
JURY TRIALS

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JURY SELECTION PROCESS

A. ELIGIBILITY FOR JURY SERVICE

Section 3(1) of the *Juries Act*, R.S.O. 1990, c. J.3, provides that every person engaged in the enforcement of law is ineligible to serve as a juror, including:

... without restricting the generality of the foregoing, sheriffs wardens of any penitentiary, superintendents, jailers or keepers of prisons, correctional institutions or lockups, sheriff's officers, police officers, firefighters who are regularly employed by a fire department for the purposes of subsection 41 (1) of the *Fire Protection and Prevention Act*, 1997, and officers of a court of justice [Emphasis added.]

The *Police Services Act*, R.S.O. 1990, c. P.15, s. 2(1) excludes an auxiliary member of a police force from the definition of "police officer."

The plain meaning of s. 3(1) of the *Juries Act*, describing "every person engaged," is that persons who are currently so employed are excluded from jury service.

Note that ss. 670 and 671 of the *Criminal Code* limits the remedy available for discovery of an irregularity respecting juror eligibility after a verdict is rendered:

670. Judgment shall not be stayed or reversed after verdict on an indictment

(a) by reason of any irregularity in the summoning or empanelling of the jury; or

(b) for the reason that a person who served on the jury was not returned as a juror by a sheriff or other officer.

671. No omission to observe the directions contained in any Act with respect to the qualification, selection, balloting or

distribution of jurors, the preparation of the jurors' book, the selecting of jury lists or the drafting of panels from the jury lists is a ground for impeaching or quashing a verdict rendered in criminal proceedings.

These curative sections were applied in *R. v. Rushton* (1974), 20 C.C.C. (2d) 297 (Ont. C.A.), where it was discovered after the verdict that a juror was the wife of a police officer and exempted from service under the version of the *Juries Act* then in force. They were also applied in *R. v. Stewart*, [1932] S.C.R. 612, where a member of the jury was ineligible because he had been convicted of an indictable offence: *R v Zvolensky*, [2017 ONCA 273](#) at paras 190-197

B. INHERENT POWERS OF THE TRIAL JUDGE

The trial judge has inherent power to control the jury selection process to make effective use of court resources and ensure fairness to all parties: *R v Nouredine*, [2015 ONCA 770](#) at para 38; *R v Riley*, [2017 ONCA 650](#) at paras 109-110

The latitude afforded to trial judges in respect of the jury selection process is particularly applicable where the *Criminal Code* does not specifically address an issue in jury selection. The *Criminal Code* is not exhaustive of the trial judge's authority over jury selection. This inherent jurisdiction does *not*, however, extend to permit orders that contradict mandatory *Criminal Code* requirements: *R v Province*, [2019 ONCA 638](#), at para 69

A trial judge has an inherent jurisdiction, to control the jury selection process involving challenges for cause. This discretion is exercised to prevent an abuse of the selection process and to ensure fairness to the parties, as well as to the prospective jurors: *R v Province*, [2019 ONCA 638](#), at para 68

C. CHALLENGE FOR CAUSE

A wide range of characteristics are the proper subject of a challenge for cause. The trial judge enjoys significant discretion to determine how far the parties may go in the questions that are asked. Questions ought to explore the juror's willingness to identify unconscious bias and to strive to cast it aside. Appropriate questions may relate to aspects of the case such as race, addiction, religion, occupation, sexual orientation or gender expression. Questions should balance the accused's right to an impartial jury and the privacy interests of prospective jurors: *R v Chouhan*, [2021 SCC 26](#)

In determining whether to permit a challenge for cause under s. 638(1)(b) for want of indifference, the standard to be met in the supportive material is a "realistic potential for partiality": *R v Durant*, [2019 ONCA 74](#), at para 148

A trial judge has an inherent jurisdiction, to control the jury selection process involving challenges for cause. This discretion is exercised to prevent an abuse of the selection process and to ensure fairness to the parties, as well as to the prospective jurors: *R v Province*, [2019 ONCA 638](#), at para 68; *R v Poobalasingham*, [2020 ONCA 308](#), at para 69

An accused who seeks to challenge prospective jurors under s. 638(1)(b) (impartiality) must establish a realistic potential for the existence of partiality on a ground sufficiently articulated in the application. In assessing whether an accused has met this threshold, courts have considered the availability and efficacy of various components of the trial process to serve as antidotes in ensuring impartiality. Only where these components are insufficient to negate a realistic potential of partiality will the challenge be permitted to proceed: *R v Poobalasingham*, [2020 ONCA 308](#), at paras 71-72; see also para 84

In order to demonstrate a realistic potential for juror partiality, the two factors must be satisfied: (1) that there exists a widespread bias in the community; and (2) that, despite trial safeguards, including jury instructions, some jurors will not be able to set aside that bias: *R v JC*, [2021 ONCA 787](#), at para 106

Accused persons do not have a right to challenge prospective jurors on the base of their proficiency in the English language. Section 530 of the *Criminal Code* created a right for the accused to have his trial in an official language of his

choice. This did not give rise to a challenge for cause based on language competency: *R v Poobalasingham*, [2020 ONCA 308](#)

Deciding whether to permit a challenge for cause engages an exercise of judicial discretion.. Therefore, an appellate court's function is a narrow one, confined to inquiring into whether the decision demonstrates an error in principle or caused a miscarriage of justice: *R v JC*, [2021 ONCA 787](#), at para 104

D. OLD METHOD OF JURY SELECTION (S.640)

i. ROTATING VERSUS STATIC TRIERS

The selection of jurors in a case involving a challenge for cause is governed by [s.640](#). There are three options available for the trial of a challenge for cause:

1. rotating triers with the unsworn prospective jurors remaining in the courtroom;
2. rotating triers with the unsworn prospective jurors excluded from the courtroom; or
3. static triers with both sworn and unsworn prospective jurors excluded from the courtroom: *R v Murray*, [2017 ONCA 393](#) at para 60

"A formal application under s. 640(2.1) to have sworn and unsworn jurors excluded during the trial of the challenge for cause and to have static triers try that challenge is not dispositive against the use of static triers. Substance trumps form. A decision by defence counsel to choose static triers may amount to the functional equivalent of an application to exclude sworn and unsworn jurors under s. 640(2.1). Likewise, a desire to exclude prospective jurors during the challenge process and satisfaction with properly-vetted static jurors:" *Murray* at para 55

ii. RIGHT TO ROTATING TRIERS

The accused has the right to rotating triers, pursuant to [s.640\(2\)](#) of the Criminal Code, unless the accused brings a motion under [s.640\(2.1\)](#).

Where no jurors have been sworn and no order made under s. 640(2.1), rotating triers are appointed by the presiding judge from persons present in the courtroom. The “persons present” may include prospective jurors and others who are not members of the jury panel and may not even be qualified for jury service under provincial law: *Riley* at para 100

The use of rotating triers avoids the risk of one trier skewing the jury selection process, and gives each juror a role in the selection of their fellow jurors, which promotes responsibility and cohesiveness: *R v Nouredine*, [2015 ONCA 770](#) at paras 33-35, 65

The trial judge does not have inherent jurisdiction to order the use of static triers despite requirement in s.640(2): para 3

The mere fact of the amendments that added subsections (2.1) and (2.2) to s. 640 and created a new method of determining the truth of the challenges for cause did not eliminate or whittle down the authority of a trial judge presiding over a challenge for cause to be determined by rotating triers to exclude prospective (unsworn) jurors from the courtroom until the selection process has been completed: *Grant*, at paras. 18, 37, 41; *Murray*, at para. 53, 60; *R v Husbands*, [2017 ONCA 607](#) at para. 35; *R v Riley*, [2017 ONCA 650](#) at paras 62, 69; *R v Esseghaier*, [2019 ONCA 672](#), aff'd at [2021 SCC 9](#); *R v Cumor*, [2019 ONCA 747](#)

Exclusion of the unsworn prospective jurors during the use of rotating triers is discretionary, linked to the need to preserve impartiality in the jury selection process. A trial judge, invited to exercise this discretion is entitled to insist on a sufficient reason for doing so. What is sufficient depends on the circumstances of each case: *R v Murray*, [2017 ONCA 393](#) at para 53

Some courts have held that this discretion to exclude unsworn prospective jurors when the truth of the challenge for cause is tried by rotating triers extends to sworn jurors who are not acting as triers: *Murray* at para 54

iii. STATIC TRIERS

Absent an application by an accused to exclude all jurors from the courtroom during the trial of the challenge for cause, static triers may not be used to try the truth of the challenge. Static triers may be used pursuant to [s.640\(2.1\) and \(2.2\)](#),

but they do not become part of the jury: *R v Noureddine*, 2015 ONCA 770, at paras 30, 36; *R v Murray*, 2017 ONCA 393 at para 46; *R v Riley*, 2017 ONCA 650 at para 68

The procedure put in place by ss. 640(2.1) and (2.2) requires two pre-conditions:

- i. an application by an accused for an order excluding all jurors – sworn and unsworn – from the courtroom until the truth of the ground of challenge for cause is determined; and
- ii. a finding by the presiding judge that exclusion is necessary to preserve the impartiality of the jurors: *Husbands* at para 34; *Riley* at para 65

Sections 640(2.1) and (2.2) do not require that the application be in writing or any particular statutory form. No precise words need be uttered in oral applications. Substance triumphs, not form: *Husbands*, at paras. 38-39; *Riley* at para 66

The order does not issue as of right but is subject to the trial judge's discretion: *Husbands*, at para. 34; *Murray*, at para. 43; *Grant*, at para. 12; *Riley* at para 67

The consequences of an order under s. 640(2.1) are fourfold:

- iii. the triers of the truth of the challenge for cause will be selected in accordance with s. 640(2.2);
- iv. the same triers will determine the truth of all challenges for cause;
- v. the rotating triers procedure will not be available as a method of trying the challenge for cause; and
- vi. all jurors, both sworn and unsworn, will be excluded from the courtroom until the challenge for cause process has been completed and a full jury, including any alternates and additional jurors, has been empanelled *Riley* at para 68

Where an order is made under s. 640(2.1), static triers are appointed by the presiding judge from prospective (unsworn) jurors or persons present in the courtroom. The “persons present” include those in the courtroom who are not prospective (unsworn) jurors and, as under s. 640(2), may not be qualified for jury service: *Riley* at para 101

The failure to invite submissions on the prospective juror selected as the second static trier does not invalidate the process: *Riley* at para 129

A trial judge has inherent jurisdiction to substitute static triers in situations other than an inability to reach a unanimous decision about the acceptability of a prospective juror: *R v Province*, [2019 ONCA 638](#), at paras 78, 93

iv. PROCEDURAL DEFECTS IN JURY SELECTION

The failure to require that the prospective jurors be sworn or affirmed does not mandate appellate intervention. Neither does general variations in the challenge inquiries: *Riley* at para 129

There is no obligation on the trial judge to use the same language for each prospective juror who is subject to the pre-screening procedure. Substance prevails, not form: *Riley* at para 129

The curative proviso in [s. 686\(1\)\(b\)\(iv\)](#) can be applied to cure jury selection errors where the “trial court had jurisdiction over the class of offence” and the court of appeal is of the opinion that “the appellant suffered no prejudice” as a result of the error. For the purposes of the proviso, “jurisdiction” is concerned only with the trial court’s capacity to deal with the subject-matter of the charge (i.e., whether it is a 469, indictable, or summary conviction offence), as it is only a lack of subject-matter jurisdiction that deprives the court *ab initio* of all jurisdiction. In the context of applying [s. 686\(1\)\(b\)\(iv\)](#) to a procedural error in jury selection, the prejudice inquiry is focused solely upon the risk of depriving accused persons of their right, under [s. 11\(d\)](#) of the *Charter*, to a fair trial by an independent and impartial jury. Where the appellant is able to show that a procedural error led to an improperly constituted jury, the onus shifts to the Crown to show, on a balance of probabilities, that the appellant was not deprived of their right to a fair trial by an independent and impartial jury and, consequently, suffered no prejudice: *R v Esseghaier*, [2021 SCC 9](#)

In *Esseghaier*, the SCC held that the accused suffered no prejudice despite the improper use of static triers, as, inter alia, the procedure chosen one of the two legally sanctioned procedures for trying challenges for cause at the time of trial

Esseghaier overturned previous appellate jurisprudence that held that that:

- where a jury has been selected by following a challenge for cause procedure disavowed by an accused, thus depriving the accused of the option to invoke their preferred method of selecting the triers, s.

