the circumstances require" envisaged by s. 679(6) may, in exceptional circumstances, allow for the revocation of bail pending appeal pursuant to s. 524(3), and the ordering of a new bail pending appeal under s. 524(5), without having to first issue an arrest warrant.

When an appellant is in custody and is represented by counsel on the Crown's revocation application, the appellant is "before the court" for the purpose of the revocation application, and a further arrest warrant is not necessary: *R v JR,* 2022 ONCA 152, at paras 45-46

Where an appellant has completed the incarceral component of his sentence when a new trial is directed, s/he is subject to arrest so that s/he can be released pending a new trial: *R v Gordon,* 2025 ONCA 225

H. PUBLICATION BANS FOR BAIL

It is not clear that a publication an under s. 517 applies to a review conducted under s. 680: *R v JA,* 2020 ONCA 695, at para 5

A publication ban under s. 517 applies to youth matters, pursuant to s. 28 of the *Youth Criminal Justice Act*: *R v AM,* 2023 ONCA 711, at para 1

I. FORFEITURE OF BAIL MONIES

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

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

The pull of bail can sometimes be vindicated by something less than total forfeiture. In *Horvath*, the leading Ontario case on forfeiture, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining whether there should be forfeiture, and in what amount relative to the amount in issue. They are:

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

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

R v Wilson, 2017 ONCA 229; see *R v Biya,* 2022 ONCA 99, at paras14-16

In *Campbell,* the Court of Appeal ordered forfeiture of a total of $85,000 from four sureties due to the appellant's failure to surrender into custody in accordance with the terms of his bail. The court noted that there is no right of appeal from a forfeiture order made under s.771 of the *Criminal Code:* 2024 ONCA 194

A forfeiture order makes the principal and their sureties judgment debtors of the Crown, each in the amount the judge orders them to pay: s. 771(3).

Section 771(3.1) of the *Criminal Code* describes the mechanics of enforcing a forfeiture order: once a forfeiture order is made, it may be filed with the clerk of the superior court and, if an order is filed, "the clerk shall issue a writ of *fieri facias* in Form 34 and deliver it to the sheriff of each of the territorial divisions in which the principal or any surety resides, carries on business or has property."

Section 771(3.1) or 772(1) of the *Criminal Code* permit a court in one province exercising its criminal jurisdiction to enlist the services of sheriffs in another province to enforce forfeiture.

In consequence, a person who resides in another province is not precluded from being an acceptable surety: *R v ST,* 2022 ONCA 443, at paras 28-29, 41, 44; see, for example, *R v Campbell,* 2024 ONCA 194, where one surety lived in Dubai: para 15

J. BREACH OF BAIL AND COLLATERAL ATTACKS

An accused is not entitled to launch a collateral attack to the constitutionality or validity of a condition that he is charged with breaching: *R v Bird*, 2019 SCC 7 (note that Bird dealt with this issue in the context of LTSO breach hearings, but the principles appear equally applicable to breach of bail hearings).

Minor, technical errors in the drafting of a release order do not invalidate an order and may be corrected by the court. An accused is required to follow the terms of the release order regardless of any such mistake in it, unless and until it was varied

or revoked. Like all court orders, release orders made within jurisdiction must be followed. The accused is not entitled to make a collateral attack on the order by challenging its validity only after he has been charged with breaching its terms: *R v SH,* 2025 ONCA 320, at paras 16, 19

K. SURETY WARRANTS

Typically, surety warrants are executed by a police arrest of the subject, and the arresting officers are responsible for the removal of the warrant from CPIC. Upon the accused's arrests (i.e., the execution of the surety warrant) the judge endorses the warrant with a "certificate of committal," *R v Gerson-Foster,* 2019 ONCA 405, at paras 18-19

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

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

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

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

JUDICIAL NOTICE

When a judge intends to draw upon specific experiences in his or her pre-judicial experience to determine a contested issue in a case, procedural fairness demands both judicial restraint and judicial transparency.

The adversarial system imposes a necessary restraint on that which a trial judge can take into account when deciding contested issues, including the credibility of a party. The only facts a trier of fact may consider in making his or her decision in a case is the evidence adduced in the courtroom. A trial court is not justified in acting on its own personal knowledge of or familiarity with a particular matter, alone and without more. Accordingly, unless the criteria of notoriety or immediate demonstrability are present, a judge cannot judicially notice a fact within his or her personal knowledge: *R v JM,* 2021 ONCA 150, at paras 48-51

As a matter of transparency and trial fairness, there may be occasions when a trial judge has an obligation to advise the parties that they are contemplating taking judicial notice of a fact and to invite them to make submissions: *R v GMC,* 2022 ONCA 2, at para 35

There are different forms of judicial notice. The form that arises in this case has been referred to as “tacit or informal judicial notice”. This involves the trier of fact drawing on “common experience, common sense or common knowledge to interpret and understand the formal evidence presented at trial”: *R v GMC,* 2022 ONCA 2, at para 36

The existence of anti-Black racism in Canadian society is beyond reasonable dispute and is properly the subject matter of judicial notice. It is well recognized that criminal justice institutions do not treat racialized groups equally. This reality may inform the conduct of any racialized person when interacting with the police, regardless of whether they are the accused or the complainant: *R v Theriault,* 2021 ONCA 517, at para 143

In *R v CK,* 2021 ONCA 826, at paras 54-65, the Ontario Court of Appeal took judicial notice of the fact that indigenous accused plead guilty at a higher rate than other accused persons

JUDICIARY AND THE COMMON LAW

Courts cannot abdicate their role of incrementally adapting common law rules where legislative gaps exist. The court must be diligent in its role as a custodian over the common law, which, by its very nature is organic and must develop incrementally in tandem with a changing society: *R v McColman,* 2021 ONCA 382, at paras 49-50

JURISDICTIONAL ISSUES

A. GENERAL PRINCIPLES

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

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

B. WHEN JUDGE IS FUNCTUS

A trial judge exercising the functions of both judge and jury in a criminal case is not *functus* following a finding of guilt until he or she has imposed sentence or otherwise finally disposes of the case: *R v Sualim,* 2017 ONCA 178 at para. 29; *R v Mitchell,* 2020 ONCA 187, at para 11

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

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

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

C. CIVIL V. CRIMINAL

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

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

D. DIVISION OF POWERS

i. General Principles

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

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

ii. The Division of Power Analysis

a) Pith and Substance

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

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

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

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

b) Assignment to a Head of Power

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

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

E. JURISDICTION OF THE SUPERIOR COURT OF JUSTICE

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

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

A provincial superior court should decline its *habeas corpus* jurisdiction only when faced with a complete, comprehensive and expert scheme which provides review that is at least as broad and advantageous as *habeas corpus* with respect to the grounds raised by the applicant: *Canada (Public Safety and Emergency Preparedness) v Chhina,* 2019 SCC 29

F. JURISDICTION OF THE ONTARIO COURT OF JUSTICE

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

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

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

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

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

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

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

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

H. TRIAL MANAGEMENT POWERS

Trial judges have considerable discretion to manage the cases before them and an appellate court will not lightly interfere with that discretion. However, deference is not owed to unreasonable exercises of discretion: *R v Imola,* 2019 ONCA 556, at para 17

The trial management power allows trial judges to control the process of their court and ensure that trials proceed in an effective and orderly fashion. Judges may intervene to manage the conduct of trials in many ways, including restricting cross-examination that is unduly repetitive, rambling, argumentative, misleading, or irrelevant. Managing the conduct of trials to ensure timely justice is particularly important, considering Jordan.

That being said, the trial management power is not a license to exclude otherwise relevant and material evidence in the name of efficiency. Trial management decisions and the rules of evidence must generally remain separate issues on appellate review. The standard of review for evidentiary errors is correctness, while deference is owed to trial management decisions. Trial management decisions, engage the judge's discretion. Absent error in principle or unreasonable exercise, these discretionary decisions deserve deference

Sometimes trial management decisions will overlap with the rules of evidence. It is important on appellate review that trial management decisions are examined in the context of the trial as a whole, rather than as isolated incidents: *R v Samaniego,* 2022 SCC 9, at paras 20-26

An example of the trial judge's trial management powers arose in *Cargioloi*, where the Court of Appeal held that it was within the trial judge's powers to direct defence counsel to accurately put a statement to a witness in cross-examination, rather than waiting for the Crown to deal with it in re-examination: 2023 ONCA 612, at para 43

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

Every court has a supervisory and protecting power over its own records, which includes its own reasons: *R v NH,* 2021 ONCA 646, at paras 19-21

I. JURISDICTION OF JUDGE TO RECONSIDER ORDER

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

The trial judge is not obliged to follow a pre-trial ruling which the parties agree is wrong in law: *R v Cumor,* 2019 ONCA 747, at para 70

J. JURISDICTION OF REPLACEMENT JUDGE

i. SECTION 653.1

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

ii. SECTION 669.2

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

The jurisdiction of a s. 669.2 trial judge to reconsider prior rulings derives not from s. 669.2, but from that judge's status as the trial judge. When a judge becomes seized of a matter under s. 669.2, he becomes the trial judge for all purposes.

Since he continues the trial as the trial judge, the s. 669.2 trial judge is given the same authority that the replaced trial judge had. As such, he has the same power to reconsider prior rulings made within that trial by the replaced trial judge, when it is in the interests of justice to do so.

The relevant principles are as follow.

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

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

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

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

K. TERRITORIAL JURISDICTION

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

Section 476(b) provides that:

> where an offence is committed on the boundary of two or more territorial divisions or within five hundred metres of any such boundary, or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any of the territorial divisions;

The test is whether an “element” of the offense was committed in the province claiming territorial jurisdiction. It is not necessary that an essential element of the offense be committed in the province in question, but rather there must be a real and substantial connection between the offense and the province where the prosecution takes place. Examples of where the court in Ontario has territorial jurisdiction over the prosecution of an offense that was committed in another province, include:

(1) when there is a continuum in the course of the criminal operation s extending from the province in question (Ontario) to other provinces
(2) when the commission of an overt act of the offense took place in Ontario or
(3) when the effects of the offense are in Ontario

A flexible and sensible approach is to be preferred over one that is too narrow and technical:

Similarly, in the context of transnational offences the relevant question is whether there is “a real and substantial connection” between the offense and the country of prosecution: *R v GL,* 2023 ONCA 750, at para 29

L. VALIDITY OF ORDERS MADE WITHOUT JURISDICTION

Orders made without jurisdiction remain in force until validly challenged and set aside: *R v Gerson-Foster,* 2019 ONCA 405, at para 42

M. JURISDICTION TO FIX LEGISLATIVE GAPS

From time-to-time, minor imperfections in legislation can be corrected by the courts, but this is to be done only in "relatively rare cases": *R v Boily,* 2022 ONCA 611, at para 68

LINGUISTIC RIGHTS

Linguistic rights are substantive and not procedural It is therefore not necessary to demonstrate specific harm when there is an infringement. However, questioning in the official language which is not the one chosen by the accused is a departure from the language law expressly permitted by s. 530.1(c.1) of the *Criminal Code*: *R v Vanier,* 2023 ONCA 545, at para 39

MENTAL HEALTH

A. POWERS OF REVIEW BOARD

Where the Ontario Review Board finds that an NCR person continues to pose a significant threat to the safety of the public and that the least onerous and least restrictive disposition requires his continued detention in a hospital it is the Board's role to set out the general parameters of his detention, leaving the day-to-day management decisions to the hospital.

For example, the Ontario Review Board cannot impose a mandatory oder on a hospital to take an NCR person for escorted visits to his mother's home. By making an order mandatory, with no discretion accorded to the hospital to implement it only if and when it would be beneficial to the NCR person and public safety would be ensured, the Board erred in law and acted unreasonably. The person in charge

had to be able to ensure that the NCR person would be able to handle such visits, that his mother would be prepared to accommodate them, and that the hospital was in a position to facilitate them: *R v Scott*, 2017 ONCA 94.

