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Public Access to Courts

Open Court Principle

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General Principles

The "open court principle" provides the public the right to observe the court process and access court records, including filings and exhibits.

Purpose and Importance of Principle

The openness of the court process is necessary to achieve justice. [1] It is "one of the hallmarks of a democratic society".[2]

The open courts principle intends "to illuminate the avenue of accountability for the judicial system".[3] Every stage of a proceeding should have "public accessibility and concomitant judicial accountability".[4] Reduction of "public accessibility can only be justified where there is present the need to protect social values of superordinate importance."[5]

The right to a open court includes access "to the court's proceedings, records and exhibits" as well as the right to copy and distribute the information.[6]

All examinations of witnesses must be done in open court.[7]

Burden and Presumptions

The burden will be upon the person who attempts to deny access to court information.[8]

The open court principle imposes a presumption against all discretionary judicial decisions that limit access to the court.[9]

The burden requires Crown to provide "sufficient evidentiary basis in favour of granting the ban".[10]

There is a presumption that Courts are open including their exhibits and records.[11]

The evidence must be "convincing" and "subject to close scrutiny and meet rigorous standards".[12]

Standard

At common law, a publication ban should only be ordered where the Dagenais-Mentuck test is satisfied which requires:[13]

1. such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
2. the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Restrictions will be in the public interest where it is necessary to:[14]

- protect the innocent from unnecessary harm
- prevent significant harm to the victim or to witnesses
- "safeguarding privacy interests" of victims to encourage reporting of sexual offences

"Purely personal interests" cannot justify non-publication or sealing orders. Emotional distress or embarrassment of a litigant will not suffice.[15]

Variable Standard

The Dagenais/Mentuck test is to be applied in a "flexible and contextual manner".[16]

There is more likely to be a serious risk to the administration of justice at the investigative stage that would warrant less openness.[17] However, the interest may swing the other way to openness by the time of trial.[18]

Search Warrants

After a search warrant is executed openness is "presumptively favoured".[19]

UK Experience

The United Kingdom also has an "open court principle" that it describes as "an essential requisite of the criminal justice system" and the "embodiment of the principle of open justice in a free country".[20]

The need for open court includes the need to know the identity of the accused.[21]

1. *A.G. (Nova Scotia) v MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 SCR 175, *per* Dickson CJ ("Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.")
2. *CBC v New Brunswick (A.G.)*, 1996 CanLII 184 (SCC), [1996] 3 SCR 480, *per* La Forest J
3. *Coltsfoot Publishing Ltd. v Foster-Jacques*, 2012 NSCA 83 (CanLII), 1014 APR 166, *per* Fichaud JA, at para 85
   See also *Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), [2004] 2 SCR 332, *per* Iacobucci and Arbour JJ, at para 25
   Vickery v Nova Scotia Supreme Court (Prothonotary), 1991 CanLII 90 (SCC), [1991] 1 SCR 671, *per* Cory J (in dissent on other issue: "If court proceedings, and particularly the criminal process, are to be accepted, they must be completely open so as to enable members of the public to assess both the procedure followed and the final result obtained. Without public acceptance, the criminal law is itself at risk.")
4. *A.G. (N.S.) v MacIntyre*, *ibid.*
5. *A.G. (N.S.) v MacIntyre*, *ibid.*
6. E.g. *R v Canadian Broadcasting Corporation*, 2010 ONCA 726 (CanLII), 262 CCC (3d) 455, *per* Sharpe JA
   Lac Amiante du Quebec Ltee v 2858-0702 Quebec Inc, 2001 SCC 51 (CanLII), [2001] 2 SCR 743, *per* LeBel J
7. *Re Krakat*, 1965 CanLII 358 (ON SC), 4 CCC 300, *per* Hughes J
8. *MacIntyre*, *supra*, at p. 189 ("The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercice of the right.")
9. *R v Bagri*, 2004 SCC 43 (CanLII), [2004] 2 SCR 332
10. *R v ONE*, 2001 SCC 77 (CanLII), [2001] 3 SCR 478, *per* Iacobucci J, at para 9
11. *R v Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 SCR 442, *per* Iacobucci J
12. *MEH v Williams*, 2012 ONCA 35 (CanLII), {{{4}}}, *per* Doherty JA, at para 34
13. *Mentuck*, *ibid.* 462
    R v CBC, [2010] OJ No 4615 (CA)(*no CanLII links)
14. *CBC v New Brunswick (A.G.)*, *supra*
15. *MEH*, *supra* at para 25
16. *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 (CanLII), [2005] 2 SCR 188, *per* Fish J, at para 8 ("The Dagenais/Mentuck test, although applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner.")
17. *Toronto Star*, *ibid.* ("...serious risk to administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at an early stage.")
18. *Toronto Star*, *ibid.*
19. *Toronto Star*, *ibid.* at para 21
20. *R v Pearce*, (December 7, 2017 Nottingham Crown Court) [1]
    Re Trinity Mirror and others (A and another intervening) [2008] QB 770 (UK), at para 32
21. *Pearce*, *supra*, at para 16
    Re S (FC) (a child) [2005] 1 AC 593 (UK), at para 34