686(1)(b)(iv) cannot preserve the verdict rendered at trial: *Noureddine*, at paras. 57, 68; *Husbands*, at para. 41; *Riley* at para 73

- the improper use of static triers to determine the challenge for cause cannot be cured by s.686(1)(b)(iv) because the court will never have been properly constituted in the first place, and jurisdiction therefore never arose: *R v Noureddine*, 2015 ONCA 770 at paras 49-56; *R v Esseghaier*, 2019 ONCA 672; *R v Cumor*, 2019 ONCA 747
- The failure to use rotating triers cannot be cured by s.670 or 671; these apply only to irregularities, and not to a situation where the accused has been deprived of a statutory right and/or where an objection is raised before the verdict: *R v Noureddine*, 2015 ONCA 770 at paras 41-45
- The failure to use rotating triers over the express objection of counsel also creates prejudice by undermining the appearance of fairness in the proceedings and the due administration of justice: *Noureddine* at paras 64, 68

The curative provisio can apply where the accused wanted to use static triers but failed to bring the appropriate motion under s.640(2.1): *Noureddine* at para 57; *R v Kossyrine*, 2017 ONCA 388 at paras 29-30.

Importantly, in determining whether the accused in fact made an application under s.640(2.1), the substance of defence counsel's actions, and not the form, is important. The context of the record may lead to the inference that the accused, in substance if not in form, did make an application under s.640(2.1): *Kossyrine*, at paras 22-28; *R v Grant*, 2016 ONCA 639; *R v Mansingh*, 2017 ONCA 68

Only the party whose interest was adversely affected by the error made in the jury selection process can rely on that error to set aside a verdict returned by the jury: *Noureddine* at para 77

E. INSTRUCTIONS TO THE TRIERS

It is an error of law for a trial judge to fail to adequately instruct the triers about the nature of their task and how they are to go about it: see *R v Brown*, (2002), 166 C.C.C. (3d) 570 (Ont. C.A.),

While there is nothing wrong with a trial judge giving those instructions to the jury panel as a whole (especially with the agreement of counsel), the trial judge should make it very clear to the jury panel why he or she is doing this, and the importance of the instructions. Among other things, the trial judge should make it clear to the jury panel that they must listen carefully to the instructions because each of them may be called upon to be a trier at some point.

If a trial judge does decide to instruct the entire jury panel at once with respect to the role of a trier, then it is also desirable that the trial judge should ask each trier, as they are sworn, if they heard the instructions and whether they have any questions. In this way, the trial judge can be satisfied that the jury panel member was actually listening when the instructions were given. A trial judge may also wish to give the triers a written copy of the instructions, for their reference, while they are performing their duties as triers.

There is no absolute rule regarding how these instructions should be communicated to the triers. Different judges will express the instructions in different ways. The point is to ensure that the various topics are covered so that the triers understand their role. If it becomes apparent, as the challenge process unfolds, that any trier does not understand his or her role, then the trial judge should reinstruct them: *R v Hungwe*, [2018 ONCA 456](#) at paras 60, 63, 64

The instructions should cover each of the following areas:

1. The process is designed to give each side the fairest trial possible.
2. Each prospective juror will be sworn or affirmed to tell the truth in answering the question.
3. Every jury panel member will be asked the same question. He or she will give an answer. The triers' job is to listen to the answer each person gives and decide, based on the answer, whether that person is acceptable or not acceptable.
4. An acceptable juror is a person who would likely approach jury duty with an open mind and decide the case on the evidence given at trial and the legal instructions given by the trial judge.
5. The acceptability of a prospective juror is determined on a balance of probabilities.

6. Just because a person has a prejudice or bias against a racial or ethnic group does not mean, by itself, that the person is not acceptable as a juror to try the case. However, before finding anyone who has a prejudice or bias against a racial or ethnic group acceptable as a juror, the triers must find that that person would likely put that prejudice or bias aside in deciding the case.

7. The role of the triers is to examine the impartiality of any prospective juror based on their attitudes towards matters of race and whether their ability to decide the case solely on the evidence will be affected by their attitudes.

8. For anyone to be acceptable as a juror, both triers must agree that the person is acceptable. However, they do not have to agree on the acceptability of any person. Before they give their decision, they should discuss the matter between themselves in the jury box. They also have the right to retire to a room to consider their decision, if they wish.

On the last point, there are often practical difficulties that would be encountered if the triers actually did wish to retire to a separate room to consider their decision. There is nothing wrong with a trial judge adding a comment to his or her instruction to the effect that it would probably not be necessary for the triers to do so in normal circumstances. What is important is that the triers know that the option exists: *R v Hungwe*, [2018 ONCA 456](#) at paras 61-62

Deficiencies in the instructions on the challenge for cause process will not always render the conduct of the trial so defective as to require it to be redone. Rather, the extent of the deficiencies, and their potential impact, will have to be evaluated on a case by case basis. The issue to be determined is whether the circumstances of the particular case reveal a reasonable likelihood that the triers misunderstood the nature of their task and the procedure they were to follow: *Hungwe* at para 66

F. VETTING JURORS

The enactment of s. 632 of the *Criminal Code* in 1992 codified the common law authority of a trial judge to pre-screen prospective jurors for “obvious partiality”. The common law authority was limited to non-controversial situations of partiality and did not extend to controversial or disputed questions:

Section 632 provides:

The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or (3.1) or any challenge has been made in relation to the juror, for reasons of

(a) personal interest in the matter to be tried;

(b) relationship with the judge presiding over the jury selection process, the judge before whom the accused is to be tried, the prosecutor, the accused, the counsel for the accused or a prospective witness; or

(c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

Section 632(c) can be invoked as a basis to pre-screen the entire panel of prospective jurors. This is accomplished by the presiding judge asking general questions of the panel to uncover manifest bias or personal hardship and to exclude prospective jurors on either of those grounds.

The inherent authority of the presiding judge to control the jury selection process extends to pre-screening triers whose role it will be to determine whether prospective jurors, if selected by the parties, will approach their task impartially.

This inherent authority, a creature of the common law, has now been codified in s. 632 of the *Criminal Code*, in particular, in section 632(c) which authorizes pre-screening of prospective jurors for “personal hardship or other reasonable cause”.

In appropriate cases, the presiding judge should invite submissions from counsel about the need for and subject-matter of any inquiries that might be made of the prospective triers. This is so whether the prospective triers are the first of two rotating triers or the static triers who will try every challenge for cause. Any questions asked of the prospective triers must be relevant to the suitability of the prospective trier to discharge his or her responsibility as a trier of the challenge in accordance with the presiding judge’s instructions on that issue. That responsibility is to decide, on the basis of the questions asked of and the answers given by the prospective juror whether, if selected by the parties, the

prospective juror would likely decide the case on the basis of the evidence adduced at trial and the instructions of the trial judge and not otherwise.

It is not mandatory that potential triers respond successfully to the challenge for cause questions. Indeed, a successful response by prospective triers to the challenge for cause questions ensures that they are approaching their duties as adjudicators of the challenge impartially: *Riley* at paras 116-128

G. PEREMPTORY CHALLENGES

i. RIGHT TO PEREMPTORY CHALLENGES (OLD REGIME)

The accused has the right to peremptorily challenge a juror after unsuccessfully challenging that juror for cause: *R v Nouredine*, 2015 ONCA 770 at paras 78-81

The denial of the accused's right to peremptorily challenge prospective jurors is a right personal to the accused in which the prosecution has no interest. The Crown cannot therefore rely on the error as a basis for nullifying an acquittal returned by the jury: *Nouredine* at paras 80-81

ii. ABOLITION OF PEREMPTORY CHALLENGES (NEW REGIME)

The abolition of peremptory challenges does not infringe the s. 11(d) Charter rights of accused persons. Section 11(d) does not entitle the accused to any particular procedure. The jury selection regime continues to provide the independent and impartial jury that each accused is owed under s. 11(d): representative jury rolls provide a fair opportunity for a broad cross-section of society to serve as jurors, randomness in the jury selection process bolsters independence and impartiality, and challenges for cause and the trial judge's power to excuse prospective jurors provide mechanisms for removing prospective jurors whose impartiality is in question: *R v Chouhan*, 2021 SCC 26

H. GENERAL JURY INSTRUCTIONS

Trial judges should consider jury charges and mid-trial instructions that caution against the risk that bias will taint the jury’s deliberations. Jury instructions can expose biases, prejudices, and stereotypes that lurk beneath the surface. General instructions on biases and stereotypes ought to highlight that jurors may be aware of some biases while being unaware of others and should exhort jurors to approach their task with self-consciousness and introspection. Instructions on specific biases and stereotypes that arise on the facts of the case should consider context and the harmful nature of stereotypical assumptions or myths, for example, the effects of colonization and systemic racism on Indigenous peoples or myth-based reasoning in sexual assault prosecutions: *R v Chouhan*, [2021 SCC 26](#).

I. STAND-ASIDE PROVISIONS

The power to direct jurors to stand by to maintain public confidence in the administration of justice under s. 633 of the Criminal Code provides a means to exclude a juror who might be partial but who survived a challenge for cause: *R v Chouhan*, [2021 SCC 26](#), at para 70

The provision cannot be used to actively promote jury diversity. This procedural error cannot be cured by the proviso, as the jury selection method is not one approved by Parliament or sanctioned by the courts: *R v Azzi*, [2022 ONCA 366](#), at paras 31, 41

DISCHARGING A JUROR

Section 644(1) provides statutory authority for a trial judge to discharge a juror at any time “in the course of a trial”. The discretionary authority may only be exercised where the judge is satisfied that the juror should not continue to act by reason of:

1. illness; or
2. other reasonable cause.