B. DISPOSITION ORDERS

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

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

C. WHERE TREATMENT IMPASSE OCCURS

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

- First, a long period of incarceration without treatment or progress can constitute a treatment impasse.
- Second, an accused's stubborn refusal to engage with the treatment team can also constitute a treatment impasse.
- Third, although the Review Board has no power to prescribe medical treatment, where the Board finds there to be a treatment impasse, it is entitled, under its supervisory powers, to order a re-evaluation of current or past treatment approaches and an exploration of alternative approaches. The Board must form its own independent opinion about the accused's treatment plan and clinical progress, and in doing so, it may order an independent assessment in some form under s.672.121 of the *Criminal Code*, and may order the accused's transfer to another facility for that purpose.

In Gonzalez (Re), a treatment impasse existed because the only way forward for the NCR person was for him to consent to treatment or be declared incapable, but the his mental illness precluded his consent to treatment, and the treatment team

had not declared him incapable. The court stated that while a treatment impasse might be tolerable for a certain period of time, "when it reaches the duration of this case, a decade, the Review Board is obliged to go further" (at para. 41). The court held that an independent assessment of the appellant was required. The court stated that it would be up to the Board to specify the modality of the assessment.

MISTRIALS

A mistrial is a discretionary remedy of last resort. Embedded in the throes of a trial, the trial judge is ideally situated to make this assessment. The trial judge must assess whether there is a real danger that trial fairness has been compromised. Appellate intervention is appropriate only if the decision is clearly wrong or based on an error in principle: *R v Zvolensky,* 2017 ONCA 273 at para 185; *R v Anderson,* 2018 ONCA 1002, at para 15; *R v Abdulle,* 2020 ONCA 106, at paras 112-114

Because mistrial applications are very fact-specific, based on the nature of the triggering events within the dynamics of the trial, mistrial rulings of fellow trial judges will often be of limited value to a trial judge exercising their discretion in deciding whether to grant a mistrial: *R v Collins,* 2023 ONCA 394, at para 82

MENS REA

A. GENERAL PRINCIPLES

The general *mens rea* which is required and which suffices for most crimes where no mental element is mentioned in the definition of the crime, is either the intentional or reckless bringing about of the result which the law, in creating the offence, seeks to prevent: *R v Fox,* 2023 ONCA 674, at para 21

There is a common sense inference that a sane and sober person intends the natural and probable consequences of his or her actions. When evidence points in a different direction (for example, evidence of intoxication or mental illness), the jury should be instructed to consider this evidence, along with all other evidence,

in deciding whether to draw the common sense inference: *R v Spence,* 2017 ONCA 619 at para 45

The common sense inference can be relevant in determining an accused's state of mind, and, in particular, the intent for murder: see *R v Firlotte,* 2023 ONCA 854, see generally paras 51-59

In the context of a specific intent offence, it is an error for the trial judge to fail to address an accused's apparent intoxication: *R v Lo Verde,* 2019 ONCA 467, at para 1

The fault requirements for criminal offences – both the actus reus and mens rea- must be concurrent at some point in time to ground criminal liability. This may be referred to as the simultaneous principle or the contemporaneity principle: *R v Collins,* 2023 ONCA 394, at para 36

However, it is not always necessary for the guilty act and the intent to be completely concurrent. The determination of whether the guilty mind or *mens rea* coincides with the wrongful act will depend to a large extent upon the nature of the act. If a sequence of acts form part of the same transaction, and if the requisite intent coincides at any time with the sequence of acts, this would be sufficient for contemporaneity purposes. In other words, the contemporaneity principle is applied flexibly: *R v Collins,* 2023 ONCA 394, at para 40

B. RECKLESSNESS

Recklessness is "the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. recklessness requires an inquiry into what the accused subjectively knew or understood at the relevant time: *R v AB,* 2024 ONCA 446, at paras 34-35

C. WILFUL BLINDNESS

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

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

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

In order to find an accused willfully blind about his/her possession of a narcotic, a trial judge does not have to find that the accused knew or suspected s/he was in possession of a specific form of criminal contraband, as opposed to another form of criminal contraband. To the contrary, willful blindness is met by finding beyond a reasonable doubt that the accused had his/her suspicion aroused to the point that s/he thought there was a need for inquiry, but s/he deliberately chose not to inquire because s/he did not want to know the truth: *R v Downey,* 2017 ONCA 789 at paras 4-6

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

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

For a review of the Watts instruction on wilful blindness and the National Judicial Institute Model Jury instruction, see: : *R v AB,* 2024 ONCA 446, at para 41

THE OPEN COURT PRINCIPLE

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

A person asking a court to exercise discretion in a way that limits the open court principle must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects: *Sherman Estate v. Donovan*, 2021 SCC 25; Canadian Broadcasting Corp. Manitoba, 2023 SCC 7

The onus of persuading the court that it should limit the open court presumption rests with the moving party:

In camera hearings are greater incursions on court openness compared to publication bans, because they more absolutely limit public discourse on the subject information by preventing access to the protected material entirely. The same interests animating the limitations on the open court principle prescribed by the Criminal Code will nonetheless justify an appeal hearing that excludes the public in some instances: *R v JOP,* 2025 ONCA 121, at paras 8 and 9

PARTY LIABILITY ISSUES

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

Joint/co-principal liability flows whenever two or more individuals come together with an intention to commit an offence, are present during the commission of the offence, and contribute to its commission: *R v Strathdee,* 2021 SCC 40

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

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

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

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

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

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

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

The *actus reus* of abetting is doing something or omitting to do something that encourages the principal to commit the offence. As for the *mens rea*, the abettor must have intended to abet the principal in the commission of the offence and known that the principal intended to commit the offence: *R v Cowan,* 2021 SCC 31, at para 32

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

There need not be a causative link between the act of aiding (or abetting) and the perpetrator's commission of the offence. Instead, the authorities take a wide view of the necessary connection between the acts of alleged aiding or abetting and the

commission of the offence, such that any act or omission that occurs before or during the commission of the crime, and which somehow and to some extent furthers, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime: *R v Grewal,* 2019 ONCA 630, at para 30 [citation omitted]

In addressing the liability of an accused, the trier of fact must consider the potential liability of each separately. Drawing a clear distinction between the legal basis for the perpetrator's liability and the bases for liability of the helper is important because the facts which the Crown must prove beyond a reasonable doubt are different depending upon whether liability flows as a perpetrator or as an aider. For example, the causation requirement has application only to the perpetrator, not to an aider: *R v Josipovic,* 2019 ONCA 633, at paras 47-49; *R v UK,* 2023 ONCA 587, at para 119

Indeed, it is a basic principle of criminal liability that in a joint trial, the trier of fact must consider the liability of each accused individually. A failure to so instruct a jury is particular concern in a case where there is significant overlap of the evidence and the issues for the two accused, thereby making it essential for the jury to understand that, in its assessment of credibility and the reasonable doubt standard, each accused is entitled to individual consideration of the case against him and the defence evidence as it applies to his case: *R v UK,* 2023 ONCA 587, at paras 119, 134

A trier of fact may also convict if satisfied beyond a reasonable doubt that either or both accused participated in the offence, without being able to decide the exact nature of their participation: *R v Josipovic,* 2019 ONCA 633, at para 51

It is doubtful that "attempting to aid an offence" is a recognized form of criminal liability in Canada: *R v Grewal,* 2019 ONCA 630, at para 33

Where an accused is being tried alone and there is evidence that more than one person participated in the commission of the offence, the Crown is not required to prove the identity of the other participant(s) or the precise part played by each in order to prove an accused's guilt as a party where an accused is prosecuted as an abettor: *R v Cowan,* 2021 SCC 45, at paras 31, 33

A jury cannot convict an accused person as an aider based on a generic finding that they played some undefined part in the crime charged: *R v Moreira,* 2023 ONCA 807, at para 82

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

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

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

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

The “offence” must be committed as the participants are carrying out their original agreement or plan. The incidental offence, although not intended by the accused, must nonetheless be related to the original unlawful purpose. The trier of fact must find that the action of the principal was a consequence of the prosecution of the original common unlawful purpose, and not the result of any “supervening causative event wholly outside the agreed plan.”

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

Finally, if satisfied there is an air of reality to each element of s. 21(2) liability, the trial judge must, in charging the jury, set out the three elements of that basis of liability, explain what the Crown must prove in relation to each of those elements,

and review the evidence the jury may consider in relation to the elements in determining whether that route to liability has been established:

R v Patel, 2017 ONCA 702 at paras 38-44

Section 21(2) does not require the harm to "be foreseeable in relation to a specific identifiable individual." Nor does the specific mode of harm have to be foreseen: *R v Gong,* 2023 ONCA 230, at para 43

Section 21(2) can impose liability on co-perpetrators for crimes which occur when something goes wrong in the carrying out of the common unlawful purpose – as is often the case with robberies. The requirement is not that the unplanned offence occurs in a particular or expected way, but that the probability of it occurring in some way while the planned offence was being carried out, was reasonably foreseeable: *R v Gong,* 2023 ONCA 230, at para 40

A person could be found guilty of manslaughter under s. 21(2) where a reasonable person in all the circumstances would have foreseen at least a risk of harm to another as a result of carrying out the common intention. Put differently, an accused can be convicted of manslaughter under s. 21(2), if the accused, having formed an intention in common to carry out an unlawful purpose and to assist the perpetrator therein, knew or ought to have known that a probable consequence of carrying out the common purpose was the carrying out by the perpetrator of a dangerous act which a reasonable person could recognize as creating the risk of bodily harm which is neither trivial nor transitory: *R v Gong,* 2023 ONCA 230, at para 41

The offence component of s. 21(2) party liability is an incidental offence which, although not intended by the accused, must nonetheless be related to the original unlawful purpose. The action by the offender would be outside the ambit of the section if it was the result of a supervening causative event wholly outside the agreed plan: *R v Gong,* 2023 ONCA 230, at para 48

D. PARTY COUNSELLING AN OFFENCE (S.22)

Where an accused is being tried alone and there is evidence that more than one person participated in the commission of the offence, the Crown is not required to prove the identity of the other participant(s) or the precise part played by each in order to prove an accused's guilt as a party where an accused is prosecuted as a counsellor: *R v Cowan,* 2021 SCC 45, at para 31

Counselling is defined in the Criminal Code as including procuring, soicitiring, and inciting. The actus reus is the deliberate encouragement or active inducement of the commission of a criminal offence. The person deliberately encouraged or actively induced by the counsellor must also actually participate in the offence. As for the mens rea, the counsellor must have either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct. The person counselled can participate not only as a principal, but also as a party: *R v Cowan,* 2021 SCC 45, at paras 35, 36

E. JURY CHARGE

It is an error of law to charge a jury about different modes of party liability and move back and forth between them without adequately delineating between them. Further, in a case of multiple co-accused, it is an error to charge the jury on different modes of party liability without delineating which counts might properly attract liability for which accused on which basis. Further, in instructing on common intention, the trial judge must clearly set out which offences were ones that the accused had agreed to commit, and which offences were ones that the accused knew, or should have known, one of the other participants would probably commit. Each potential basis for liability should be clearly and separately laid out for each offence and each accused. *R v Akhi,* 2022 ONCA 264, at paras 8-9

F. APPEAL – FAILURE TO CHARGE

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

G. VICTIM AS PARTY AND CONSENT

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

PLEAS

A. NOT GUILTY

A plea of not guilty is an accused's formal, in-court *denial* of having committed any offence to which the plea is entered. By pleading not guilty, an accused provides notice to the Crown and the trier of fact that the accused requires the Crown to prove each essential element of the offence to which the plea was entered beyond a reasonable doubt by evidence that is relevant, material and admissible. A plea of not guilty does not involve any admission by an accused about any essential element of the offence or the ability of the Crown to prove it:

Neither s. 606 nor any other *Criminal Code* provision requires or authorizes a plea comprehension inquiry where the plea entered is not guilty: *R v Anderson,* 2021 ONCA 333, at paras 51-52

B. GUILTY

To be valid, a guilty plea must be (1) voluntary, (2) unequivocal, and (3) informed.

i. VOLUNTARY REQUIREMENT

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

To enter a voluntary plea of guilty, an accused need only be able to understand the process leading to the plea, communicate with counsel, and make an active or

conscious choice. Whether the choice to plead guilty is wise, rational or in the accused's best interest is not part of the inquiry: *R v Cherrington,* 2018 ONCA 653 at para 21

There are a range of ways that volition can be destroyed, including coercion, improper inducements or pressure imposed, and incapacity. The capacity to make a volitional choice to plead guilty is not high. A limited cognitive capacity test applies, similar to the same standard used to determine an accused's fitness to stand trial, or to resolve whether confessions are the voluntary product of an operating mind. The inquiry into volition is entirely subjective.