Sub Judice

The common law principle of contempt *sub judice* prevents parties from making statements to the public that are calculated to interfere with the court proceedings.[1]

1. See also Contempt of Court (Offence)

See Also

- Statutory Publication Ban on Court Proceedings
- Statutory Publication Ban on Evidence
- Excluding People From Court

Public and Media Restrictions

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Topics

- Open Court Principle
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Statutory Publication Ban on Court Proceedings

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General Principles

There are several types of publication ban permitted under the Criminal Code:

- An order restricting the publication of information identifying victims and witnesses (s. 486.5(1))
- An order restricting the publication of information identifying a justice system participant for certain offences (s. 486.5(2))
- An order restricting the publication of information identifying victims or witnesses of sexual offences (s. 486.4(2))
- An order restricting the publication of information identifying victims under the age of 18 of non-sexual offences (s. 486.4(2))
- An order restricting disclosure of witness identity (486.31)
- An order restricting publication of information identifying jury members (631)
- order restricting publication of evidence:
  - in the course of a bail hearing (517)
  - in the course of a preliminary inquiry (539)
  - in the course of a jury trial while jury is absent (648)

Under s. 486.6, anyone who violates any of these orders (s. 486.4(1), (2) or (3) or 486.5(1) or (2)) can be liable for a summary conviction offence.

Procedure

Applications for a publication ban, whether statutory or common law, should be made to the court at the level the case will be heard.[1]

The form of evidence can be through testimony, affidavit, or submissions of counsel.[2]

There is the suggestion that where the request is for a mandatory publication ban there is no need for notice to the media. Where the ban is discretionary notice is required.[3]

1. *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835, *per* Lamer CJ, at para 16 ("This request should be made to the trial judge (if one has been appointed) or to a judge in the court at the level the case will be heard (if the level of court can be established definitively by reference to statutory provisions such as ss. 468, 469, 553, 555, 798 of the Criminal Code...")
2. *R v Southam Inc*, 1989 CanLII 7177 (ON CA), 47 CCC (3d) 21, *per* Blair JA, at para 12 ("Where evidentiary support is required for discretionary orders under s. 442(3) [s. 486(3)], counsel for the Crown and the appellant submitted that it could be provided either by viva voce evidence, affidavit, or submissions of counsel. I agree. It is unnecessary to lay down any restriction on the type of information or the manner in which it may be put before a judge on this type of application.")
3. e.g. PPSC Deskbook - Ch 4 on publication bans and sealing orders

General Publication Ban (s. 486.5(1),(2))

Protection of Victims, Witness or System Participants

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4 [*order restricting publication identifying certain persons*], on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1) [*order restricting publication – justice system participants – enumerated offences*], or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Offences