Each case must be tackled according to its own idiosyncracies. When asked to discharge a juror under s. 644(1), a trial judge must follow this non-exhaustive list of considerations, ensuring that the process will:

- a. be fair to all the parties and all the jurors;
- b. be conducted in open court, on the record, and in the presence of the accused and counsel on both sides;
- c. enable the trial judge to determine the true basis of the claim for discharge and to resolve it; and
- d. preserve the integrity of the trial process and the impartiality of the jury.

Juror inquiries under s. 644(1) should take place in open court, on the record, in the presence of the accused and counsel. The inquiry should be conducted by the trial judge. At least so far it relates to the juror(s) affected, counsel should be permitted to suggest questions to be asked of the juror(s) and to make submissions about the decision to be made, but not permitted to question the juror directly:

No further oath or affirmation is required before the juror is to answer questions. S/he remains bound by the oath or affirmation s/he took when empaneled.

A juror may be discharged under s. 644(1) for lack of impartiality. The presumptive starting point is that all jurors are impartial. The challenging party must demonstrate a reasonable apprehension of bias. This 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 grounds for the apprehension must be substantial.

In concluding whether a reasonable apprehension of bias has been established, a judge tasked with an application under s. 644(1) could take into account, among other things, the juror's oath or affirmation; the presumption of impartiality; and the contents of the judge's instructions to the jury on fundamental legal principles like the need to keep an open mind, how to assess evidence, the irrelevance of extraneous considerations, and the proper conduct of the deliberative process.

A decision under the subsection is afforded substantial deference and set aside only when it is tainted by an error of law or principle, there is a misapprehension

of material evidence, or it is a decision that is plainly unreasonable: *R v Durant*, [2019 ONCA 74](#), at paras 137-152; *R v Wood*, [2022 ONCA 87](#), at paras 151-152

The failure to follow the procedure under s.652.1(2) for randomly discharging any jurors in excess of 12 at the time of deliberations constitutes a reversible error that cannot be remedied through the curative proviso: *R v Rose*, [2020 ONCA 306](#), at paras 28-33

OPENING AND CLOSING ADDRESSES

In terms of the ordering of closing addresses, there is no evidence that an accused who addresses the jury first is less able to defend against the persuasive aspects of the Crown jury address than an accused who goes last: *R v Noureddine*, [2022 ONCA 91](#), at para 40

A. OPENING ADDRESSES

The Crown should use an opening to introduce the parties, explain the process, and provide a general overview of the evidence the Crown anticipates calling in support of its case. The Crown should not refer to evidence the admissibility of which is in dispute. For example, since a statement or confession an accused person made to a person in authority does not become evidence until ruled admissible, Crown counsel should not refer to it in an opening: *R v Clause*, [2016 ONCA 859](#) at paras 32-33

Where a trial judge fails to redress properly the harm caused by a clearly unfair or significantly inaccurate jury address, a new trial may result. The question is whether, in the context of the entire trial, the remarks and the trial judge's response or failure to respond caused a substantial wrong or miscarriage of justice: *R v Clause*, [2016 ONCA 859](#) at paras 38-39

B. CLOSING ADDRESSES

Counsel in closing argument to a jury cannot make submissions that are unavailable as a matter of law, or on the evidence. Nor can counsel misstate the evidence or the law. When they do, the trial judge may be required to provide a timely and focused correction. If counsel's allegedly improper submissions become a ground of appeal, it falls to the Court of Appeal to decide whether those submissions, considered beside any correction provided by the trial judge, and in the context of the entire trial, resulted in a miscarriage of justice: *R v MacKenzie*, [2020 ONCA 646](#), at para 18

In closing addresses, counsel, both prosecuting and defending, are entitled to make submissions about the effect of absence of evidence of a forensic connection between an accused and the scene of a crime. What they can say is bounded by the evidence given at trial and subject to the prohibition against counsel, especially Crown counsel, putting before the jury, as facts for their consideration, matters of which there is no evidence: *R v Hassanzada*, [2016 ONCA 284](#) at para 72

A trial judge has the authority, in some cases the duty, to define the extent to which counsel may discuss a subject in their final addresses and to balance what is said there with an instruction to the jury on the same subject-matter: *Hassanzada* at para 73

For more on the law on the bounds of a crown closing in jury trials, see: *R v Taylor*, [2015 ONCA 448](#)

The Crown is afforded considerable latitude when making a closing address. But forceful advocacy has clear limits and in making closing submissions, the Crown "should not ... engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions that effectively undermine a requisite degree of fairness": *R v John*, [2017 ONCA 615](#) at para 77, [citations omitted]; *R v Walsh*, [2021 ONCA 43](#), at para 89

The Crown must limit its means of persuasion to facts found in the evidence adduced before the jury. The Crown is expected to be rigorous but fair, persuasive, and responsible: *R v Walsh*, [2021 ONCA 43](#), at para 89

Crown counsel must also avoid comments or behaviour that could be taken as an invitation to the jury to decide the case based on emotion or the personal opinion of Crown counsel: *R v MacKenzie*, [2020 ONCA 646](#), at para 19

The Crown is not entitled to corrupt the fair reach of the evidence by inviting the jury to speculate in order to find guilt established. Neither defence or Crown counsel is entitled to invite the jury to use an item of evidence in reaching its verdict for a purpose other than that for which it was admitted and the law permits.

Closing addresses may contain some measure of argument and advocacy. Counsel on both sides are entitled to a fair degree of latitude in their closing addresses.

A trial judge's failure to provide an adequate jury caution, where Crown counsel's comments are sufficiently prejudicial, amounts to an error of law: *R v Barrett*, [2022 ONCA 355](#), at para 37

The standard for appellate intervention is whether, considered in the context of the trial as a whole, including the evidence adduced and the positions advanced, the substance or manner of the Crown's closing address has caused a substantial wrong or miscarriage of justice, including by prejudicing the accused's right to a fair trial: *R v McGregor*, [2020 ONCA 307](#), at paras 179-184

The Crown is entitled to urge the jury to disbelieve the accused's evidence because it conflicts with the evidence of other witnesses who the Crown urges are credible. The credibility of any individual witness, including the accused, must, of necessity, be assessed having regard to all of the relevant evidence and the jury's evaluation of the credibility of evidence given by other witnesses. However, in making this argument, the Crown counsel cannot suggest that disbelief of the accused be equated with guilt, or invite the jury to decide the case by choosing between competing versions of events: *R v MacKenzie*, [2020 ONCA 646](#), at paras 28-31

Where a defence seeks an adverse inference to be drawn from the Crown's failure to call a witness, the Crown can, in closing address, provide an explanation for the failure. That explanation has to in ordinary logic and experience, furnish a plausible reason for nonproduction: *R v AC*, [2018 ONCA 333](#) at para 75

Inviting the jury to place themselves in the accused's position and to engage their emotions or personal beliefs has been held to be "wrong" and "improper": *R v Premji*, [2019] OJ No 3279 (CA) at para 9

On its own, use of the terms “not denied”, “unchallenged” or “uncontradicted” in relation to the testimony of a particular witness does not amount to a comment on the failure of an accused to testify which is prohibited by s. 4(6) of the *Canada Evidence Act*. To run afoul of the prohibition, the comment must invite an inference of guilt from silence: *R v JH*, [2020 ONCA 165](#), at paras 171-175

C. REMEDIESS

The trial judge is in the best position to gauge the impact of closing submissions made by either counsel. The trial judge can take the temperature of the trial. The trial judge can assess the apparent significance or otherwise of the impugned remarks, and determine whether and to what extent correction or other remedial action may be required. The Court of Appeal accords substantial deference to the trial judge’s conclusions on these issues: *R v McGregor*, [2020 ONCA 307](#), at para 182

When improper comments by Crown counsel are sufficiently prejudicial, a trial judge has a duty to intervene; a failure to do so will constitute an error of law.

Where, for example, the Crown refers in its opening to anticipated evidence that subsequently is not led or is ruled inadmissible, it is the duty of the trial judge to tell the jury explicitly that the statements complained of are not in evidence and they must try to free their minds from them:

Where a trial judge fails to redress properly the harm caused by a clearly unfair or significantly inaccurate jury address, a new trial may result. The question is whether, in the context of the entire trial, the remarks and the trial judge’s response or failure to respond caused a substantial wrong or miscarriage of justice: *R v Clause*, [2016 ONCA 859](#) at paras 38-39;

The appellate court should intervene only if the trial judge exercised their well-established remedial discretion unreasonably or acted on a wrong principle. A relevant factor in the assessment is the position of defence counsel at trial: *R v Chacon-Perez*, [2022 ONCA 3](#), at paras 126-127

i. MISCHARACTERIZING THE EVIDENCE

Serious mischaracterizations of the evidence can result in an unfair trial. This is particularly so when the mischaracterization relates to forensic evidence. There is always the risk that a jury may treat forensic evidence as infallible because of its scientific nature and, as a result, overemphasize its significance: *R v JS*, [2018 ONCA 39](#) at para 78

JURY CHARGE

A. GENERAL PRINCIPLES

A review of the basic principles regarding the trial judge's instructions to the jury and the standard of appellate review: *R v. Sinobert*, [2015 ONCA 691](#) at paras 32-34; see especially cited cases in *R v Newton*, [2017 ONCA 496](#) at para 10

A jury charge does not need to be perfect, but it does need to be fair: *R v Olufeko*, [2022 ONCA 308](#), at para 39

i. COMPONENTS OF THE CHARGE

Ideally, the charge should contain some basic components. In addition to general instructions on the presumption of innocence, the burden of proof, how to assess the credibility and reliability of witnesses' testimony and the like, the charge on the particular case should contain the following five components:

1. the legal framework, typically the elements of the offence or offences with which the accused is charged;
2. the factual issues arising out of the legal framework that the jury must resolve;
3. the material evidence relevant to these issues;
4. the position of the Crown and defence on these issues; and
5. the evidence supporting each of their positions on these issues: *R v Newton*, [2017 ONCA 496](#) at para 11

The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case: *R v Brown*, [2021 ONCA 320](#), at para 15

ii. REVIEWING THE LAW

If the jury does not clearly understand the basic and fundamental concept of the burden of proof, including the meaning of the term “reasonable doubt”, no matter how exemplary the directions to the jury may be in every other respect, “if they are wanting in this aspect the trial must be lacking in fairness”: *R v Brown*, [2018 ONCA 1064](#), at para 15

A trial judge should identify the relevant legal instructions instead of including large extracts from a model charge manual relating to matters not in issue. Uncertainty about what to include can easily be settled by raising the issue directly with counsel during the pre-charge conference to ascertain whether any elements of the offence can be omitted from the jury direction as immaterial to the case: *R v MRS*, [2020 ONCA 667](#), at paras 109, 111

if a party misstates the law, a trial judge should not repeat that mistaken position in the jury charge unless it is for the purpose of correcting the error. Quite naturally, a jury would infer absent such correction that the position being repeated before them by the trial judge is a correct one, available for them to accept: *R v Stojanovski*, [2022 ONCA 172](#), at para 134

iii. PARTICULAR CREDIBILITY ISSUES

It is an error of law for the trial judge to fail to give the jury special instructions about assessing credibility and prior inconsistent statements, which are designed to focus the jury’s attention on particular problems with the evidence in the case, and to provide them with tools for assessing the evidence: *R v WD*, [2019 ONCA 120](#), at paras 12, 14, 17

iv. REVIEWING THE ISSUES AND THE RELEVANT EVIDENCE

The trial judge must adequately relate the evidence to the issues and should not simply put evidence in bulk to the jury, leaving it to them to determine the relationship between the evidence and the issues that must be decided: *R v Duncan*, [2015 ONCA 928](#) at para 29; see, for example, *R v Lewis*, [2018 ONCA 351](#) at para 28; *R v Mendez*, [2018 ONCA 354](#) at paras 14-15

A witness by witness recitation of the evidence is almost always ineffective, for at least two reasons. First the recitation tends to be unnecessarily detailed; the jurors will naturally have difficulty processing what evidence is important and what evidence is not. Second, and most importantly, the summary of the evidence bears no relationship whatsoever to the issues in dispute. The evidence at trial has to be organized for the jury according to its relevance to the issues. Otherwise the jury will not appreciate its significance: *Newton* at paras 15-16. For additional examples from the case law, see citations in *R v Newton*, [2017 ONCA 496](#), at paras 17-18; see also *R v Cooke*, [2017 ONCA 749](#); *R v Headley*, [2018 ONCA 915](#), at paras 29-35, 48; *R v Davidson*, [2020 ONCA 218](#); *R v MRS*, [2020 ONCA 667](#), at para 108; *R v McGill*, [2021 ONCA 253](#), at para 114

There may be a rare case where an appellate court will deem a witness by witness recitation adequate: a simple case, a short trial, only a few witnesses: *Newton* at para 19.