A plea of guilty entered in open court in the presence of counsel [is] presumed to be voluntary. The presumption is rebuttable, but the onus is on the party seeking to withdraw a guilty plea to demonstrate, on a balance of probabilities, that he lacked the capacity to make an active or conscious choice to plead guilty: *R v CK,* 2021 ONCA 826, at paras 68-74

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

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

ii. could communicate with counsel; and

iii. could make an active or conscious choice: *Cherrington* at para 38

The trial judge is not required as a general matter to inquire into the effect that the accused's experiences as an indigenous person might have on his decision to plead guilty. However, certain circumstances *could* raise a concern that the accused's indigenous status and experiences is impacting the voluntariness of the plea. In such circumstances, the trial judge would have a duty to inquire further: *R v CK,* 2021 ONCA 826

ii. Requirement that the Plea be Informed

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

i. the nature of the allegations;

ii. the effect of the plea; and

iii. the criminal and legally relevant collateral consequences of pleading guilty: *R v Wong*, 2018 SCC 25, at paras 3-4; *Cherrington* at para 23; *R v Quick,* 2016 ONCA 95 at para 4

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

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

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

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

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

For example, if the accused was unaware of an indefinite license suspension, but for health reasons was unable to drive again in any event, the collateral consequence would be too remote to warrant a striking of the plea: *Quick* at para 32

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

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

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

iii. Acceptance of Facts Underlying the Plea

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

Where facts read in support of a guilty plea are accepted by the accused as "substantially correct," any facts that are not a necessary element of the offence are not necessarily accepted by the accused: *R v Thomas,* 2018 ONCA 694, at paras 38-39

C. PLEA INQUIRY: S.606

Section 606(1.1) of the *Criminal Code* permits a court to accept guilty pleas only if satisfied that

(a) the accused is making the plea voluntarily;

(b) the accused understands

(i) that the plea is an admission of the essential elements of the offence,

(ii) the nature and consequences of the plea, and

(iii) that the court is not bound by any agreement made between the accused and the prosecutor; and

(c) the facts support the charge.

Section 606(1.2) provides that the failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

Notwithstanding the fact that the failure to make an inquiry under s.606(1.1) does not affect the validity of the plea, an inquiry is mandatory nonetheless. A judge's failure to conduct a plea inquiry can leave the door more readily open to a finding that a plea was not valid because the plea was informed, unequivocal, and voluntary.

Ao discharge the mandatory duty to inquire that arises from s. 606(1.1), a judge must inquire into apparent indications that there may be a problem with the validity of the guilty plea.

It follows that if there are indications at the time a plea is being entered that an Indigenous person's experiences may be having an adverse effect on the integrity of the guilty plea that is being entered, the trial judge is obliged to inquire to see if this is so. That same obligation would hold true where an Indigenous person subsequently applies to withdraw their guilty plea: *R v CK,* 2021 ONCA 826, at paras 90-99

The trial judge is not required as a general matter to inquire into the effect that the accused's experiences as an indigenous person might have on his decision to plead guilty. However, certain circumstances *could* raise a concern that the accused's indigenous status and experiences is impacting the voluntariness of the plea. In such circumstances, the trial judge would have a duty to inquire further: *R v CK,* 2021 ONCA 826

Although the plea inquiry has been described as mandatory: by virtue of s. 606(1.2), the failure to "fully inquire" into the conditions in s. 606(1.1) does not affect the validity of the plea. When someone seeks to strike a guilty plea, and a

complete inquiry was not undertaken, the question is whether allowing the plea to stand would amount to a miscarriage of justice. For example, where the accused insists on not receiving credit for time spent in presentence custody, this would be a red flag that should alert the trial judge to the possibility that the accused's guilty plea was motivated by something other than an acknowledgment of guilt: *R v Nettleton,* 2025 ONCA 155, at para 38

D. GUILTY PLEAS - SETTING ASIDE

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

A trial judge is not required to inquire into the aboriginal status of a person who seeks to withdraw their guilty plea: *R v CK,* 2021 ONCA 826, at para 75

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

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

Accused persons who seek to withdraw their guilty plea on the basis that they were unaware of legally relevant consequences at the time of the plea should be required to establish subjective prejudice. To that end, the accused must file an affidavit establishing a reasonable possibility that he or she would have either (1) opted for a trial and pleaded not guilty; or (2) pleaded guilty, but with different conditions: *R v Wong,* 2018 SCC 25. See, for example, *R v Dean,* 2019 ONCA 587

For a guilty plea to be informed, the accused must be aware of the allegations made by the Crown and the effect and consequences of the plea. If the accused establishes that he was unaware of the consequences of the plea, the court will consider the gravity of those consequences objectively. This

step objectively assesses the seriousness of the unknown legal consequence. A significantly longer sentence than the accused was advised he would receive could be the type of consequence that the accused was uniformed of: *R v Gordon,* 2025 ONCA 201, at paras 23, 28

The ineffective assistance of counsel framework is irrelevant to the information component because that framework focuses on the *source* of the misinformation (or incomplete information) rather than the misinformation itself. Assessing whether prejudice arises from misinformation does not depend upon its source: *R v Gordon,* 2025 ONCA 201, at para 30

To demonstrate prejudice, the appellant must file an affidavit to establish that he would either have (1) pleaded differently, or (2) pleaded guilty but with different conditions: : *R v Gordon,* 2025 ONCA 201, at para 32

Sometimes a remote chance of avoiding a particular collateral consequence may be worth the risk of a trial. However, the veracity of an accused's assertion that he or she would have risked a trial had they know of the collateral consequences must be considered in the light of objective circumstances including risks known to the accused: *R v Rai,* 2022 ONCA 703, at para 30

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

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

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

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

Examples

- Where trial judge not informed of immigration consequences: *R v Aujla,*2015 ONCA 325
- A informed plea does not require that the accused be aware of appeal rights and their limitations: *R v Girn,* 2019 ONCA 202
- Where accused argues that he had limited cognitive capacity to enter plea: *R v Baylis*, 2015 ONCA 477
- Where accused argues ineffective assistance of counsel on the guilty plea: *R v Baylis*, 2015 ONCA 477; *R v Grewal*, 2015 ONCA 482; *R v Cherrington,* 2018 ONCA 653
- Where accused not informed of immigration consequences of his plea: *R v Pineda,* 2019 ONCA 935; *R v Davis,* 2020 ONCA 326
- Where accused argues ineffective assistance of counsel on the application to strike the guilty plea: *R v Baylis,* 2015 ONCA 477
- Fresh evidence that meets the *Palmer* criteria and calls into question the accused's liability for the offence will serve to invalidate a guilty plea on appeal: *R v Shepherd,* 2016 ONCA 188 at paras 17-21
- Where the plea was not unequivocal: *R v Bhagwandat,* 2019 ONCA 589
- Where no plea inquiry held and judge intimated that plea could be struck. Appellant argued he only plead guilty because he believed he would get access to drug treatment program, which did not happen: *R v Flowers,* 2020 ONCA 468
- Where an accused was pressured to plead guilty as a result of incorrect legal advice concerning his ability to have contact with his daughter. Trial counsel told him that contact could be affected if he was convicted, but contact would be more likely if he plead guilty and received targeted treatment. This was incorrect legal advice and resulted in an involuntary plea: *R v Fox,* 2023 ONCA 40
- Where a material disclosure omission lead to the plea being uniformed: *R v Keizer,* 2024 ONCA 815
- Where the accused was assured by his counsel that he would receive a further six months, but instead received a further 2.5 years: *R v Gordon,* 2025 ONCA 201,
- The court's failure to inquire into the accused's understanding of the consequences of entering an NCR plea and failed to explain to the accused why he was found NCR: *R v Nahmabin,* 2024 ONCA 534, at para 7

E. NO CONTEST PLEA

A Fegan plea is entered typically where an accused loses a Charter application that is dispositive of the Crown's case. In order to preserve the right of appeal, the accused pleads guilty, accepts the case for the Crown, whether based on an agreed statement of facts or otherwise, and adduces no defence evidence.

When this procedure is proposed, the presiding judge should engage in the functional equivalent of a plea comprehension inquiry to confirm the accused's understanding of what is at stake by proceeding in this way. Where an inquiry is not conducted, it is for the reviewing court to determine whether the absence of a formal inquiry has resulted in a miscarriage of justice because it compromised the fairness of the proceedings or contributed to an unreliable verdict: *R v Anderson,* 2021 ONCA 333, at paras 53-54; *R v Laming,* 2022 ONCA 370, at para 55-57

F. NCR PLEA

There can be no shortcuts in a process that could result in such serious consequences to the accused. There must be a proper plea to the arraignment on the charges. Where there is agreement on the factual underpinnings of the offences, the court must nevertheless make findings with respect to the *actus reus* of the offences. The court cannot simply rely on a consent to a NCRMD finding but must reference s. 16 of the *Criminal Code* and explain why the evidence before the court justifies the NCRMD verdict.

Furthermore, there must be a valid and comprehensive plea inquiry that confirms that the accused is aware of, and agreeing to, the consequences associated to such a plea: *R v Nahmabin,* 2024 ONCA 534

G. USE OF CO-ACCUSED PLEA IN SUBSEQUENT PROCEEDING

The Crown should not be restricted in prosecuting another party on the basis of the same basic factual scenario that the related pleading party was prepared to admit. Imposing such a strict limit would frustrate legitimate tactical decisions to

accept pleas of guilt from co-parties and would require verdicts to be imposed after the trial of a co-party that are inconsistent with the facts proved at that trial.

This conclusion is informed by the fact that a guilty plea is based on the facts an accused person is prepared to admit, and not on the facts the Crown might have succeeded in proving after trial. Further, the decision of the Crown to accept a guilty plea is a tactical one that can properly be influenced by a range of considerations. This includes the strength of the case against the particular accused person and the public interest in accepting a plea agreement from one alleged party to secure testimony against another party: *R v Osborne*, 2024 ONCA 467, at para 47

PRECEDENT

A. STARE DECISIS – GENERAL PRINCIPLES

Stare Decisis has three main functions. First, *Stare decisis* promotes legal certainty and stability, allowing people to plan and manage their affairs. It serves to take the capricious element out of law and to give stability to a society. Second, it promotes the rule of law, such that people are subject to similar rules. Third, *stare decisis* promotes the legitimate and efficient exercise of judicial authority. *Res judicata* prevents re-litigation of specific cases and *stare decisis* guards against this systemically, by preventing re-litigation of settled law. Both doctrines promote judicial efficiency. *Stare decisis* also upholds the institutional legitimacy of courts, which hinges on public confidence that judges decide cases on a principled basis, rather than based on their own views. *Stare decisis* is foundational in that it requires that judges give effect to settled legal principles and depart from them only where a proper basis is shown: *R v Kirkpatrick,* 2022 SCC 33 (dissenting opinion, but not on this point)

The dissent in Kirkpatrick develops a framework to govern when the Court can overturn its own precedent, namely, if that precedent: (1) was rendered *per incuriam*, that is, in ignorance or forgetfulness of the existence of a binding authority or relevant statute; (2) is unworkable, or (3) has had its foundation eroded by significant societal or legal change.