(2.1) The offences for the purposes of subsection (2) [*order restricting publication – justice system participants*] are

(a) an offence under section 423.1 [*intimidation of justice system participant*], 467.11 [*participation in activities of criminal organization*], 467.111 [*recruitment of members by a criminal organization*], 467.12 [*commission of offence for criminal organization*] or 467.13 [*instructing commission of offence for criminal organization*], or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
(b) a terrorism offence;
(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
(d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

Limitation

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.
[*omitted (4), (5), (6), (7), (8) and (9)*]
2005, c. 32, s. 15; 2015, c. 13, s. 19.
[*annotation(s) added*]

– CCC

Section 486.5(1) provides the court with the authority to make an order "directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice."

While section 486.5(2) provides the authority to make an order to not reveal "information that could identify the justice system participant".

This can be applied for by a prosecutor, a victim or a witness, a judge or justice. (s. 486.5(1))

Procedure

486.5
[*omitted (1), (2), (2.1) and (3)*]
(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and
(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Hearing may be held

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.
[*omitted (7), (8) and (9)*]
2005, c. 32, s. 15; 2015, c. 13, s. 19.
[*annotation(s) added*]

– CCC

Under s.486.5(4), the application must be made in writing and notice must be given to the prosecutor, accused, or any other person affected by the order that the judge specifies. The application itself as well as the contents of a hearing on the application cannot be published.(s. 486.5(6), (9))

Requirement and Factors

"Proper Administration of Justice"

The order shall only be made where the applicant establishes that the order is "necessary for the proper administration of justice". (s. 486(1), (2), (5))

Factors

> 486.5
> [*omitted (1), (2), (2.1), (3), (4), (5) and (6)*]
>
> **Factors to be considered**
>
> (7) In determining whether to make an order, the judge or justice shall consider
>
> (a) the right to a fair and public hearing;
> (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
> (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
> (d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
> (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
> (f) the salutary and deleterious effects of the proposed order;
> (g) the impact of the proposed order on the freedom of expression of those affected by it; and
> (h) any other factor that the judge or justice considers relevant.
>
> **Conditions**
>
> (8) An order may be subject to any conditions that the judge or justice thinks fit.
>
> **Publication prohibited**
>
> (9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way
>
> (a) the contents of an application;
> (b) any evidence taken, information given or submissions made at a hearing under subsection (6) [*order restricting publication – hearing in private*]; or
> (c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.
>
> 2005, c. 32, s. 15; 2015, c. 13, s. 19.
> [*annotation(s) added*]
>
> – CCC

Publication Ban for Victims and Witnesses of Sexual Offences

Section 486.4 provides for publication bans relating to sexual offences:

> **Order restricting publication — sexual offences**
>
> 486.4 (1) Subject to subsection (2) [*mandatory order on application – who can apply*], the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences:
>
> (i) an offence under section 151 [*sexual interference*], 152 [*invitation to sexual touching*], 153 [*sexual exploitation*], 153.1 [*sexual exploitation of disabled*], 155 [*incest*], 160 [*bestiality*], 162 [*voyeurism*], 163.1 [*child pornography*], 170 [*parent or guardian procuring sexual activity*], 171 [*householder permitting prohibited sexual activity*], 171.1 [*making sexually explicit materials available to child*], 172 [*corrupting children*], 172.1 [*child luring*], 172.2 [*agree or arrange sexual offence against*

child], 173 [*Indecent acts*], 213 [*stopping or impeding traffic*], 271 [*sexual assault*], 272 [*sexual assault with a weapon or causing bodily harm*], 273 [*aggravated sexual assault*], 279.01 [*trafficking in persons*], 279.011 [*trafficking in persons, under 18*], 279.02 [*material benefit from trafficking*], 279.03 [*withholding or destroying docs*], 280 [*abduction of a person under 16*], 281 [*abduction of a person under 14*], 286.1 [*comm. to obtain sexual services for consideration*], 286.2 [*material benefit from sexual services provided*], 286.3 [*procuring*], 346 [*extortion*] or 347 [*criminal interest rates*], or
(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b) [*order restricting publication – sexual offences – offences*], the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
(b) on application made by the victim, the prosecutor or any such witness, make the order.