A trial judge need only review relevant evidence once and is under no duty to repeat its substance in connection with every issue to which the evidence may relate. What is essential is that, taking the charge as a whole, the jury is left with a sufficient understanding of the facts as they relate to the issues: *R v JB*, [2019 ONCA 591](#), at para 135; *R v Debassige*, [2021 ONCA 484](#), at para 107

In general, where an accused denies participation in the conduct requirements of an offence, it makes good sense to instruct the jury to consider and determine the participation or identity issue first, before moving on to issues of mens rea: *R v Rosen*, [2018 ONCA 246](#) at para 24

An assessment of the adequacy of jury instructions relating the evidence to the issues requires a functional and contextual analysis. There are essentially two questions:

1. Would the jury appreciate the potential significance of the evidence to the issues from both the Crown and defence perspective?
2. Was the instruction fair, in the sense that it represented an even-handed treatment of the evidence as it related to the issues the jury had to decide? *R v Figliola*, [2018 ONCA 578](#) at para 11

The charge should ensure the jurors would adequately understand the issues involved and the evidence they should consider in resolving the issues. They have to understand the law to be applied to those issues and the evidence, the positions of the parties, and the evidence relevant to the positions of the parties. The trial judge should isolate the evidence that is relevant to a particular issue: *R v HW*, [2022 ONCA 15](#), at para 84

The nature of the trial is an important feature of the contextual analysis required in assessing the adequacy of a jury instruction. For example, in *Figliola*, the Court of Appeal held that, as it was a lengthy trial of five months with a six-week delay between the end of the evidence and the jury instruction, it was open to the trial judge, given the length of the trial and the long delay between the evidence and the jury instruction, to conclude that a thorough review of the evidence would assist the jury in discharging its duties.

The question is not whether the trial judge chose the most effective method of instruction, but whether his instructions, as given, adequately related the evidence to the issues.

The entire charge must be examined. For example, in relating evidence to an issue, the trial judge may refer to certain evidence in a general way. However, when the trial judge summarizes the evidence for the jury, he may refer to that evidence in considerably more detail. When deciding whether the trial judge adequately related the evidence to the issues, the appellate court is entitled to draw a connection between the reference to a part of the evidence in one part of the jury instruction, and the detailed summary of that same evidence in another part of the jury instruction: *Figliola* at paras 12-13

The extent to which a trial judge reviews the evidence in final instructions varies from one case to the next and resides largely within the discretion of the trial judge: *R v Debassige*, [2021 ONCA 484](#), at para 108

Without more, non-direction on an item of evidence is not misdirection. Nor does it amount to a failure to put the position of the defence to the jury. Non-direction on an item of evidence only becomes misdirection where the item of evidence omitted is the foundation of a defence: *R v Debassige*, [2021 ONCA 484](#), at para 109

Errors in the recitation of evidence in a charge to the jury are different than misapprehensions of evidence that appear in a judge's reasons for judgment in a judge-alone trial. Judicial references to the evidence in a jury trial serve as an *aide memoire* for jurors. They are designed to assist the jury in their recollection of the evidence. As each charge makes clear, it is the jurors' recollections that control, not those of the trial judge. Misapprehensions of evidence in a judge-alone trial, on the other hand, may be material, play an essential part in the reasoning process leading to the verdict and result in a miscarriage of justice: *R v McGill*, [2021 ONCA 253](#), at para 118

The trial judge must inoculate the jury against mistakes of law masquerading as mistakes of fact. One way of doing so is by means of a “little difficulty” instruction – i.e., the jury can be told that, if satisfied of a certain fact, they should have little difficulty in concluding that a certain element is, or is not made out: *R v HW*, [2022 ONCA 15](#), at paras 89, 96

v. REVIEWING ELEMENTS OF THE OFFENCE

A jury charge need not include reference to elements of an offence that are not in issue: *R v HW*, [2022 ONCA 15](#), at para 35

vi. JURY CHARGE MUST BE EVEN-HANDED

A charge to the jury may be unfair and unbalanced despite the absence of any specific legal error.

A claim of imbalance or unfairness in a jury charge requires an assessment of the instructions as a whole in light of the evidence adduced and the positions put forward by the parties at trial: *R v Megill*, [2021 ONCA 253](#), at paras 124-125

No party's position at trial should be undermined or prejudiced through the jury charge: *R v Laforme*, [2022 ONCA 395](#), at para 25

A jury charge that is not even-handed undermines the accused's right to a fair trial: *R v Jeanvenne*, [2016 ONCA 101](#) at paras 30-33; *R v Hungwe*, [2018 ONCA 456](#) at paras 50-51 Fairness requires, among other things, that the charge explain the theories of each side and review the salient facts in support of those theories

So long as the substance of the defence position was put to the jury, a charge will not be unfair or unbalanced merely because the trial judge did not spend an equal amount of time reviewing the parties' evidence: *R v Jeanvenne*, 2016 ONCA 101

A jury charge is unbalanced where the charge as a whole steers the jury in the Crown's direction or navigates the jury towards conviction. A charge that has unduly promoted the case for the Crown and effectively ignored and denigrated the case for the defence. lacks fairness and balance: *R v Dirie*, [2022 ONCA 767](#), at para 71

Where the Crown's case relates to a large number of charges alleged to have taken place over a long period of time and the defence is a "blanket denial," there will be a "superficial imbalance" in time spent on the Crown and defence cases in the jury charge (at para. 25). This type of imbalance is not a reversible error: *R v DS*, [2017 ONCA 131](#) at para 25

Also, in some cases, evidence that tends to show an accused committed an offence far exceeds the evidence to the contrary. A balanced charge does not require a trial judge to ignore evidence that implicates an accused. Nor is a trial judge obliged to spin a web of exculpatory inferences, turning each piece of circumstantial evidence every which way to reveal its every possible inference. This proposition is all the more applicable where the defence position appears to be that the cumulative effect of all the evidence falls short of proof beyond a reasonable doubt: *R v Speer*, 2017 ONCA 333 at para 23 excerpting *R. v. Stubbs*, 2013 ONCA 514; see also *Speer* at paras 21-22

An appellate court must consider the charge as a whole and its overall effect in reviewing a trial judge's instructions.

vii. COUNSEL'S REVIEW OF CHARGE

As a general proposition, when a trial judge has provided a draft of his jury instructions to counsel, and received their comments on that draft, it is generally a risky step for a trial judge to then add other commentary "on the fly" as s/he delivers her or his instructions. While there may undoubtedly be occasions when some alteration is necessary, because an error or omission is discovered as the instructions are given, the addition of unscripted commentary should generally be avoided: *R v Hungwe*, [2018 ONCA 456](#) at para 48

viii. Providing the jury a copy of the charge

Whether to provide a written copy of the charge to the jury is a matter of discretion for the trial judge. In some cases, it may well be helpful to the jury to have a copy of the charge while deliberating. At the same time, no adverse inference can be drawn that a jury did not understand the instructions simply because they did not have a copy during the actual deliberative process: *R v Atwima*, [2022 ONCA 268](#), at para 126

B. GENERAL INSTRUCTIONS

i. USING STANDARD JURY CHARGES

Standard form jury charges are of tremendous assistance, but they must be tailored to the specific circumstances of each case. This is particularly so for limiting instructions relating to admissible evidence such as similar fact evidence, since the limited uses to which evidence can be put turn on fact-specific considerations of logical relevance: *R v Cole*, [2021 ONCA 759](#), at para 107

ii. BURDEN OF PROOF

a) *WD Instruction*

The trial judge does not necessarily have to give a W.(D). instruction with respect to exculpatory portions of the accused's statements to police or others - as long as the charge as a whole makes the burden of proof in relation to reasonable doubt and issues of credibility clear to the jury: *R v Barrett*, 2015 ONCA 012 at paras 15, 19; *R v McCracken*, [2015 ONCA 228](#) at paras 90-91; *R v Grewal*, [2019 ONCA 630](#), at para 50; *R v Brown*, [2020 ONCA 462](#), at para 48

Unless exceptional circumstances exist, a trial judge should not provide a JJRD instruction to the jury: *R v CL*, [2020 ONCA 258](#)

iii. REASONABLE DOUBT

An instruction on reasonable doubt should point out that a reasonable doubt is a doubt that is “[l]ogically derived from the evidence or absence of evidence.” The instruction must also make it clear that a reasonable doubt cannot be founded on speculation. The instruction is not a magic incantation that requires verbatim repetition; rather, it is a suggested formula that would not be faulted if used: *R v Hassanzada*, [2016 ONCA 284](#) at para 106

An instruction to the jury to the effect that exculpatory evidence can be the source of reasonable doubt even if not affirmatively believed is particularly important because it is arguably not the kind of common sense reasoning that jurors would apply in making credibility assessments in their day-to-day lives: *R v Zeisig*, [2016 ONCA 845](#) at para 5

The *Starr* instruction –that proof beyond a reasonable doubt falls closer to absolute certainty than proof on the balance of probabilities – has not been interpreted authoritatively as requiring that this exact form of direction be given: *R v Ruthowsky*, [2018 ONCA 552](#) at para 39

iv. CIRCUMSTANTIAL CASE

No special instruction to the jury is required when the Crown’s case is entirely circumstantial. Instead, the jury must be told that, in order to convict, they must

find that the only rational inference to be drawn from the circumstantial evidence is the accused's guilt: *R v Taylor*, [2015 ONCA 448](#) at paras 152-155

V. COMMON SENSE INFERENCE INSTRUCTION

The “common sense inference” instruction assumes that the act or acts in question have natural and probable consequences. If, as a matter of common human experience, an act commonly produces a certain result, it makes sense, absent some other explanation, to infer that the person who did the act intended the result which commonly flows from doing the act. The more likely, as a matter of common human experience, the consequence is to flow from the action, the stronger will be the inference that the person intended that consequence.