B. CRITCISIM OF HIGHER COURT DECISISONS

To the degree that a judge of a lower court considers it necessary to critically comment within their judicial decisions on the decisions of higher courts, it is important that this be done with discretion and in measured terms. Unless undertaken with care, criticisms by lower courts of the decisions of higher courts can undermine confidence in the administration of justice by needlessly denigrating the fairness of the law, or the authority of those who administer it: *R v Lynch,* 2022 ONCA 109, at para 13

C. JUDICIAL COMITY

The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them Reasons to depart from a decision include (a) that the validity of the judgment has been affected by subsequent decisions; (b) that the judge overlooked some binding case law or a relevant statute; or (c) that the decision was otherwise made without full consideration. These circumstances could be summed up by saying that the judgment should be followed unless the subsequent judge is satisfied that it was plainly wrong: *R v McCaw,* 2018 ONCA 3464, at para 64; *R v Gordon,* 2019 ONSC 6508, at paras 9-13

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

Note that, in *Sullivan,* the Supreme Court of Canada held that A s. 52(1) declaration of unconstitutionality reflects an ordinary judicial task of determining a question of law, and that questions of law are governed by the

ordinary principles of *stare decisis*. Therefore, the *Spruce Mills* test that the Supreme Court adopted to allow for departure from a previous Superior Court finding of unconstitutionality seems to also apply to Superior Court questions of law: 2022 SCC 19

D. DECLARATIONS OF CONSTITUTIONAL INVALIDITY

The ordinary rules of horizontal *stare decisis* and judicial comity apply to declarations of unconstitutionality issued by superior courts within the same province. A decision may not be binding if it is distinguishable on its facts or the court had no practical way of knowing it existed.

If a prior constitutional decision is binding, a trial court may only depart from it if one or more of the three narrow circumstances set out in the *Spruce Mills* test apply: (1) the rationale of the earlier decision has been undermined by subsequent appellate decisions; (2) some binding authority in case law or some relevant statute was not considered; or (3) the earlier decision was not fully considered, for example if it was taken in exigent circumstances.

Where a judge is faced with conflicting authority on the constitutionality of legislation, the judge must follow the most recent authority unless one or more of these three criteria are met.

These criteria do not detract from the narrow circumstances in which a lower court may depart from binding vertical precedent. Horizontal *stare decisis* continues to applies to courts of coordinate jurisdiction within a province and a constitutional ruling will bind lower courts through vertical *stare decisis*.

Nor do these criteria detract from the power of the Court of Appeal to overturn any first instance superior court constitutional decision: *R v Sullivan,* 2022 SCC 19

E. INTER-PROVINCIAL JUDICIAL DECISIONS

Pursuant to s. 96 of the *Constitution Act, 1867*, superior courts operating within a province only have powers within the province. Federalism prevents a s. 52(1) declaration issued within one province from binding courts throughout the country: *R v Sullivan,* 2022 SCC 19

F. PREROGATIVE WRITS

Just as is the case with appeals, decisions by higher courts on prerogative writs are binding on lower courts: *R v RS,* 2019 ONCA 906, at paras 70-73

G. OVERTURNING PRECEDENT

Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 42; *Canada v Carter,* 2015 SCC 5, at paras 44-48

PREROGATIVE WRITS

A. INTERLOCUTORY MOTIONS AND APPEALS

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

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

Other extraordinary remedies, among them prohibition, *procedeno*, and *certiorari*, are available to parties in criminal proceedings only for a jurisdictional error by a provincial court judge. They are *not* available as a means to review or correct what are said to be errors of law in the exercise of jurisdiction: *R v Davis,* 2018 ONCA 946, at para 13

B. HABEAS CORPUS WITH CERTIORARI IN AID

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

In the context of prisoner claims, there are three different deprivations of liberty that may be challenged: an initial deprivation; a substantial change in conditions amounting to a further deprivation of liberty; and a continuation of the deprivation of liberty, which was lawful but has become unlawful. *Habeas corpus* may also be used to obtain declaratory relief under s. 24(1) of the *Charter*: *R v Budlakoti,* 2021 ONCA 163, at paras 17-18

PRELIMINARY INQUIRY

A. RIGHT TO A PRELIMINARY INQUIRY

The right to a preliminary inquiry is restricted to offences that carry a maximum sentence of 14 years or more. The fact that the Crown intends to advance a dangerous offender application does not entitle an accused to a preliminary inquiry

for charges that otherwise do not qualify. Such an argument confuses the seriousness of the offence with the seriousness of the offender: *R v Windebank*, 2021 ONCA 157

An accused is also not entitled to a preliminary inquiry where the offences carried a maximum sentence of less than 14 years at the time of their commission, which has since been increased to 14 years or more. In such circumstances, the accused's maximum liability is 10 years, pursuant to s.11(i) of the *Charter*: *R v SS,* 2021 ONCA 479

B. TEST FOR COMMITTAL

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

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

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

In this analysis, the preliminary inquiry judge does not draw factual inferences, assess credibility, or consider the inherent reliability of evidence: *Wilson* at para 23; *R v Kamermans*, **2016 ONCA 117** at para 15; *R v Zamora,* 2021 ONCA 354, at para 9

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

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be no inference without objective facts from which to infer

the facts that a party seeks to establish. If there are no positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture: *Wilson* at para 30 [citation ommitted]

C. APPLICATION FOR CERTIORARI

Certiorari is available to quash both committals and discharges ordered at the conclusion of a preliminary inquiry. The scope of review is limited to jurisdictional errors – i.e., where the preliminary inquiry judge exceeds, or declines to exercise, his or her jurisdiction: *R v Kamermans,* 2016 ONCA 117 at para 13; *R v Wilson*, 2016 ONCA 235 at para 25: *R v Marshall,* 2021 ONCA 354, at para 12

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

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

Jurisdictional error may be shown where:

1. the preliminary inquiry judge has failed to test the whole of the evidence adduced at the inquiry against the essential elements of the offences charged – which essential elements must accurately reflect the legal requirements Parliament as prescribed. A preliminary inquiry judge commits a jurisdictional error by committing an accused when an essential element of the offence is unsupported by the evidence:

2. the preliminary inquiry judge preferred an inference favourable to an accused to an inference, also available on the evidence, favourable to the Crown. Whether an inference is easy, hard or difficult to draw is of no moment to a decision on committal.

3. the preliminary inquiry judge has failed to consider “the whole of the evidence” adduced at the inquiry in reaching his or her conclusion about committal or discharge

- *Kamermans at paras 14-16, 20*; *Wilson* at paras 25-28

PROCEDURAL LAW

A. ADJOURNMENT REQUESTS

The Supreme Court in *R. v. Cody*, 2017 SCC 31, , at paras. 37-38, emphasized the need for trial judges to use their case management powers to minimize delay, which may include denying an adjournment if it will "result in an unacceptably long delay".

The decision to grant or not to grant an adjournment, including for the purpose of allowing an accused to find counsel, is a matter that is within the discretion of any trial judge. An appellate court should only interfere with a trial judge's refusal to grant an adjournment if it deprives an accused of a fair trial or the appearance of a fair trial: *R v Patel,* 2018 ONCA 541 at para 3; *R v Cordeiro-Calouro,* 2019 ONCA 1002, at para 6; *R c Arsenault,* 2020 ONCA 118, at para 46; *R v Ibrahim,* 2021 ONCA 241, at para 78; see also *R v Al-Enzi*, 2014 ONCA 569

A trial judge should ensure that an accused who wishes to be represented has a reasonable opportunity to find counsel. On the other hand, when an accused makes a request for an adjournment to enable him to find a lawyer, a trial judge may dismiss it if the evidence supports that the accused made no reasonable effort to find a lawyer or that he seeks to delay his trial: *Arsenaul* at para 47; see *R v Ibrahim,* 2021 ONCA 241

Where the appellant has not been provided a reasonable and justifiable opportunity to retain new counsel, the appointment of *amicus*, even with an expanded mandate, may not be fouond to be an adequate substitute: *R v Al-Enzi*, 2014 ONCA 569 at para 82

In respect of requests for adjournments after conviction but before sentencing, the Court should consider s.720 of the *Criminal Code,* which provides that a "court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed": *R v Allison,*

2022 ONCA 329, at para 66. In *Allison,* the Court of Appeal upheld the trial judge's exercise of discretion to refuse an adjournment after conviction where there had already been significant delay, and the trial judge found that the accused was using the adjournment request to try to delay sentencing.

i. Failure of Witness to Attend

In *Darville*, the Supreme Court of Canada identified three factors for a court to consider in determining whether to grant an adjournment required to procure the attendance of a material witness:

i. that the absent witness is a *material* witness in the case;

ii. that the party requesting the adjournment has not been guilty of laches or neglect in failing to endeavour to procure the witness' attendance; and

iii. that there is a reasonable expectation that the witness' attendance can be procured at the future time to which the party proposes the trial be adjourned.

To refuse an adjournment without giving the requesting party the opportunity to demonstrate satisfaction of the relevant criteria is an error of law. It is also an error of law to not consider those principles.

Decisions on applications for an adjournment involve the exercise of judicial discretion. They require consideration of *all* the circumstances to determine what is in the best interests of the administration of justice. The exercise of discretion must be principled. It must be firmly grounded in the circumstances disclosed in the case at hand: *R v Ke,* 2021 ONCA 179, at para 53, 54, 57, 58

B. ARRAIGNMENT

The failure to arraign an accused person is a procedural irregularity that can be cured by s. 686(1)(b)(iv) of the *Criminal Code*: *R v Stewart,* 2022 ONCA 726, at para 31

In the context of convictions after a contested trial, the failure to arraign on a count can be saved by the curative *proviso*. However, in the context of a guilty plea, an accused person's waiver of a trial on the merits elevates the significance of the arraignment process. Where the accused was not formally arraigned on a charge, they cannot have been found guilty of it. It would damage the integrity of the criminal justice system if an accused person could be convicted of an offence for which they were not arraigned or tried: *R v Nettleton,* 2025 ONCA 155, at paras 30-31

C. THE COMMENCEMENT OF PROCEEDINGS AND JOINDER OF COUNTS

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

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

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

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

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

A trial on separate informations or a single information can include, as separate counts, several offences. It is of no moment whether those offences are exclusively indictable offences, exclusively summary conviction offences, or offences triable

either way at the option of the Crown: *R v Sciascia,* 2016 ONCA 411 at paras 33 and 55

An Ontario Court of Justice judge has statutory jurisdiction to try provincial charges and to try summary conviction criminal charges, and there is no provision in the *Criminal Code* or the *POA* that expressly prohibits trying those charges jointly. Absent such a provision, the jurisdiction of an Ontario Court of Justice judge to conduct a joint trial of provincial charges and summary conviction criminal charges depends on compliance with legislative intent and adherence to relevant common law principles.

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

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

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

The YCJA prohibits the joint trial of a young offender indictment and an adult indictment involving the same accused: *R v PMC,* 2016 ONCA 829 at paras 14-16; see generally the discussion in *R v MW,* 2024 ONCA 866, at paras 14-20

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

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

The requirement under s. 650(1) of the *Criminal Code* for accused person to be "present in court during the whole of their trial" includes sentencing proceedings: *R v Mills,* 2024 ONCA 204, at para 28

The statutory right to attend the whole of one's trial serves two purposes. The first interest is the opportunity attendance provides to an accused to hear the case being made out against them and to have an opportunity to answer it. The second interest is the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result, the denial of which may well leave the accused with a justifiable sense of injustice: *R v MC,* 2023 ONCA 611, at para 37

Given the importance of the attendance of the accused, the word "trial" in s. 650 is to be liberally construed. Whether an aspect or procedural incident of or associated with a criminal trial is part of the trial depends upon whether: what occurred involved or affected the vital interests of the accused; or whether any decision made had a bearing on the substantive conduct of the trial. This is not to be determined by asking whether the outcome would have been the same had the accused been present. The focus is on whether the proceeding involved a vital interest or issue related to the determination of the trial: *R v MC,* 2023 ONCA 611, at paras 40-41

Disclosure or production motions are not inherently remote from the issues in the trial or the manner in which it will be conducted and are not *per se* events that occur outside of the trial. Indeed, they will generally be part of the trial, requiring the attendance of the accused, pursuant to s. 650: *R v MC,* 2023 ONCA 611, at para 44

Trial judges should not conduct resolution discussions in chambers: *R v Colley,* 2024 ONCA 524, at para 91

Not every in-chambers discussion will constitute part of the accused's "trial". The classification of an in-chambers discussion as part of the trial will depend on whether the context and contents of the discussion involved or affected the vital interests of the accused or whether any decision made bore on "the substantive conduct of the trial". This would include the discussion of the evidence and of a possible plea bargain: *R v Colley,* 2024 ONCA 524, at para 88

Any in-chambers discussion about the accused's trial will violate s.650(1) and will constitute an error in law that cannot be remedied by the curative proviso: R v. John Poulos, 2015 ONCA 182; *R v SM,* 2022 ONCA 765

In-chambers comments about the evidence are particularly problematic if resolution is not achieved and the trial continues. The appearance of impartiality is lost: *R v SM,* 2022 ONCA 765, at para 38

To determine whether something that happened during the course of a trial, including in-chambers discussions, is part of the "trial" for the purposes of s. 650(1), the question is whether what occurred involved or affected the vital interests of the accused or whether any decision made bore on "the substantive conduct of the trial": *R v Hassanzada,* 2016 ONCA 284 at paras 127-129; *R v SM,* 2022 ONCA 765, at paras 35; see also para 36

To determine whether a breach of s. 650(1) may be salvaged by the application of the proviso in s. 686(1)(b)(iv) requires a consideration of all the circumstances surrounding the violation. Relevant factors may include, but are not limited to:

(i) the nature and extent of the exclusion, including whether it was inadvertent or deliberate;

(ii) the role or position of the defence counsel in initiating or concurring in the exclusion;

(iii) whether any subjects discussed during the exclusion were repeated on the record or otherwise reported to the accused;

(iv) whether any discussions in the accused's absence were preliminary in nature or involved decisions about procedural, evidentiary or substantive matters;

(v) the effect, if any, of the discussions on the apparent fairness of trial proceedings; and

(vi) the effect, if any, of the discussions on decisions about the conduct of the defence: *R v Simon,* 2010 ONCA 754, at para 123

Even where s. 650 does not apply, the right of attendance is so important that judges are required to "adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence", an obligation that may require the provision of "a redacted or summarized version of the evidence" or potentially the appointment of *amicus curiae: R v MC,* 2023 ONCA 611, at para 36

A failure to comply with s. 650(1) is not simply a legal error. It is a jurisdictional error without the necessity of the accused showing that they suffered prejudice.

Where such an error arises, the statutory curative proviso, s. 686(1)(b)(iv), makes it possible to cure breaches of s. 650 that amount to a "procedural irregularity at trial": *R v MC,* 2023 ONCA 611, at para 38

The inquiry of prejudice under the curative proviso includes: (1) an individual accused's ability to properly defend her or himself and to receive a fair trial; and (2) prejudice in the broader sense of prejudice to the appearance of the due administration of justice. This latter form of prejudice arises where the circumstances of the exclusion of the accused are such as to inflict significant damage on the appearance of justice, that brings harm to the criminal justice system itself: *R v MC,* 2023 ONCA 611, at para 69

There is a presumption of prejudice when an accused is excluded from his/her trial, and the Crown must rebut that presumption. All relevant circumstances have to be considered, including:

(i) the nature and extent of the exclusion, including whether it was inadvertent or deliberate, and whether the accused and his/her lawyer was excluded;

(ii) the role or position of the defence counsel in initiating or concurring in the exclusion;

(iii) whether any subjects discussed during the exclusion were repeated on the record or otherwise reported to the accused;

(iv) whether any discussions in the accused's absence were preliminary in nature or involved decisions about procedural, evidentiary or substantive matters;

(v) the effect, if any, of the discussions on the apparent fairness of trial proceedings; and

(vi) the effect, if any, of the discussions on decisions about the conduct of the defence: *R v MC,* 2023 ONCA 611, at paras 71, 73

i. Examples

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

Inviting and receiving submissions from counsel by email or other electronic means about the necessity for, or content of, jury instructions offends s. 650(1): *Hassanzada* at paras 130-131; see also *R v E (FE)*, 2011 ONCA 783

In *DQ,* the Court of Appeal held that the exclusion of the accused from the courtroom during a discussion of an objection to the Crown's cross-examination of him of prior sexual activity was, applying the test in *Simon,* an error that was saved by the curative proviso. The court went on to hold that a remedy for such an error is generally better considered under the rubric of the curative proviso, and not s.7 of the *Charter,* except perhaps in cases where the error is particularly egregious: 2021 ONCA 827

In *Mills,* the Court of Appeal found that, irrespective of whether the appellant's absence from part of his proceeding constituted a s.650 violation in circumstances where a designation had been filed, the appellant's absence nonetheless caused a miscarriage of justice and affected the apparent fairness of the proceedings. This was because the court effectively conducted a plea inquiry in the appellant's absence in circumstances where there were live immigration consequences to a guilty plea that the appellant was unaware of: 2024 ONCA 204

E. BIFURCATION OF PROCEEDINGS

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

F. COUNSEL TABLE MOTION

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

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

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

G. ELECTION AS TO MODE OF TRIAL

i. Error in Crown's election

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

ii. Failure to afford the accused a right of election

The failure to properly afford the accused his right of election results in a lack of jurisdiction that cannot be remedied by the curative provisio under s.686(1)(b)(iv): *R v Noureddine,* 2015 ONCA 770 at para 56. Put another way, where a judge has no inherent jurisdiction to try the accused in the absence of a statutory requirement to provide the accused with an election, the judge has exceeded his jurisdiction. The *proviso* in s.686(1)(b)(iv) cannot be applied: *R v Shia*, 2015 ONCA 190; see also *R v Cadieux,* 2019 ONCA 303

Note, however, that in *White*, the SCC held that, where counsel elected on behalf of the accused without giving him legal advice on his choice of election, even if the accused's loss of election amounted to a procedural error under s.536(2), the provincial court would retain jurisdiction to hear the matter, since the court had jurisdiction over the class of offence under s.686(1)(b)(iv): *R v White,* 2022 SCC 7

This *provisio* applies only where jurisdiction has been lost by some irregularity during the trial which caused no prejudice. It does not apply where the court was

never properly constituted in the first place: *R v Noureddine,* 2015 ONCA 770 at para 56

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

For example, if the accused was represented by capable counsel, and it is clear from the record that, through counsel, he waived his right to have the words of s. 561(7) read to him, then the trial judge is entitled to rely upon counsel's representations as to the instructions he received from the accused, and to conclude that the requirements of s. 561(7) had been waived: *R v Mitchell,* 2020 ONCA 187, at para 12

H. INFORMATION

i. COUNTS ON AN INFORMATION

The Crown practice of drafting a single count of an indictment to capture multiple distinct incidents creates the risk that the accused may be convicted without the jurors' unanimous agreement on any one underlying incident: *R v MRH,* 2019 SCC 46

ii. LAYING OF AN INFORMATION

a) A Private Information

The function of the pre-enquete is to determine if the process of the court, whether a summons or warrant, should issue to compel the person named in the information to attend before a justice to answer to the offences charged in the information. This decision must be based on the allegations of the private informant and any evidence adduced at the hearing: Vasarhelyi, at para. 37.

Under s. 507.1(3) of the Criminal Code, the Attorney General, without being deemed to intervene in the proceedings, is entitled to:

i. a copy of the private information in Form 2;

ii. reasonable notice of the pre-enquete hearing;

iii. the opportunity to attend the pre-enquete;

iv. the opportunity to cross-examine witnesses; and

v. the opportunity to call witnesses and present evidence at the hearing: *R v Glegg,* 2021 ONCA 100, at para 42

iii. Replacement Information

Where an information has been laid and the accused comes before the court by any means, the court has jurisdiction to deal with a replacement information that is not alleged to be defective. The absence of process to compel the presence of the accused on the second information does not render that information a nullity: *R v Momprevil,* 2022 ONCA 56, at para 9

I. INTERLOCUTORY CHARTER/CERTIORARI REMEDIES

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

J. LANGUAGE OF THE PROCEEDINGS

The language rights provided for in art. 530 of *the Criminal Code* gives a substantive and absolute right to the accused to have equal access to the courts

in the official language of his choice.. The choice of the accused must be free and enlightened.

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

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

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

The failure to advise an accused of their legal right under s530(3) of the *Cirminal Code* to have their trial conducted in the language of their vhoice (French or English) constitutes an error of law. This error creates a presumption that the accused’s fundamental right to be tried in the official language of their choice was violated, which opens the door to appellate intervention. The Crown can then rebut this presumption for the purposes of the analysis under the curative proviso: *R. v. Tayo Tompouba*, 2024 SCC 16; see also

When the issue is raised at first instance outside the periods specified in s. 530(1), the accused can file a late application under s. 530(4). The judge’s failure to comply with s. 530(3) will then be a relevant factor in the accused’s favour that the judge hearing the application must consider when assessing the diligence displayed by the accused in exercising their fundamental right.

Where the judge did carry out their duty under s.530(3), the accused remains free to raise on appeal, for the first time, the violation of their right to be tried in the

official language of their choice. The onus will then be on the accused to prove that violation so as to justify appellate intervention at the stage of the analysis under s. 686(1)(a). No presumption will apply in the accused's favour in the absence of a breach of s. 530(3): *R. v. Tayo Tompouba*, 2024 SCC 16

Even if an accused, although duly informed of their right to a trial in the official language of their choice, does not make a request under s. 530(1), s. 530(4) gives the court the power to order that the accused be tried in the accused's official language if it is in the best interests of justice to do so.

If an order is granted under s. 530, the accused has, among other things, the following additional rights:

- At the request of the accused, the Crown is required to translate any part of any information or indictment drafted in the other official language and to provide the accused with a written copy of the translation as soon as possible (s. 530.01(1));

- the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial (para. 530.1(a));

- the accused is entitled to have a Crown prosecutor at trial who speaks the same official language as the accused or both official languages, as the case may be (para. 530.1(e));

- the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial (para. 530.1(f));

- the record of proceedings during the preliminary inquiry or trial shall include "a transcript of everything that was said during those proceedings in the official language in which it was said; a transcript of any interpretation into the other official language of what was said, and any documentary evidence that was tendered during those proceedings in the official language in which it was tendered" (para. 530.1(g));

- any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused (para. 530.1(h)): *R v Dartiguenave,* 2025 ONCA 2, at paras 58, 61

K. OATH

The failure to swear or affirm the important witnesses in a trial is a fatal error which the curative proviso cannot remedy. In *KC,* the Court of Appeal rejected the argument that casual promises to tell the truth could function as an adequate substitute for the oath or affirmation: 2021 ONCA 776

L. OPEN COURT PRINCIPLE

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature.

A person asking a court to exercise discretion in a way that limits the open court presumption must establish that

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences: *Sherman Estate v Donovan,* 2021 SCC 25

M. PRIVATE PROSECUTIONS

The standard to issue process is whether there is some evidence on each element of the offence: *Criminal Code*, ss. 507 and 507.1. The standard for issuing process is also informed by the reasonable and probable grounds standard for a Justice of the Peace to receive an Information, set out in s. 504 of the *Criminal Code*.