The “common sense inference” instruction is helpful, however, only if, as a matter of common human experience, there is a close causal connection between the act and the consequence which is material to the criminal charge: *R v Boone*, 2019 ONCA 652, at paras 89-90

C. JUDGE'S COMMENTS ON THE EVIDENCE

A trial judge is entitled to express his or her own view of the facts or the credibility of the witnesses, including the accused, and to express that opinion in strong terms, provided that the judge does not use such language as leads the jury to think that they must find the facts as the judge indicates and provided the charge, taken as a whole, does not deprive the accused of a fair presentation of his case to the jury: *R v John*, 2017 ONCA 622, at paras 108-110; *R v Vassel*, [2018 ONCA 721](#), at para 160; see *R v Walker*, 2019 ONCA 806, at paras 7-8

Even when a trial judge expresses an opinion in fair language that is within the acceptable bounds, a trial judge's opinion may nonetheless be rendered impermissible if it prejudices the accused's right to a fair trial: *R v Walker*, [2019 ONCA 806](#), at para 13

Generally speaking, a trial judge should be reluctant to express an opinion on the strength of the evidence, even where it is permissible. A jury is likely to be impressed with the experience and legal expertise of a trial judge, and there is a danger that members of the jury will incline towards deference to the trial judge's opinion of the merits of the evidence and strength of the competing cases. This undermines the independent fact-finding role the jury is to perform and potentially jeopardizes the right to a fair trial. However, it is not impermissible for the trial judge to have a view of the strength of the evidence and "express it as strongly as the circumstances permit, as long as it is made clear to the jury that the opinion is given as advice and not direction": *R v Harris*, [2022 ONCA 739](#), at para 23

Although a trial judge is entitled to express an opinion concerning his or her view of the evidence, by stating his opinion by reference to common sense and also failing to refer the jury to evidence pointing the other way, the trial judge may undermine the jury's ability to evaluate the accused's evidence fairly: *R v Othman*, [2018 ONCA 10073](#), at para 32

The trial judge must not make comments to the jury that usurp the function of the jury: *Othman*, at para 33

Trial judges must not use such language as leads the jury to think that they must find the facts in the same way the judge indicates. Further, where trial judges express opinions on factual issues, the court on appeal is entitled to intervene when the trial judge's opinion is far stronger than the facts of the case warrant or is expressed in such terms that it is likely the jury would be overawed by the opinion expressed. The appellate court may do so even if the trial judge has clarified to the jury that "they are not bound by his or her views on the evidence or factual issues: *R v Dirie*, [2022 ONCA 767](#), at para 72

In some instances, it may be permissible for a judge to instruct the jury to be especially cautious or extremely careful in considering defence evidence. This is particularly the case when this instruction is linked to or accompanied by a further instruction that is compliant with the Supreme Court's admonition in *W(D)*, that the jury must not be left with the impression that it needs to believe the evidence of the accused in order to return a verdict of acquittal:

The instruction must not, however, amount to the functional equivalent of a *Vetrovec* caution, and it must not expressly or by necessary implication

undermine the defence position or shift the onus of proof: *R v Vassel*, [2018 ONCA 721](#), at paras 161, 189

A trial judge should avoid posing rhetorical questions in the jury charge: *R v Hafizi*, [2018 ONCA 2](#), at para 20

There is the danger that rhetorical questions become simply a device to denigrate the defence; questions with obvious answers suggest that the trial judge does not believe the accused's evidence. They can be seen as the trial judge "taking up the Crown's cause and casting off the mantle of objectivity": *R v Laforme*, [2022 ONCA 395](#), at para 40

However, not all questions in a jury charge are rhetorical. Rhetorical questions must be distinguished from questions posed that naturally arise on the evidence. Such questions "are a way to analyze and understand the evidence": *R v Laforme*, [2022 ONCA 395](#), at para 41

In *Walker*, the Court of Appeal allowed Mr. Walker's appeal on the basis, by offering a stronger opinion than the one he knew the Crown was prepared to advance, the trial judge found himself bolstering the Crown's position. The court considered this to be fundamentally unfair to Mr. Walker, and ordered a new trial: *R v Walker*, [2019 ONCA 806](#), leave to appeal denied.

D. THEORY OF THE CROWN AND THE DEFENCE PUT TO JURY

A trial judge has a duty to instruct the jury on all routes to liability which arise on the evidence: *R v Nouredine*, [2022 ONCA 91](#), at para 40; *R v Doxtator*, [2022 ONCA 155](#), at para 25

The trial judge may well find it necessary to instruct the jury in a manner that does not accord with the theory advanced by either Crown or defence counsel at trial. A trial judge may do so because the jury is not bound by the theories of the Crown or defence when considering the evidence. 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; *R v Doxtator*, [2022 ONCA 155](#), at para 27

However, trial fairness concerns may intervene and foreclose consideration of an alternative basis of liability inconsistent with the way the parties conducted their respective cases. Where the trial judge instructs the jury on a material point in a manner that does not accord with the position advanced by either party, a question may arise whether the instruction affected the fairness of the trial. Trial fairness concerns will be greater when the instruction relates to a theory of liability not previously advanced by the Crown. When that occurs, the issue becomes whether the accused, in the circumstances of the case, was able to present a full and fair defence. Whether a trial judge's instruction on an alternative theory of liability had an adverse impact on trial fairness can only be determined on a case-by-case basis: *Grandine* at para 64

In short, introducing a new, alternative, theory of liability, without affording the accused an opportunity to make a further address to the jury, orally or in writing, compromises the fairness of the trial: *R v Grandine*, 2017 ONCA 718; see generally *R v Ochrym*, [2021 ONCA 48](#), at paras 38-53; *R v Levely*, [2022 ONCA 632](#), at para 58

The defence may also be granted the opportunity to reopen the case and continue cross-examination or call further evidence in response to the introduction of a new theory of liability: *R v Lai*, [2022 ONCA 344](#), at para 12

If the defence intends to rely on the fact that the Crown's case is limited to the theory advanced by the Crown in shaping the defence, the defence must take steps to properly limit the Crown's case. This can be done through a request for formal particulars, or by seeking a clear and unqualified statement from the Crown that it is relying exclusively on the factual basis advanced in its theory of the case.

That said, there can be circumstances in which the defence, based on particulars provided by the Crown, specific representations made by the Crown, or the conduct of the trial, is justifiably led to believe that the accused's potential liability is limited to a specific theory and conducts the defence accordingly. In those circumstances, the defence may be successful in arguing that any departure from the specific basis of liability advanced, especially after the evidence is complete, would unfairly prejudice the accused's ability to make full answer and defence: *R v Stojanovski*, [2022 ONCA 172](#), at paras 65-66

It is an error of law to put a theory of liability to the jury that does not have an air of reality: A theory of liability should be left with a jury if a properly instructed jury, acting reasonably, could convict based on that theory: *R v Figliola*, [2018 ONCA 578](#) at para 28; *R v Al-Enzi*, [2021 ONCA 81](#), at para 150

A decision to leave a route of liability with the jury is to be reviewed on a standard of correctness: *R v Al-Enzi*, [2021 ONCA 81](#), at para 151

Contrarily, it is an error of law to not leave a theory of liability to the jury that does have an air of reality: *R v Snelgrove*, [2019 SCC 16](#);

It is an error of law to put a defence to the jury that has no air of reality. It is also an error to misstate the accused's position: *R v Donnelly*, [2018 ONCA 575](#) at paras 6-7

Contrarily, it is also an error to not leave a defence with the jury that has an air of reality: *R v Fenton*, [2019 ONCA 492](#); *R v Othman*, 2018 ONCA 1073; *R v Alas*, [2021 ONCA 224](#), at para 41

For more on the air of reality test, see Chapter on Defences: Air of Reality

The trial judge's duty is to instruct the jury on all available defences, even when counsel does not raise or rely on them: *R v Fougere*, [2019 ONCA 505](#), at para 24

In *Ferdinand*, the Ontario Court of Appeal overturned an acquittal on a charge of aggravated assault on the basis that the trial judge erred by not instructing the jury on liability for assault through a threat of application of force, pursuant to s.265(1)(b). The Court reasoned that the Crown was not required to prove assault according to one specific theory, and that the application of s.265(1)(b) arose from the accused's own evidence: *R v Ferdinand*, [2018 ONCA 836](#), at para 7

In *Stubbs*, the Ontario Court of Appeal held that the trial judge was not obliged to put a defence to the jury that defence counsel had not in any way advanced at trial. The Court recognized that there may be many reasons why counsel might not ask for a defence to be left with the jury, adding that such decisions are often laced with tactical and practical considerations. Incompatibility with a primary defence. Presumed risk of a 'compromise' verdict. An unpalatable alternative in the circumstances disclosed by the evidence: *R v Stubbs*, [2018 ONCA 1068](#), at para 16

i. INCLUDED OFFENCES BEING PUT TO THE JURY

The overarching consideration for the trial judge in determining whether to leave included offences as verdict options for the jury is whether, on the totality of the evidence, the jury could reasonably be left in doubt with respect to an element of the main charge that distinguishes that charge from an included offence: *R v Doxtator*, [2022 ONCA 155](#), at para 30

An offence will be an included offence if the essential elements of that offence would necessarily be proved if the Crown were to successfully establish any one of the legally available avenues of conviction for the charged offence: *R v Tenthorey*, [2021 ONCA 324](#), at para 58

The position of counsel at trial is important in determining whether an included offence ought to have been left with the jury, having regard to the accused's constitutional right, within limits, to control his or her own defence. The trial judge's obligation to instruct on included offences will depend on the evidence led, the issues raised, and the positions of the parties: *R v Mikasinovic*, [2018 ONCA 573](#) at para 6; *R v Chacon-Perez*, [2022 ONCA 3](#), at para 16; *R v Doxtator*, [2022 ONCA 155](#), at para 48

However, sometimes the trial judge's instructions will not accord with the position advanced by counsel for the Crown or the defence; this is because it is the trial judge's role to charge the jury on all relevant questions of law that arise from the evidence: *R v Doxtator*, [2022 ONCA 155](#), at para 27

The obligation is conditioned upon an air of reality in the evidence adduced at trial to permit a reasonable jury, properly instructed, to conclude that the essential elements of the included offence have been established, but not those of the principal offence. Whether or not there is an air of reality to an included offence is a question of law, subject to appellate review: *R v Grewal*, [2019 ONCA 630](#), at paras 36-37; *R v Tenthorey*, [2021 ONCA 324](#), at paras 63-64, 69-71; *R v Chacon-Perez*, [2022 ONCA 3](#), at para 162

In first degree murder cases, where there is any air of reality on the evidence, the included offences of manslaughter and second degree murder should be left with the jury: *R v Doxtator*, [2022 ONCA 155](#), at para 26

In some cases, the failure to leave an included offence with the jury for one accused may taint the verdict of another accused alleged to be a party: *R v Doxtator*, [2022 ONCA 155](#), at paras 61-65

E. ROLLED UP CHARGES IN HOMICIDE CASES

Typically, items of evidence may be relevant, material and admissible on more than one issue in a criminal trial. As for example, evidence may be relevant to a specific defence, justification or excuse, and to the mental or fault element essential to be proven to establish an accused's guilt.