A different standard applies when Crown counsel is deciding whether to continue a prosecution after a Justice of the Peace has issued process – whether there is a reasonable prospect of conviction. This is a higher standard than the standard applied when a Justice of the Peace decides whether to issue process: *R v Mivasair,* 2025 ONCA 179, at paras 113-114

N. LIMITATION PERIOD TO INSTITUTE PROCEEDINGS

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

O. QUALIFICATION OF AN AGENT FOR THE ACCUSED

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

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

The procedure to be followed is as follows. The court should first determine whether the defendant has made an informed choice to be represented by the agent. In appropriate cases, the court may also inquire into the propriety of the representation. Disqualification is justified only where representation would clearly

be inconsistent with the proper administration of justice. It is not enough that the trial judge believes that the accused would be better off with other representation or that the process would operate more smoothly and effectively if the accused were represented by someone else. Disqualification of an accused's chosen representative is a serious matter and is warranted only where it is necessary to protect the proper administration of justice.

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

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

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

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

P. RECORD OF PROCEEDINGS

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

Q. RECALLING A WITNESS

Before the Crown has closed its case, a trial judge has a broad discretion to permit the recall of a witness. The discretion must be exercised judicially and in the

interests of justice. This discretion narrows as the trial proceeds through its various stages.

The trial judge must have regard to:

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

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

R. RETRIALS (FOLLOWING MISTRIAL)

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

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

S. SEVERANCE

i. Severance from Accused

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

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

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

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

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

Depending on the circumstances, the fact that the Crown will introduce an incriminating out-of-court statement by one co-accused that is inadmissible against another co-accused may be grounds for severance: *R v Mohamed,* 2023 ONCA 79, at para 154-169

An appellate court should only intervene on the ground of unjudicial ruling if the judge erred on a question of law or made an unreasonable decision: *R v Le,* 2023 ONCA 79, at para 154

ii. Severance of Charges

a) The Test

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

i. general prejudice to the accused as a result of the influence of the volume of evidence adduced and the effect of verdicts across counts;

ii. the legal and factual nexus between or among counts;

iii. the complexity of the evidence;

iv. the desire of the accused to testify on one or more counts but not on another or others;

v. the possibility of inconsistent verdicts;

vi. the desire to avoid a multiplicity of proceedings;

vii. the use of evidence of similar acts;

viii. the length of trial;

ix. prejudice to the accused's right to be tried within a reasonable time; and

x. the existence or likelihood of antagonistic defences

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

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

The success of any similar fact application will generally militate against severance. Severance is often denied in cases in which evidence on each count is admissible across other counts. But it does not follow that severance is guaranteed absent across counts application of the evidence: *R v Durant,* 2019 ONCA 74, at paras 71-77; *R v Moore,* 2021 ONCA 827, at paras 12-17

b) Standard of Review

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

On an allegation that the decision was unjudicial, the court looks to the circumstances when the ruling was made to determine whether the decision was flawed by an error of law or principle or was unreasonable. In determining whether the ruling resulted in an injustice, the court looks at the entirety of how the trial and verdicts unfolded: *R v Durant,* 2019 ONCA 74, at para 79; *R v Moore,* 2021 ONCA 827, at paras 18-19

c) Murder Charges

The test for severance in s. 591(3)(a) of the *Criminal Code* should be more stringently applied in favour of an accused where two or more counts charging murder are included in the same indictment. This is all the more so when the killings cannot meet the high threshold required to permit the introduction of evidence of similar acts across the counts to assist in proof of the identity of the killer: *R v Durant,* 2019 ONCA 74, at para 5

T. STAY OF PROCEEDINGS

Section 579(1) of the *Criminal Code* permits the Attorney General or instructed counsel to direct entry of a stay "at any time after *any* proceedings *in relation to* an accused or defendant are commenced…".

The statutory language "at any time after any proceedings in relation to an accused…are commenced" has been interpreted to mean "any time after an information has been laid. Entry of a stay need not await a determination to issue process: *R v Glegg,* 2021 ONCA 100, at paras 44-45

U. SUBPOENA

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

V. SUMMARY DISMISSAL

Rule 34.02 grants a judge authority to summarily dismiss an application that has no reasonable prospect of success. This rule is essential to effective and fair litigation. It promotes two goals: efficiency and correct results.

The procedure involved where Rule 34.02 is invoked is informal, else it become antithetical to its purpose. When summary dismissal is sought, the affected party should put its best foot forward: *R v Glegg,* 2021 ONCA 100, at para 36-37

An application in a criminal proceeding should only be summarily dismissed if the application is manifestly frivolous. This means that most applications will be decided on their merits in proportionate proceedings. The "frivolous" part of the standard weeds out those applications that will necessarily fail, and "manifestly" captures the idea that the frivolous nature of the application should be obvious. If the frivolous nature of the application is not manifest or obvious on the face of the

record, then the application should not be summarily dismissed and should instead be addressed on its merits.

The moving party, on a motion for summary dismissal, bears the burden of convincing the judge that the underlying application is manifestly frivolous. When applying the "manifestly frivolous" standard, the judge should not engage in even a limited weighing of the evidence to ascertain if it is reasonably capable of supporting an inference, nor should the judge decide which among competing inferences they prefer. Any such weighing should be left to the voir dire. The judge must assume the facts alleged by the applicant to be true and must take the applicant's arguments at their highest.

The applicant's underlying application should explain its factual foundation and point towards anticipated evidence that could establish their alleged facts. Where the applicant cannot point towards any anticipated evidence that could establish a necessary fact, the judge can reject the factual allegation as manifestly frivolous. The judge ought to generally assume the inferences suggested by the applicant are true, even if competing inferences are proffered. The judge should only reject an inference if it is manifestly frivolous, meaning that there is no reasoning path to the proposed inference.

A similar approach is taken to the overall application. Because the truth of the facts alleged is assumed, an application will only be manifestly frivolous where fundamental flaws are apparent on the face of the record. Finally, the trial judge's power to summarily dismiss an application is ongoing. Even if the judge permits the application to proceed to a voir dire, the judge retains the ability to summarily dismiss the application during the voir dire if and when it becomes apparent that the application is manifestly frivolous.

The party who has brought the underlying application bears the minimal burden of providing the judge with the following specifics, through oral or written submissions: (1) what legal principles, Charter provisions, or statutory provisions are being relied on and how those principles or provisions have been infringed; (2) the anticipated evidence to be relied on and how it may be adduced; (3) the proposed argument; and (4) the remedy requested: *R Haevischer:* 2023 SCC 11; see also *R v England,* 2024 ONCA 360, at para 67

W. TRANSCRIPTS

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

A court reporter should certify a transcript of a ruling provided that any edits made by a trial judge relate solely to matters of grammar and other minor edits, such as the correction of names: *R v Orange,* 2021 ONCA 99, at para 3

Under s. 669.2(3) of the *Criminal Code*, if a trial commences again before a new judge sitting alone and no adjudication was made or verdict rendered, the new judge must commence the trial again as if no evidence on the merits had been taken. Section 669.2(3) does not, however, prevent the parties from consenting to file the transcript of testimony from the first trial as evidence in the second trial. Absent evidence to the contrary, waiver of the procedural right in s.669.2(3) by counsel for an accused is presumed to be intentional: *R v JD,* 2022 SCC 15

X. WAIVER

Absent evidence to the contrary, waiver of a procedural right by counsel for an accused is presumed to be intentional. However, as the gatekeeper for trial fairness, the judge retains at all times the power to inquire on his or her own initiative where there are indications suggesting that the consent of the accused might be vitiated. In such. Circumstances, the court should exercise its residual discretion and investigate further in order to ensure that the consent of the accused to the procedure is voluntary and informed: *R v JD,* 2022 SCC 15

PROCEDURAL FAIRNESS

Procedural fairness speaks to the principle that persons affected by the proceedings should have the opportunity: (i) to present their case fully and fairly, and (ii) have any decision affecting their rights, interests, or privileges made using a fair, impartial and open process. The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*: *R v McDonald,* 2018 ONCA 369 at para 38

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

The right to make submissions before a ruling is an essential component of the principle that parties have the right to be heard: *R v Grier,* 2020 ONCA 795, at para 110

Lack of facilities and delay do not relieve the state of its constitutional obligation to provide an accused with procedural fairness: *R v Walker,* 2020 ONCA 765, at para 107

It is an error for the trial judge to raise a new issue in the ruling, or to rely on new sources/materials, without affording the parties an opportunity to address and respond to it during the trial: *R v JM,* 2021 ONCA 150, at paras 64, 69, 73-75

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 para 26

It is an error for the trial judge to rely on a fact not established by evidence in arriving at a verdict: *R v TO,* 2023 ONCA 222, at para 43

The absence of a break between the closing submissions and the trial judge's reasons does not, in itself, manifest a lack of deliberation: *R v VK,* 2023 ONCA 461, at para 11

It is entirely appropriate for a trial judge to analyze and draw inferences from exhibited videos. If a trial judge does sough, they ought to ensure that any inferences have been addressed by the parties and, if not, to afford the parties an

opportunity to make further submissions on inferences the trial judge considers making: *R v Walker,* 2025 ONCA 19, at para 47

A. THEORY OF LIABILITY

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

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

If a trial judge is going to rely on a different theory of liability than that advanced by the Crown it must afford the accused an opportunity to make submissions on this theory of liability. The failure to do so is an incurable error of law that undermines trial fairness: *R v Ochrym,* 2021 ONCA 48, at paras 41-53; see, for example, *R v Haidary,* 2023 ONCA 786, at paras 19-22

Similarly, if the trial judge is going to rely on evidence in a manner not contemplated by the parties, the trial judge must give the parties an opportunity to address the issue in advance: *R v PP,* 2025 ONCA 243, at paras 16-20

An accused person is entitled to know the case that they are being asked to meet. It is fundamentally unfair to convict an accused person on a theory of which they are entirely unaware, and to which they have not had the opportunity to respond: *R v RH,* 2022 ONCA 69, at paras 20-21

PUBLICATION BANS

Pursuant to s.648(1) of the *Criminal Code,* there is an automatic publication ban for any information regarding any portion of the trial for which the jury was not present. This applies after the jury has been given permission to separate.

The automatic publication ban in s. 648(1) applies not only after the jury is empanelled but also before the jury is empanelled with respect to matters dealt with pursuant to s. 645(5) of the *Criminal Code,* which confers upon trial judges the jurisdiction to deal with certain matters before the empanelment of the jury.

To assess whether a matter is being dealt with by virtue of s. 645(5), the court looks to the following factors: whether the matter concerns the indictment, and whether, but for the jurisdiction of case management judges, the matter would have to be dealt with by the trial judge.

To avoid uncertainty over what matters are covered by a publication ban under s. 648(1), it would be prudent for judges holding a hearing pursuant to s. 645(5) to announce that they are exercising their jurisdiction under that provision and to note that s. 648(1) automatically prohibits the publication of any information regarding that portion of the trial.