To ensure that jurors do not take a compartmentalized approach to evidence relevant, material and admissible on more than one issue, judges to ensure that jurors understand that, in deciding whether the Crown has proven the state of mind necessary to make an accused's unlawful killing of another murder, they are to consider *all* the evidence that illuminates the issue, even if they have rejected the specific defences, justifications and excuses in play, to which that evidence also relates.

However, not every case in which evidence of alcohol consumption and some form of provocative words or conduct are involved will require a specific instruction about the cumulative effect of evidence of these factors:. In most cases, such an instruction is preferable. In others, it will be essential. But even where such an instruction is necessary to do justice in a case, no sacred word formula need be pronounced. What is important is the message, not the medium.

The items of evidence which may be part of a "rolled up" instruction include, but are not limited to, evidence of alcohol consumption; provocative words or conduct by the deceased or others; mental disorder falling short of what would lead to a verdict of NCRMD; instantaneous reaction, among others. The provocative words or conduct need not amount to provocation under s. 232(2) the *Criminal Code*: *R v Srun*, [2019 ONCA 453](#), at paras 90-93

F. CORRECTING INSTRUCTIONS

When improper comments by Crown counsel are sufficiently prejudicial, a trial judge has a duty to intervene; a failure to do so will constitute an error of law.

Where, for example, the Crown refers in its opening to anticipated evidence that subsequently is not led or is ruled inadmissible, it is the duty of the trial judge to tell the jury explicitly that the statements complained of are not in evidence and they must try to free their minds from them: *R v Clause*, 2016 ONCA 859, at para 38.

The trial judge is entitled to give correcting instructions to the jury when the defence has mounted an attack on the integrity of an investigation. Whether the accused has mounted an attack on the integrity of an investigation is a matter for the trial judge to determine. For a stark example of the acceptable scope of such correcting instructions, see *R v Wilson*, [2020 ONCA 3](#)

G. LIMITING INSTRUCTIONS

i. GENERAL PRINCIPLES

Whereas a corrective instruction relates to evidence that is inadmissible, a limiting instruction applies to evidence that is admissible for one purpose, but not for another: *R v Calamusa*, [2016 ONCA 855](#) at para 13

The jurisprudence is clear that when there is a real risk that evidence properly admitted for one purpose could be used by the jury for an improper purpose, the trial judge must caution against that misuse of the evidence: *R v Joles*, [2022 ONCA 681](#), at para 7

To succeed on an appeal based on the absence of an instruction, the appellant must establish that a specific jury instruction should have been given and that its omission amounted to legal error: *R v Warren*, [2016 ONCA 104](#) at para 9

A trial judge's failure to provide a limiting instruction may fail to equip a jury with the tools needed to return a true verdict in the case: *R. v. Bailey*, 2016 ONCA 516 at para 42

The fact that a requisite limiting instruction was absent from the trial judge's own instructions, but included in the trial judge's reference to the defence position in the jury charge may be insufficient to cure the trial judge's failure to provide the limiting instruction himself/herself. Explanations coming directly from the judge will carry more weight with the jury than will simply repeating what defence counsel has said: *R v McKenna*, 2018 ONCA 1054, at para 39

i. CROSS COUNT REASONING

In cases involving multiple complainants, when the evidence of those complainants overlaps and is essentially part of an ongoing single narrative, there is a genuine risk that the jury will assess the credibility of the complainants as a whole, or at least that a positive impression with respect to the credibility of one will rub off on the assessment of the credibility of the other.

Unless the evidence directly relevant to the allegations of one complainant qualifies as relevant to the allegations of the other complainants, this cross-count reinforcement of the credibility individual complainants is wrong in law.

The trial judge must clearly instruct the jury that they must make their decision on each charge only on the basis of the evidence that relates to that charge, and they must not use evidence relating to only one charge in making a decision on any other charge. The trial judge has to further make it clear to the jury that it cannot not use the evidence of one complainant to bolster the credibility of the other complainants. The trial judge also has to specifically tell the jury that if the jury is satisfied that the accused has committed the offences against any one of the complainants, it cannot use that finding in any way in determining the appellant's liability on the other charges: *R v Dowholis*, [2016 ONCA 801](#) at paras 123-130;

The same limiting instructions apply in respect of multi-count indictments involving only one complainant. Evidence properly admitted on one count cannot be relied upon to determine the accused's guilt on another count, absent a

successful similar fact evidence application. Further, regardless of whether there has been a successful similar fact evidence application, the trier of fact may not rely on the evidence of other counts or other uncharged misconduct as proof that the accused is the sort of person who would commit the offence or offences charged: *R v MRS*, [2020 ONCA 667](#), at paras 67-68, but see para 94

The fact that the trial judge earmarks the relevant evidence to be used on each count does not obviate the need for the requisite limiting instructions: *R v MRS*, [2020 ONCA 667](#), at para 87

ii. EXTRANEOUS RESEARCH

Instructions prohibiting extraneous research by jurors: *R v Pannu*, [2015 ONCA 677](#) at paras 109-113

iii. PLEAS OF CO-ACCUSED

A caution to the jury is ordinarily required to ensure that the jury does not rely on the guilty plea of an accomplice or former co-accused. However, the lack of an instruction is not fatal in the absence of prejudice to the accused: *R v Granados-Arana*, [2018 ONCA 826](#), at paras 7, 8

iv. PRIOR CONSISTENT STATEMENTS

See Evidence Law: Prior Statements: Prior Consistent Statements: Limiting Instructions

v. STATEMENTS MADE BY AN ACCUSED

i. Exculpatory Statements

A *WD* jury instruction should be given to exculpatory statements made by the accused: *R v Bengy*, 2015 ONCA 397, see paras 98-102

ii. Fabricated versus Disbelieved Statements

In instructing the jury on the use to be made of an exculpatory statement made by an accused which they may or may not accept, the trier of fact must be cautioned against jumping directly from disbelief of the statement to an inference that the accused fabricated the statement because s/he is guilty. The jury must be instructed along the following lines.

First, the trier of fact must determine whether they believe or have a reasonable doubt about the truthfulness of the alibi.

Next, if the judge concludes that there is sufficient independent evidence of fabrication of an exculpatory out-of-court statement, “the judge should instruct the jurors that it is open to them to find that the accused fabricated the exculpatory version of events because he or she was conscious of having done what is alleged and that they may use that finding, together with other evidence, in deciding whether the Crown has proven the case beyond a reasonable doubt”

If, on the other hand, there is insufficient independent evidence of fabrication, the jury should be instructed to disregard any disbelieved exculpatory statement and decide the case on the balance of the evidence

It is essential for the trial judge to set out clearly the difference between evidence leading only to disbelief and independent evidence of fabrication. Where the fabrication instruction is given, the trial judge must “carefully outline what evidence is capable of constituting independent evidence

vi. STATEMENTS MADE BY A CO-ACCUSED

A trial judge must instruct the jury that out-of-court statements made by one accused are admissible only against that accused and are not admissible ‘in any

way_for or against the other accused who did not make the out-of-court utterance.

However, there is no obligation on the trial judge to give an express instruction that the jury is not to use any adverse credibility findings concerning one accused against the other, provided the jury is given the requisite instructions on forbidden propensity reasoning and the need to decide each count separately: *R v Godwin*, [2018 ONCA 419](#) at paras 5-6

vii. EVIDENCE ADDUCED BY A CO-ACCUSED

In a joint trial, where conflicting defences are raised, it may be necessary for a trial judge to provide the jury with a special caution in order to balance the competing rights to a fair trial. This is a discretionary matter left to the trial judge: *R v Abdulle*, [2020 ONCA 106](#), at paras 81-83, 111-112, 118; see also *R v Oliver*, 194 OAC 284, at paras 50-60 for more on the “Oliver instruction.”

viii. VETROVEC INSTRUCTION

The discretion to give a vetrovec instruction: *R v Moffit*, [2015 ONCA 412](#) at paras 74-78

For more on Vetrovec instructions, see Evidence Law: Witnesses: Vetrovec Cautions

ix. MISCELLANEOUS INSTRUCTIONS

After three days of jury deliberations, the trial judge should caution the jury against engaging in impermissible verdict compromise based on expediency, frustration or a desire to simply resolve the case and complete their deliberations: *R v Lapps*, [2016 ONCA 142](#) at para 18

A trial judge has the authority, in some cases the duty, to define the extent to which counsel may discuss a subject in their final addresses and to balance what is said there with an instruction to the jury on the same subject-matter: *R v Hassanzada*, [2016 ONCA 284](#) at para 73

A jury should be told that they cannot speculate about the evidence they have not heard: *R v Bailey*, [2016 ONCA 516](#) at para 67

For a review of the principles surrounding instruction on party liability, see Law: Party Liability

ix. Propensity Reasoning

A propensity direction given by the trial judge relating to an accused's criminal record cannot be treated as a direction not to engage in propensity reasoning generally. Indeed, the risk that a jury might engage in propensity reasoning can be enhanced where a targeted direction is given not to use propensity reasoning relating to the criminal record of the accused, but not with respect to other discreditable conduct: *R v MRS*, [2020 ONCA 667](#), at para 98

Whether the failure to give a limiting instruction regarding propensity use of prior discreditable conduct evidence amounts to reversible error depends on a variety of circumstances, which must be considered in the context of the evidence and issues raised in a particular case. Factors that may be relevant include: (i) the nature and extent of the prior discreditable conduct evidence at issue; (ii) the issue(s) at trial to which the discreditable conduct evidence was properly relevant; (iii) the relative gravity of the prior discreditable conduct in relation to the misconduct charged; (iv) the likelihood that such an instruction would confuse the jury or unnecessarily draw attention to the discreditable conduct; and (v) other factors which bear on the risk that such evidence would be used improperly by the jury.

In some cases, the fact that the prior discreditable conduct alleged is less serious than the offence(s) charged may reduce the need for a limiting instruction. This would seem to be particularly so where the prior discreditable conduct is not of the same nature as the offence(s) charged: *M.T.*, at para. 87. But the focus of the inquiry on appeal is whether in all the circumstances, in the absence of a limiting instruction, there is a real risk of prejudice in the sense that the jury would misuse the evidence.

The absence of a limiting instruction about evidence of the accused's prior discreditable conduct could be aggravated by a limiting instruction in relation to evidence that could be perceived as discreditable about the complainant. In such circumstances, the absence of a similar limiting instruction regarding

discreditable conduct evidence about the accused would likely signal to the jury that there was no restriction on how they could use the discreditable conduct evidence about him. Further, the presence of a limiting instruction about evidence that could be perceived as discreditable about the complainant, but no limiting instruction about discreditable conduct evidence about the accused, may make the jury instructions unbalanced: *R v RM*, [2022 ONCA 850](#), at paras 15, 20, 23

EXHIBITS

Trial judges have a discretion to determine whether things filed as exhibits should accompany the jury to the jury room during their deliberations. The guiding principle is one of trial fairness. The exercise of this discretion attracts appellate deference. Deference also applies to a review of any jury instructions on the handling of the evidence: *R v Mohamad*, [2018 ONCA 966](#), at para 268

Documents that are not entered as lettered or numbered exhibits should not go to the jury room during deliberations, even with the consent of counsel, and even when those documents were referred to by a party during cross-examination. To send such documents to the jury room after the evidence portion of the trial has been completed is essentially to permit the introduction of further evidence during deliberations. This is an error: *R v JB*, [2019 ONCA 591](#), at para 49

APPELLATE REVIEW OF JURY CHARGES

A. STANDARD OF REVIEW

On appeal, the standard of review is adequacy, not perfection. An appellate court's approach is "functional". It assesses the adequacy of the charge in the light of its purpose. Even if a trial judge strays from the ideal, the fundamental question an appellate court must ask is: has the jury been "left with a sufficient

understanding of the facts as they relate to the relevant issues". Or, is the court satisfied "that the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues:" *Newton* at para 13. *R v Barrett*, [2016 ONCA 002](#) at para 18; *R v CKD*, [2016 ONCA 66](#) at para 22; *R v Goforth*, [2022 SCC 25](#)

Considerable discretion is afforded to a trial judge to choose the method of reviewing the evidence and relating the evidence to the issues: *Duncan*. A trial judge's decision about how much evidence to review, what structure to use and how to organize the charge falls within that discretion: *Newton* at para 11

Trial judges must be afforded some flexibility in crafting the language of jury instructions, as their role requires them to decant and simplify the law and evidence for the jury: *R v Goforth*, [2022 SCC 25](#), at para 22

The question on appeal is really a holistic one: is the jury sufficiently informed about the case as put forward by the defence? What matters is that by the end of the instruction, the jury must understand:

1. the factual issues which had to be resolved;
2. the law to be applied to those issues and the evidence;
3. the positions of the parties; and
4. the evidence relevant to the positions taken by the parties on the various issues: *R v Speer*, [2017 ONCA 333](#) at paras 16-17

The appellate court will be equally attentive to the necessity of considering the whole of the charge and other aspects of the trial, such as the addresses of counsel and the positions they advanced: *R. v. Araya*, 2015 SCC 11; *R v MP*, [2018 ONCA 608](#) at para 63

B. GENERAL PRINCIPLES

The model instructions (e.g. Watts) are not a “one-size-fits-all product; at best, they “provide the basic building blocks for final and other instructions”: *R v McDonald*, [2015 ONCA 791](#)

A decision tree is not a jury instruction. It is, rather, a deliberation aid to assist jurors in the deliberation process. It is the jury charge that describes and defines the constituent elements of the offences on which jurors are to deliberate. The absence of definitions or accurate definitions from a decision tree is of no moment, provided the essential elements are explained, in the charge to the jury: *R v Dyce*, [2016 ONCA 397](#) at para 4

Where the trial judge instructs the jury on a material point in a manner that does not accord with the position advanced by either party, a question may arise whether the instruction affected the fairness of the trial. Trial fairness concerns will be greater when the instruction relates to a theory of liability not previously advanced by the Crown. When that occurs, the issue becomes whether the accused, in the circumstances of the case, was able to present a full and fair defence: *R v Grandine*, [2017 ONCA 718](#) c

Non-direction with respect to items of evidence is not, without more, misdirection. Non-direction on a matter of evidence only becomes misdirection where the non-direction relates to an item of evidence that is the foundation of the case: *R v Rosen*, [2018 ONCA 246](#) at para 57. Non-direction can also become misdirection when something left unsaid makes wrong something that was said, or where what was left unsaid is essential to an accurate instruction on the subject. The fact that counsel had a full opportunity to raise this issue with the trial judge but remained silent is a factor in assessing the adequacy of the instruction on appeal *R v Adams*, [2018 ONCA 678](#) at para 71; *R v Cote*, [2018 ONCA 870](#), at para 40; for example, see *R v Bacci*, [2018 ONCA 928](#), at paras 50, 52

A jury charge that is unnecessarily confusing constitutes an error in law: *R v Cumor*, [2019 ONCA 747](#), at para 64

C. FAILURE TO OBJECT

Where defence counsel had the opportunity to review and object to the charge, this suggests that the charge was adequate – although this factor is not

conclusive: *R v Smith*, [2015 ONCA 831 at para 25](#); see *R v Chafe*, [2019 ONCA 113](#), at para 46

The failure of counsel to object to the judge's charge to the jury is a relevant consideration that may inform a court's conclusion on both the overall accuracy of an instruction and likely impact of the error: *R v Jeanvenne*, [2016 ONCA 101](#) at para 43; *R v Warren*, [2016 ONCA 104](#) at para 25; *R v Laing*, [2016 ONCA 184](#) at para 45; *R v Rosen*, [2018 ONCA 246](#) at para 26

This is especially so when counsel have received a copy of the proposed charge in advance of delivery and make no complaint about the completeness of the instruction: *R v Van Every*, [2016 ONCA 87](#) at para 55. Relevant considerations include all of the evidence at trial, the balance of the charge, the positions of counsel, and the period of parole ineligibility recommended by the jury: *Van Every* at paras 66-7

Tactical decisions to allow an omission in a charge may be considered as a factor against finding that the charge was inadequate on appeal: *R v Wilson*, [2019 ONCA 564](#), at para 19

However, counsel's failure to object is not determinative because the trial judge is ultimately responsible for the charge to the jury. If the charge contains legal error, counsel's failure to object to the erroneous charge does not change the nature or effect of the legal error: *Warren* at para 26; *R v Iyeke*, [2016 ONCA 349](#) at para 9; *R v Poulin*, [2017 ONCA 175](#) at para 50; see *R v Newton*, [2017 ONCA 496](#) at para 24; *R v Spence*, [2017 ONCA 619](#) at para 63; see *R v Pope*, [2021 NLCA 47](#), at para 13; affirmed at [2022 SCC 8](#)

It is immaterial that defence counsel failed to object to the impugned aspects of the jury charge where the errors left the jury inadequately equipped to properly evaluate important evidence. Irrespective of any oversight by defence counsel at trial, an accused is entitled to a fair trial. Failure to object is also less material where there was no tactical advantage to be gained from the failure to object: *R v McFarlane*, [2020 ONCA 548](#), at para 91; *R v MRS*, [2020 ONCA 667](#), at para 74

If a misdirection or non-direction leaves the jury inadequately equipped to properly evaluate important evidence, counsel's failure to object at trial cannot negate the error: *R v Bailey*, [2016 ONCA 516](#) at para 56

Where Crown improprieties inject a particular risk that the jury will engage in an impermissible pattern of reasoning, trial judges are required to respond through

specific corrective instructions, irrespective of the failure to object: *R v BG*, [2022 ONCA 92](#), at para 34; *R v DM*, [2022 ONCA 429](#), at para 52

D. APPELLATE REVIEW

A jury instruction does not have to meet the standard of perfection: *R v McCracken*, [2016 ONCA 228](#) at para 78

The principles of appellate review of the adequacy of a jury charge: *R v McDonald*, [2015 ONCA 791](#) at para 17; *R v Duncan*, [2015 ONCA 928](#) at paras [27-31](#); *R v Sinobert*, [2015 ONCA 691](#) at para 84; *R v Hassanzada*, [2016 ONCA 284](#) at paras 104-105

The adequacy of jury instructions is not measured against their conformity to the content of a model instruction. What is critical is that the instruction be tailor made for the case being tried pointing out the specific concerns that emerge from the evidence at trial: *R v Bailey*, [2016 ONCA 516](#) at para 42, 43

When a complaint about a jury charge arises as a result of an appellate judicial decision rendered after the charge has been given, the essential issue is whether the charge substantially complies with the principles later expressed. The appellate court must assess whether the deficiencies in the charge delivered, compared to the standard later pronounced, give rise to a reasonable likelihood that the jury misapprehended the correct legal standard: *R v Ansari*, [2015 ONCA 575](#) at paras 182-184

It is an error for the trial judge to instruct the jury that corroboration of a witness' evidence is required: *R v HAK*, [2015 ONCA 905](#)

A trial judge's weighing of probative value and prejudicial effect is entitled to significant deference – as the trial judge is generally better positioned to understand the likely impact of the evidence on the jurors: *R v Farouk*, [2019 ONCA 662](#), at para 50

QUESTIONS FROM THE JURY

A. GENERAL PRINCIPLES

Questions from the jury are important. They provide a clear indication of the particular problem or problems confronting the jury and on which the jury requires assistance. Answers to jury questions are extremely important, carrying an influence far exceeding instructions given in the main charge. The practical reality is that such answers will be given special emphasis by jurors. Consequently, a trial judge must fully, clearly, correctly, and comprehensively answer a question asked by the jury: *R v Poulin*, [2017 ONCA 175](#) at para 74; *R v Grandine*, [2017 ONCA 718](#) at para 62; *R v Mohamad*, [2018 ONCA 966](#), at para 269

Questions by the jury give the clearest possible indication of the particular problem the jury is confronting. When the jury submits a question, it must be assumed that the jurors have forgotten the original instructions and will base their subsequent deliberations on the answer to the question. The correctness of the original charge cannot excuse an error in the answer to the jury's question: *R v Williams*, [2019 ONCA 846](#), at para 39

Thus, even if the question relates to a matter that has been carefully reviewed in the main charge, it still must be answered in a complete and careful manner. It may be that after a period of deliberation, the original instructions, no matter how exemplary they were, have been forgotten or some confusion has arisen in the minds of the jurors. This is even more so where the jury is not given a written copy of the charge: *R v Maestrello*, 2019 ONCA 953, at paras 72-73

The trial judge's response to the jury's questions must, however, like the rest of the charge, be considered as a whole: *R v Graham*, [2019 ONCA 347](#), at para 35

A trial judge must not make comments that discourage the jury from asking questions: *R v Lewis*, [2018 ONCA 351](#) at paras 29-31

A trial judge's incomplete and unhelpful response to a jury's question can compromise trial fairness and may lead to unsafe verdicts: *R v Lapps*, [2016 ONCA 142](#)

Sometimes repetition of the original instructions will be sufficient (assuming they are correct); in other situations, it may be necessary to explain things differently. This will depend on the issues in play, the nature of the request for assistance, and whether the jury has been provided with a written version of the trial judge's instructions. In *Spence*, for example, the Court of Appeal found that "the trial judge undermined the opportunity to be of assistance to the jury by offering only a simple playback of his original instructions:" *R v Spence*, [2017 ONCA 619](#) at paras 60-61

Where the jury's question signals it requires assistance in dealing with the evidence, the trial judge may instruct the jury in a manner that does not accord with the theory advanced by either Crown or defence counsel at trial, because the jury is not bound by the theories of the Crown or defence when considering the evidence.