Judges retain inherent jurisdiction to impose discretionary publication bans in accordance with the *Dagenais/Mentuck/Sherman* principles: *La Presse Inc. v Quebec,* 2023 SCC 22

REASONABLE APPREHENSION OF BIAS

A. TEST FOR REASONABLE APPREHENSION OF BIAS

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

The fundamental principles are as follows:

1. First, there is a presumption of judicial integrity, that is to say, that judges will carry out their oath of office. The test to displace the presumption of integrity is

high because it calls into question both the integrity of the presiding judge and the administration of justice itself: R v Arnaout, 2015 ONCA 655 at para 19; R v Nero, 2016 ONCA 160 at para 30. The presumption may be rebutted where the party establishes a real likelihood or probability of bias: *R v GMC,* 2022 ONCA 2, at para 85

2. Second, this presumption of judicial integrity does not relieve a judge from their sworn duty to be impartial
3. Third, although the threshold for a successful claim of actual or apprehended bias is high, it is not insurmountable. The presumption of judicial integrity can be displaced by cogent evidence that demonstrates that something the judge did or said gives rise to a reasonable apprehension of bias
4. Fourth, the onus of demonstrating bias lies with the party who alleges its existence, and is based on a balance of probabilities: *Nero* at para 31
5. Fifth, allegations of reasonable apprehension of bias, thus inquiries into whether such a claim has been made out, are entirely fact-specific. *R v Nero,* 2016 ONCA 160 at para 32
6. Sixth, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining the required information about it. The test is "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Inherent in this test is a two-fold objective element. The person considering the alleged bias must be reasonable. And the apprehension of bias must also be reasonable in all the circumstances of the case. The reasonable person must be informed, impressed with the knowledge of all the circumstances, including the traditions of integrity and impartiality that form a part of the background and cognizant of the fact that impartiality is one of the duties judges swear to uphold.
7. Finally, stereotypical reasoning may give rise to a reasonable apprehension of bias: *R v Richards,* 2017 ONCA 424 at paras 42-50

The analysis factors in whether a reasonable person think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide the matter fairly: *R v GMC,* 2022 ONCA 2, at para 85

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

In conducting themselves in a courtroom, trial judges have a duty to maintain composure during the course of a trial, both in the presence and absence of the jury: *R v Ibrahim,* 2019 ONCA 631, at para

Where the Crown has information about potential for a biased trial, this information is relevant and that be disclosed to the defence for the purpose of making full answer and defence: *R v Cowan,* 2022 ONCA 432, at para 21

Not all comments by a trial judge, even if troubling in some respects, can or should be equated with bias. This point is especially germane when it is comments about counsel that form the basis for the allegation of bias. Criticism of counsel is not simply equated with bias against the client. As Trotter J. (as he then was) noted, comments must be judged from the standpoint of what they say about whether the judge was disposed to decide fairly between the parties, not whether the judge was unimpressed by counsel: *R v Marrone,* 2023 ONCA 742, at para 96

Moreover, the impugned conduct or comments of the trial judge must be viewed in the context of the entire record to determine whether the alleged bias influenced the decision-making process or the overall appearance of the fairness of the proceedings: *R v Colley,* 2024 ONCA 524, at para 72

In the context of reasons, trial judges have the discretion and independence to write their decisions as they see fit. To the extent that their use of language is unrestrained, however, they risk courting allegations of bias. Judicial restraint is necessary to uphold public confidence in the impartiality of the judiciary. While trial judges are human and are not expected to remain as immovable as a statue, trial judge's duty is to try the case impartially – without favour or prejudice. A trial judge's personal feelings about the appellant are irrelevant and ought not to have played any role in his decision: *R v BCM,* 2024 ONCA 12, at para 24

Trial judges should avoid inviting counsel into their chambers during the trial to comment on the evidence and encourage guilty pleas, both because of the risk to impartiality and the risk that the accused's vital interests may be affected: *R v Colley,* 2024 ONCA 524, at para 72; see also para 76

The reasonable apprehension of bias test is more difficult to satisfy when the trier of fact is a jury and the impugned conduct of the judge did not occur in the presence of the jury. However, it is possible to establish a reasonable apprehension of bias claim in these circumstances: *R v Colley,* 2024 ONCA 524, at para 74

i. EXAMPLES

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

In *Slatter,* the Court of Appeal held that the fact that the trial judge had previously presided over an accomplice's trial did not, in and of itself, deprive him of the ability to preside over the accused's trial. There were no allegations made against the accused in the former trial and she did not testify. The trial judge had never been called upon to adjudicate on her role in any alleged misconduct. Nor had the trial judge been previously called upon to consider the accused's conduct or her credibility or reliability as a witness.

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

In *Locknik,* the Court of Appeal upheld the trial judge's ruling that no reasonable apprehension of bias attached to a justice who granted dial recorder warrants. The justice wrote to the affiant requesting additional information and clarifications. The Court agreed that, in doing so, the justice was seeking facts relevant to the justice's assessment of the reliability of the information: 2019 ONCA 625, at paras 31-39

In *Chambers,* the trial judge's reasons for conviction gave rise to a reasonable apprehension of bias through animated and unrelenting criticism and sarcasm towards the evidence of the appellant and the conduct of the defence. The reasons gave rise to concerns regarding a loss of perspective and objectivity: *R v Chambers,* 2019 ONCA 736

In *SM,* the Court of Appeal cautioned that forecasting resolution discussions and potential guilty pleas to the trial judge, especially when the case is scheduled to proceed as a judge alone trial, risks jeopardizing the appearance of impartiality of the trial judge, especially when the trial ends up going ahead or continuing before the same judge: 2022 ONCA 765, at para 17

In *Ibrahim,* the Court of Appeal dismissed an allegation of bias but found that the trial judge conducted the mistrial application in an injudicious manner by making numerous unfounded allegations against defence counsel, raising none of them with counsel at the time, and then not affording counsel the opportunity to respond:

R v Ibrahim, 2019 ONCA 631, at paras 92-95; but see *R v Gager,* 2020 ONCA 274, at paras 141-155

In *MM,* the Court of Appeal acknowledged that there are circumstances in which the mere fact of *ex parte* communications between the trial judge and a party or someone connected to a party create an appearance of bias. However, it will generally be important to consider the content of the communications, and how the trial judge responds to them: 2022 ONCA 63

In *Cowan,* the Court of Appeal found a reasonable apprehension of bias arose when the trial judge and Crown had drinks followed by dinner immediately after the jury convicted the appellant of second degree murder: *R v Cowan,* 2022 ONCA 432

In *Colley,* the Court of Appeal found a reasonable apprehension of bias where the trial judge invited counsel into his chambers to discuss the case in the middle of evidentiary motions. During these discussions, he encouraged the accused to plead guilty. The trial judge subsequently made comments in court that suggests that his rulings on the evidentiary motions were tied to his views on the guilt of the accused and his desire to encourage them to plead guilty. The trial judge further exhibited a reasonable apprehension of bias when he addressed the accused directly in court, notwithstanding that they were represented by counsel. In doing so, he risked undermining their solicitor-client relationships and left an impression that defence counsel were not doing their jobs properly: *R v Colley,* 2024 ONCA 524, at paras 77, 79

B. TRIAL JUDGE'S INTERVENTION IN PROCEEDING

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

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

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

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

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

3. Interventions which effectively preclude the accused from telling his or her story in his or her own way: *R v Said,* 2019 ONCA 378, at paras 4-5

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

A trial judge's interventions constitute a "trial management power." A trial judge may intervene to: focus the evidence on issues material to a determination of the case; clarify evidence as it has been given and is being given; avoid admission of evidence that is irrelevant; curtail the needless introduction of repetitive evidence; dispense with proof of the obvious or uncontroversial; ensure the way that a witness answers or fails to respond to questions does not unduly hamper the progress of the trial; and to prevent undue protraction of trial proceedings. In doing so, a trial judge should confine herself to her own responsibilities, leaving counsel and the jury to their respective functions. *R v Murray,* 2017 ONCA 393 at paras 91-92; *R v DC,* 2017 ONCA 143 at para

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

An isolated intervention by a trial judge would not normally render a trial unfair. Instead, it is the cumulative effect of multiple interventions that must be

considered. The interventions must be considered in light of any other conduct by the trial judge that may magnify the impact of those interventions. A trial judge's extemporaneous comments in his/her jury instructions fall into this latter category: *Hungwe* at para 44

The impact of the trial judge's interventions must also be considered in light of two other factors. One factor is whether the trial judge permitted counsel the opportunity to ask further questions after the trial judge asked his or her questions. However, providing the opportunity for counsel to ask further questions, when the gravamen of the concern is that the trial judge is telegraphing his view of the evidence to the jury, has marginal, if any, rehabilitative prospects. Once the trial judge's opinion is conveyed, there is little that further questioning by counsel can do to remove the resulting sting. The other factor is whether counsel objected to the trial judge's questioning: *Hungwe* at paras 45-46

i. EXAMPLES

In *DC,* for example, the trail judge's interjections did not raise a reasonable apprehension of bias because they did not interfere with counsel's ability to fully and fairly advance a defence. The interjections were made during both the Crown and Defence case, and were said to be intended only to insure that procedural and evidentiary rules were followed, clarify questions asked by counsel, clarify answers, and move the trial forward in an orderly fashion when questioning had bogged down on a collateral matter.

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

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

In *R v Said,* 2019 ONCA 378, the Court of Appeal found that the trial judge's repeated interjections exceeded what was reasonably necessary and (1) strayed into derisive commentary about trial counsel and (2) left the impression that she

did not believe the accused by the end of his cross-examination, much of which she was heavily involved in, thereby creating the appearance of unfairness. Furthermore, the trial judge's repeated interventions during the accused's evidence created actual unfairness, by preventing the accused from getting his story out.

In *Marrone,* the Court of Appeal found that the trial judge exhibited a reasonable apprehension of bias by the manner in which he repeatedly criticized defence counsel, suggesting that she had been dishonest and mislead the court. The trial judge also adopted positions that were not advanced by the Crown, and drew conclusions of fact before there was an evidentiary basis: 2023 ONCA 742, at para 121

C. BIAS IN THE REASONS

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

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

D. STANDARD OF REVIEW

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

- questioning an accused or witnesses in such a way as to convey an impression that the judge aligns him or herself with the case for the Crown;

- questioning witnesses in such a way as to make it impossible for counsel to present the defence case;
- intervening to such an extent in the testimony of the accused that it prevents the accused from telling his or her story; and
- inviting the jury to disbelieve the accused or other defence witnesses: *Murray* at paras 94-95

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

A judicial determination at first instance that real or apprehended bias exists may itself be worthy of some deference by appellate courts. However, an allegation of judicial bias raises such serious and sensitive issues that the basic interests of justice require appellate courts to retain some scope to review that determination: *R v PG,* 2017 ONCA 351 at para 22 (citing *RDS*)

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

REOPENING THE DEFENCE CASE

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

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

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

The test is as follows:

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

The evidence proposed for reception must be compliant with the rules governing admissibility: *R v MGT,* 2017 ONCA 736 at paras 47, 48, 51; see also R v. J.A., 2015 ONCA 754

The jurisdiction to reopen should be exercised only in “exceptional circumstances” where its exercise is clearly called for. This is a rare power and no one should expect a do-over: *R v RG,* 2023 ONCA 343, at para 52; *R v HS,* 2023 ONCA 805, at para 27

The decision is entitled to significant deference on appeal unless of course the decision is infected by legal error, a material misapprehension of evidence or is unreasonable: *R v RG,* 2023 ONCA 343, at para 53

The principle that trial judges should vacate a conviction only in "very rare cases" applies with particular force where an accused seeks to reopen the case based on a complainant's VIS. Parliament's purpose in providing for the introduction of such statements was to give victims a voice in the criminal justice process, to provide a way for them to confront offenders with the harm they have caused, and to ensure that courts are informed of the full consequences of the crime. If victims could routinely be cross-examined based on an alleged inconsistency between their VIS and their trial evidence, they would be discouraged from offering such statements and risk being revictimized through any subsequent cross-examination.