However, where the trial judge instructs the jury on a material point in a manner that does not accord with the position advanced by either party, a question may arise whether the instruction affected the fairness of the trial. Trial fairness concerns will be greater when the instruction relates to a theory of liability not previously advanced by the Crown. When that occurs, the issue becomes whether the accused, in the circumstances of the case, was able to present a full and fair defence: *R v Grandine*, [2017 ONCA 718](#) at paras 63-64

The task of answering jury questions is often challenging for a trial judge because there is no set of standard answers that can be applied. Ultimately, it "is a judicial function that relies entirely on the proper exercise of discretion tailored to the applicable circumstances. How the response is given is left largely to the discretion of the presiding judge. And that discretion, uncontaminated by errors of law or misapprehensions of fact and falling within a range of reasonable alternatives is entitled to deference on appellate review: *R v Morin*, [2021 ONCA 307](#), at para 36

When the jury's request relates to evidence admitted at trial, the jury is entitled to have the evidence of a witness or witnesses on a particular subject, and the entire evidence of a witness or witnesses if requested, read back or replayed. Where the jury's question is ambiguous or unclear, the trial judge is entitled to seek clarification and should do so before responding to the question. A trial judge may also seek clarification before responding to a request for a rereading or replaying of the testimony of a witness or witnesses. Relatedly, a trial judge

might ask whether a summary of the witness' testimony from the judge's notes of it might suffice.

In some instances, failure to clarify questions that are unclear or ambiguous may amount to reversible error. This is so not only because of the nature of the response to which the jury is entitled to their in-deliberation questions, but also because the answer they are given, or in some cases refused, is the final word they hear on a problem they have identified in their deliberations: *R v Chacon-Perez*, [2022 ONCA 3](#), at paras 197-200

Nothing the judge says in responding to the jury's in-deliberation question should discourage the jury from asking further questions on that or any other subject: *R v Morin*, [2021 ONCA 307](#), at para 36; *R v Chacon-Perez*, [2022 ONCA 3](#), at paras 201

B. REQUEST TO REHEAR ARGUMENTS OR EVIDENCE

There is no legal difference between assisting the jury in recalling evidence and assisting the jury in recalling arguments about the evidence. If the jury requests assistance in recalling evidence or arguments about the evidence, they are entitled to an answer. There is no legal principle that requires that all counsel agree: *R v Nouredine*, [2015 ONCA 770](#) at para 106

When the jury asks to rehear the closing address of one party, the trial judge is not necessarily required to also provide the jury with the closing address of the other party: *R v JB*, [2019 ONCA 591](#), at paras 73-75

There is a duty on a trial judge to ensure that any evidence read back to the jury as a result of a jury question should be read back together with any other portions of the evidence that qualify or contextualize it. This is so even if the jury indicates that it does not wish to hear any more of the witness' evidence: *R v McLellan*, [2018 ONCA 510](#) at para 63; *R v Mohamad*, 2018 ONCA 966, at paras 273-275; *R v JB*, [2019 ONCA 591](#), at para 69

Where a trial judge errs in failing to read back all the relevant evidence, an appellate court is required to consider whether the error prejudiced the accused by improperly influencing the jury's verdict, thereby resulting in a substantial wrong or miscarriage of justice: *Mohamad* at para 276

When the jury requests to have a copy of materials referred to in cross-examination but not entered as exhibits, the trial judge should advise the jury that, because the materials they requested were not made exhibits at trial, those materials were not part of the evidence and can not be provided to them for review in their jury room. The judge should then tell the jury that arrangements could be made to replay or read back those portions of the cross-examination on the materials: *R v JB*, [2019 ONCA 591](#), at paras 50-51

C. QUESTION THAT PERTAINS TO SOME PARTIES BUT NOT ALL

Counsel may be entitled to have input in how to respond to a question that relates to other parties in the proceeding. This will depend on the nature of the question and how it might impact the non-affected party: *v Nouredine*, [2015 ONCA 770](#) at para 108

D. RETRACTED QUESTIONS

When the jury asks a question, and subsequently advises that it no longer requires the question to be answered, the trial judge is entitled to accept this representation and not answer the question: *R v Barnett*, [2021 ONCA 9](#), at paras 31-38

EXHORTATIONS

The purpose of an exhortation is to encourage jurors to reach a unanimous verdict by reasoning together and considering each other's views, as well as avoiding disagreements based on fixed, inflexible perceptions of the evidence.

Exhortations represent an attempt to assist in the deliberation process, not to influence the content of the jury's discussions.

The contents of an exhortation must not impose any form of pressure on deliberating jurors; likewise, it must eschew reference to extraneous or irrelevant factors. What is said should not invite jurors to compromise honestly held views of the evidence for the sake of conformity, or impose any deadline for reaching a verdict. An exhortation should avoid putting the situation to the jury in confrontational terms of opposing sides. Rather, it should appeal to individual jurors to reason together to achieve a verdict.

Jury exhortation must also be free of anything that would have the effects of undermining each juror's oath or affirmation to give a true verdict according to the evidence. Nor should the instructing judge attempt to influence the result by expressing an opinion about the ultimate result of the deliberations.

To determine whether an exhortation has crossed the line between what is proper and what amounts to coercion, it is necessary to consider the entire sequence of events leading up to the direction. For example, the language used in the main charge to advise jurors of the right to disagree. The substance of any notes received from the jury. The language used by the trial judge in her instructions. And any indication by the jury that it was "useless to continue" deliberations.

A final point concerns the significance of the time that elapses between the exhortation and verdict. Where the time is brief, this may afford a clear indication of the significance the jury attached to the exhortation and of its coercive impact on the minority: *R v JB*, 2019 ONCA 591, at paras 105-109

JUROR MISCONDUCT

A. PRESUMPTION OF PROPRIETY

In a jury trial, it is presumed that jurors will perform their duties according to their oath or solemn affirmation. But this presumption of impartiality is rebuttable. *R v Pannu*, [2015 ONCA 677](#), at para 61; see also *R v Zvolensky*, [2017 ONCA 273](#) at paras 230-242

It is also presumed that jurors understand and follow the instructions they are given. This presumption is also rebuttable: *Pannu* at para 61

B. MISCONDUCT DURING DELIBERATIONS

Section 647(2) of the Criminal Code mandates that when a jury is sequestered:

[T]he jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.

The purpose of this section is to protect jurors from outside influences that might affect their verdict. This section does not require that all twelve jurors must all be together at all times, unless they are in their hotel rooms alone. Jurors should be encouraged to relax when they are. It is undoubtedly a good practice for trial judges to tell jurors not to deliberate when they are not all together. However, some casual comment about the case while some of them are in smaller groups does not amount to a miscarriage of justice. These are a diverse group of people compelled to be with each other, and the only thing they have in common is the trial. It may well happen that someone will comment on the evidence while one juror is in the washroom, for example. The requirement of unanimity for a verdict removes any concern about such comments.

Where there is no evidence that a juror's ability to do their job has been impaired by alcohol, consumption of alcohol by a juror with or after dinner is no basis to set aside a verdict: *R v Zvolensky*, [2017 ONCA 273](#) at paras 233-238

x. Questioning a jury

When questioning a jury in respect of juror misconduct, the question is whether the trial judge’s approach complied with the following non-exhaustive list of considerations, ensuring that the process:

- 1) was fair to the parties and members of the jury;
- 2) open, on the record, and in the presence of the accused and counsel;
- 3) enabled the trial judge to determine the true nature of the internal problem faced by the jury, and to resolve it; and
- 4) preserved the integrity, confidentiality and impartiality of the jury’s deliberation process: *R v Wise*, 2022 ONCA 586, at para 22

C. EXTRINSIC MISCONDUCT

Evidence clearly establishing the presence of extrinsic material during deliberations can displace the presumption that jurors will perform their duties according to their oath or solemn affirmation: see generally *R v Lewis*, [2017 ONCA 216](#), at para 36

JURY PARTIALITY

A. PRESUMPTION OF PARTIALITY

A juror is a judge. There is a strong presumption of judicial impartiality and a heavy burden on a party who seeks to rebut this presumption. Judicial impartiality has been called “the key to our judicial process. The presumption of impartiality anchors public confidence in the integrity of the administration of justice.

The Canadian system starts on the presumption that jurors are capable of setting aside their views and prejudices and acting impartially. The safeguards of the trial process and the instructions of the trial judge are designed to replace

emotional reactions with rational, dispassionate assessment: *R v Dowholis*, [2016 ONCA 801](#) at paras 18, 22

B. REASONABLE APPREHENSION OF BIAS

In order to maintain public confidence in the administration of justice, the appearance of judicial impartiality is as important as the reality. The relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was.

The test to be applied to determine whether juror's conduct gave rise to a reasonable apprehension of bias is: what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he or she think that it is more likely than not that the juror, whether consciously or unconsciously, would not decide fairly?: *R. v. Dowholis*, [2016 ONCA 801](#) at paras. 19 and 20; *R v Godwin*, [2018 ONCA 419](#) at para 12

In *Dowholis*, the Court of Appeal concluded that a juror's remarks on radio regarding the accused created a reasonable apprehension of bias; the Court allowed the appeal and ordered a new trial.

In *Godwin*, the Court of Appeal concluded that a juror's email to a Crown counsel after the verdict, evidencing some affection for him, did not create a reasonable apprehension of bias.

JUROR SECRECY RULE

The jury secrecy law is protected by common law and s.649 of the Criminal Code of Canada: *R v Godwin*, [2018 ONCA 419](#) at para 10

Preservation of the secrecy of jury deliberations is of vital importance to the proper administration of criminal justice. The rule helps to ensure that jurors feel comfortable freely expressing their views in the jury room. If jurors know that the views they express in the jury room may eventually come to light, they may be less inclined to argue for a verdict that may be perceived as unpopular. For example, a juror who has serious concerns about the foundations of a conviction might rapidly accede to the majority viewpoint of convicting an accused charged with a horrible crime rather than attempt to argue for, or even explore out loud, the arguments favouring an acquittal, fearful of possible negative public exposure.

The jury secrecy rule is also important to the assure finality and the authority of a verdict and protects jurors from repercussions.

A court cannot, therefore, receive or adjudicate upon statements or affidavits by any member of a jury as to their deliberations or intentions on the case: *R v Lewis*, [2017 ONCA 177](#), at para 37-43; *R v Godwin*, [2018 ONCA 419](#) at para 10; *R v MB*, [2020 ONCA 84](#), at paras 5-6

The scope of the jury secrecy rule is not, however, without limits. Facts, statements and events extrinsic to the process of jury deliberation are not caught by this rule. Therefore, evidence that the jury was exposed to outside information or influence may be admissible. There is also a statutory exception in s. 649 of the *Criminal Code* for investigations and court proceedings related to obstruction of justice charges pursuant to s. 139(2) of the *Criminal Code* in relation to a juror: *R v MB*, [2020 ONCA 84](#), at para 7

A breach of jury secrecy does not automatically mean there was a miscarriage of justice. If a juror is discharged on proper grounds, such as an unwillingness to discharge their responsibility as a juror, the fact that their vote was revealed during the inquiry will not necessarily undermine trial fairness. When such a juror is discharged, the fact that the remaining members deliberated for a significant time longer is strong evidence that the accused received a fair and valid verdict, and that the discharged juror was not simply a “hold out”: *R v Wise*, [2022 ONCA 586](#), at paras 24-29

VERDICTS

The trial judge can never direct a jury to return a verdict on certain counts, even if the essential elements seem obvious: *R v. Budhoo*, 2015 ONCA 912