Where an appellant seeks to vacate a conviction on the basis of a complainant's VIS, the test for adducing fresh evidence should be applied with the following considerations in mind: (i) the alleged inconsistency between the VIS and the complainant's evidence at trial should be plain and obvious; (ii) the relevant portions of the complainant's trial evidence must have played a central and essential role in the trial judge's reasoning leading to a conviction; and (iii) the obviously inconsistent statement(s) in the VIS, had they been known at the time of the trial, would likely have affected the result: *R v HS,* 2023 ONCA 805, at para 30

A. EXAMPLE: POST-VERDICT RECANTATION

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

B. STANDARD OF REVIEW

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

SELF REPRESENTED LITIGANTS

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

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

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

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

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

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

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

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

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

See also *R v Tossounian,* 2017 ONCA 618 at paras 36-38; *R v Breton,* 2018 ONCA 753 at para 13-18; *R v Sabir,* 2018 ONCA 912, at para 18; *R v Forrester,* 2019 ONCA 255, at paras 14-18

The idea that the defence will be brought out in its full force where the accused is self-represented is aspirational. However, a trial judge cannot cross-examine a witness without descending into the arena and losing neutrality: *R v Bancroft,* 2024 ONCA 121, at para 14

To warrant allowing an appeal on the basis that the trial judge failed to discharge their duty to assist a self-represented accused, the trial judge's failure must be material to the outcome of the case. Such a failure is not an independent ground of appeal but raises the possibility of an unfair trial or miscarriage of justice that might attract appellate intervention under s. 686(1)(a)(iii) of the *Criminal Code.* Not every breach of a trial judge's obligation to assist a self-represented accused will render a trial unfair or result in a miscarriage of justice. The court must assess the cumulative effect of any breaches. The assessment must be holistic so that the appellant's arguments are considered in the context of the trial as a whole. The court must determine whether, at the end of the day, the accused had a fair trial or whether, on the contrary, a miscarriage of justice occurred.

In the result, even when a trial judge fails to assist a self-reperensted accused the appeal court will not allow the appeal where this fail was not material to the outcome of the case: *R v Bancroft,* 2024 ONCA 121, at paras 8, 45-49

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

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

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

C. THE DUTY ON TRIAL JUDGES AT SENTENCING

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

D. THE DUTY ON APPEAL JUDGES

An appellate court shares the same duty as trial judges in ensuring fairness, with necessary modifications: *R v Imona-Russel,* 2019 ONCA 252, at para 50

SOLICITOR-CLIENT RELATIONSHIP

For Privilege, see Evidence Law, Privilege

A lawyer has a duty of candour with the client on matters relevant to the retainer. This requires the lawyer to inform the client of information known to the lawyer that may affect the interests of the client in the matter. Put in another way, this requires the lawyer to disclose any factors relevant to the lawyer's ability to provide effective representation.

A lawyer also has a duty of confidentiality towards the client. This requires the lawyer to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of their professional relationship and not to divulge that information unless expressly or impliedly authorized to do so by the client: *R v Lo,* 2020 ONCA 622, at paras 158-159

A. GETTING OFF THE RECORD

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

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

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

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

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

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

STATUTORY INTERPRETATION

A. GENERAL PRINCIPLES

Statutory interpretation is governed by only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *R v Osborne,* 2017 ONCA 129 at para 49; *R v Stipo,* 2019 ONCA 3, at para 175, 176

The starting point is to determine the ordinary meaning of the text. Ordinary meaning refers to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context and is the natural meaning which appears when the provision is simply read through.

In other words, the “plain” or “ordinary” meaning of a word is not dictated by its dictionary meaning nor is it frozen in time: *R v Walsh,* 2021 ONCA 43, at para 60

Although the ordinary meaning of a term may not be the same as its dictionary meaning, dictionary meanings can nonetheless be instructive in identifying ordinary meaning: *R v Joseph,* 2020 ONCA 733, at para 79

With respect to textual analysis, dictionaries can be a useful tool in statutory interpretation, but where – as here – a word might have narrower and broader meanings, a dictionary cannot resolve which meaning was intended by Parliament: *R v Sillars,* 2022 ONCA 510, at para 44

For a comprehensive review of the principles surrounding the determination of the ordinary meaning of the text, see dissenting reasons of Miller J. in *Walsh* at paras 141-150

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

Where Parliament chooses specific means to achieve its ends, the court is not permitted to choose different means any more than it would be permitted to choose different ends. The interpretive question is not what best promotes the section’s purpose, such that courts can modify the text to best bring about that result, but rather how Parliament chose to promote its purpose. Courts are required to respect chosen means as well as ends: *R v Walsh,* 2021 ONCA 43, at para 171 (dissenting opinion of Miller J.A.)

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

Indeed, the context does not always permit assumptions to be made about a legislature's unexpressed thinking. A statute should not be interpreted as substantially changing the law.

In a similar vein, the Courts will not, if they can help it, allow any enactment to overrule existing Common Law *by inference* merely, but it is quite otherwise when the provision of the statute is express, or when there is a general clear intention to change the law: *R v Basque,* 2023 SCC 18, at para 49

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

i. leads to ridiculous or frivolous consequences;

ii. is extremely unreasonable or inequitable;

iii. is illogical or incoherent;

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

or

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

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

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

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

Where a statute is ambiguous and susceptible to two reasonable interpretations, the one that accords with “justice and good sense” will be adopted over the one

that “would lead to extravagant results”. This is true even when the latter interpretation aligns closer to the actual wording of the provision. Even so, if a statute is clear, it must be enforced, no matter how harsh it may be, provided of course that it is constitutional: *R v Menezes,* 2023 ONCA 838, at para 64

From time-to-time, minor statutory imperfections in legislation can be corrected by the courts, but this is to be done only in “relatively rare cases.” The fact of an absurdity alone does not justify a correction by judicial amendment. There is no distinct absurdity approach.’ Provided that a statute is clear, it must be enforced however harsh or absurd or contrary to common sense the result may be: *R v Boily,* 2022 ONCA 611, at para 70

One overriding principle is that care must be taken to interpret penal provisions in a way that is most favourable to an accused. When freedom is at stake, one should at least know that some Act of Parliament requires its restriction in express terms and not by implication: *R v Boily,* 2022 ONCA 611, at para 72

Courts must presume that Parliament intended to enact constitutional, Charter-compliant legislation and strive, where possible, to give effect to this intention. If legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional: *R v JJ,* 2022 SCC 28, at para 18

The presumption against tautology instructs that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Instead, every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. Thus, every part of a provision or set of provisions should be given meaning if possible”, and courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant: *R v Gallone,* 2019 ONCA 663, at para 31; *R v Fox,* 2023 ONCA 674, at para 27

B. PROSPECTIVE OR RETROACTIVE EFFECT

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

New legislation that affects substantive rights may have retroactive effect if it is possible to discern a clear legislative intent that it is to apply retrospectively. Procedural legislation designed to govern only the manner in which rights are asserted or enforced is presumed to apply immediately. Procedural provisions that affect substantive rights in their application are not purely procedural and do not apply immediately. On the other hand, procedural provisions that only affect the exercise of substantive rights are procedural and apply immediately: *R v Chouhan,* 2021 SCC 26 (but see Abella J.'s dissent)

THIRD PARTY RECORDS

A. CROWN'S DUTY

The Crown is not an ordinary litigant in the criminal courtroom or on appeal, its undivided loyalty being to the proper administration of justice. When Crown counsel is notified of the existence of relevant information, unless the notice appears baseless, the Crown is duty-bound as an officer of the court to make inquiries of the police to obtain that information where it is "reasonably feasible to do so": *R v Esseghaier,* 2021 ONCA 162, at para 26

B. O'CONNOR REGIME

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

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

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

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

A trial judge's assessment of the *O'Connor* factors and the balance they strike is an evaluation of mixed fact and law that attracts deference: *R v Dent,* 2023 ONCA 460, at para 113

C. MILLS REGIME

For more on the Mills Regime and third party records in the context of sexual assault cases, see Evidence Law chapter: Sexual Offences (Evidentiary Issues): Applications under s.278

TIME AS AN ELEMENT OF THE OFFENCE

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

However, where the indictment specifies a certain time period, and the time period is critical to the defence, the Crown may be required to prove that the offence occurred within the specified time period: see *R v Sandhu,* 2023 ONCA 150, at para 11

UNDERTAKING

The trial judge can, in appropriate circumstances where the interests of justice so dictate, permit an accused to withdraw an undertaking or admission previously given in the proceedings: *R v Brennan,* 2021 ONCA 132, at para 4

YOUTH LAW

A. PRINCIPLES OF THE YCJA

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

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

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

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

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

B. ADMISSIBLITY OF STATEMENTS

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

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

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

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

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

This informational component requires that police provide the young person with a clear explanation of his or her rights. The Crown's evidentiary burden will be discharged by clear and convincing evidence that the person to whom the statement was made took reasonable steps to ensure that the young person who made it understood his or her rights under s. 146 YCJA. A mere probability of compliance is incompatible with the object and scheme of s. 146, read as a whole. Compliance must be established beyond a reasonable doubt.

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

The informational requirements set out in s. 146(2)(b) are aimed at preventing false confessions by young people inclined to make a statement in order to end the

pressure of interrogation or to please an authority figure and at ensuring that any statement given manifests the exercise of free will.

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

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

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

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

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

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

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

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

First, the protections offered by s. 146(2) are more comprehensive: police are required to inform a young person of his or her right to consult with a lawyer and parent or other adult prior to making any statements. A young person is also entitled to have a lawyer and a parent or other adult present when the police take any statements from the young person. Any waiver of these rights must be audio and videotaped or written and signed by the youth: see YCJA, s. 146(4). In contrast, the right to counsel protected by s. 10(b) must be specifically invoked by a detained individual, and there is no right to have counsel present during a police interview.

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

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

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

ii. SECTION 146(6) – EXCLUSION OF EVIDENCE

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

However, there are two key differences between s. 146(6) and s. 24(2). First, under s. 24(2), the effects of admission of the evidence on the administration of justice as a whole are considered. In contrast, under s. 146(2), the question is whether admission would bring into disrepute the principle that young persons are entitled to enhanced procedural protections to ensure fair treatment and protection of rights. Second, reliance on s. 146(6) is constrained to circumstances where the violation of s. 146(2) amounted to a "technical irregularity". Where the violation is more serious, s. 146(6) is unavailable. In contrast, there is no such limitation in s. 24(2)

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

C. JUDICIAL INTERIM RELEASE

Section 33(8) of the *YCJA* confers exclusive jurisdiction upon "a youth justice court judge" to release a young person charged with an offence referred to in s. 522 of the *Criminal Code*, which incorporates s. 469 offences, from custody. The jurisdiction to hear such applications is concurrent as between Superior Court judges sitting as Youth Court judges, and Youth Court judges, even after an accused elects to be tried in the Superior Court: *R v TJM,* 2021 SCC 6

D. JURISDICTION OF SUPERIOR COURT JUDGES

Where a superior court judge becomes a youth justice court judge by operation of the deeming provisions in s. 13(2) or s. 13(3) of the *YCJA,* the superior court is so deemed for the purpose of the proceeding. "The proceeding" is not confined to the trial, but rather includes any step taken by a youth justice court judge after the

young person elects to be tried at the superior court, including any pre-trial application for judicial interim release, until trial: *R v TJM,* 2021 SCC 6

E. PSCYHOLGOICAL DETENTION

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

1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;

2. Whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;

3. Whether the accused left at the conclusion of the interview or whether he or she was arrested;

4. The stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;

5. Whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;

6. The nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;

7. The subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance,

youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained: : *R v NB,* 2018 ONCA 556 at para 118

F. RETENTION OF YOUTH RECORDS

In *M.M.*, 2018 ONCJ 515, the Ontario Court of Justice imposed a conditional discharge on a young adult for theft under $5,000 and breach of a youth sentence order, not based on the accused's prior good character but because of the impact an adult conviction would have on her youth record. The accused had a lengty youth record, and this was her first findings of guilt as an adult. A conviction would result in the permanent addition of her youth record to her adult record.

G. ACCESS TO YOUTH RECORDS

For a review of the principles relating to access to you records and the open court principle in the context of youth proceedings, see *R v Canadian Broadcasting Corporation,* 2024 ONCA 765