[*omitted (2.1) and (2.2)*]

Child pornography

(3) In proceedings in respect of an offence under section 163.1 [*child pornography*], a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.
2005, c. 32, s. 15, c. 43, s. 8; 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18; 2019, c. 25, s. 190.
[*annotation(s) added*]

– CCC

Under s. 486.4 (1), the court may make an order "directing that any information that could identify the complainant or a witness" not be published, broadcast or transmitted for any sexual offences (as listed in s. 486.4(1)(a)).

Any complainant or witness under the age of 18 years old must be notified of their right to make an application for an order, and if requested by the complainant, prosecutor or witness under 18 years of age, the judge must made the order. (s. 486.4(2))

Similarly, under 486.4(3), for charges under 163.1, the court must make an order in relation to any person who comprises the subject of child pornographic materials.

The bans under s.486.4 play an important part in protecting victims by removing the fear of publication of their names should they report the offence. The mandatory nature of the order provides certainty to the victim of non-publication.[1]

Duration of Ban

A publication ban under 486.4(3) cannot be revoked by application of a third party and is not extinguished by the death of the protected person.[2]

Effect on Previously Published Information

Where information falling within s. 486.4 has been published online before the issuance of a 486.4 publication ban has been ordered, the information does not need to be taken off-line.[3]

1. *Canadian Newspapers Co v Canada (Attorney General)*, 1988 CanLII 52 (SCC), [1988] 2 SCR 122(*complete citation pending*), at p. 132
see also *R v Adams*, 1995 CanLII 56 (SCC), [1995] 4 SCR 707, *per* Sopinka J, at para 25
2. *R v KB*, 2014 NSPC 24 (CanLII), 345 NSR (2d) 203, *per* Campbell J
3. *R v Canadian Broadcasting Corporation*, 2018 ABCA 391 (CanLII), 77 Alta LR (6th) 232, *per* Rowbotham JA (3:0)

Pub. Ban for Non-Sexual Offences Relating to Victims Under 18 Years

486.4
[*omitted (1) and (2)*]

Victim under 18 — other offences

(2.1) Subject to subsection (2.2) [*order restricting publication – non-sexual offences – mandatory notice when victim under 18*], in proceedings in respect of an offence other than an offence referred to in subsection (1) [*order restricting publication – sexual offences*], if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1) [*order restricting publication – sexual offences*], if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and
(b) on application of the victim or the prosecutor, make the order.

[*omitted (3)*]

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.
2005, c. 32, s. 15, c. 43, s. 8; 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18. 2019, c. 25, s. 190.
[*annotation(s) added*]

– CCC

Sexual Offences in Relation to Youthful Victims

Section 486.4(2.2) requires that a judge order the publication ban of any information identifying an underage victim.

The mandatory nature of this provision may not be constitutional as it may violate the public's right to freedom of speech under s. 2(b) of the Charter.[1]

1. e.g. see *R v RDF*, 2016 SKPC 89 (CanLII), *per* Martinez J

Statutory Ban on Disclosure Identity of Witness

Section 486.31 is an order prohibiting the disclosure of "information that could identify the witness" during the "course of the proceedings".

Non-disclosure of witness' identity

486.31 (1) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Hearing may be held

(2) The judge or justice may hold a hearing to determine whether the order should be made, and the hearing may be in private.

Factors to be considered

(3) In determining whether to make the order, the judge or justice shall consider

(a) the right to a fair and public hearing;
(b) the nature of the offence;
(c) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(d) whether the order is needed to protect the security of anyone known to the witness;
(e) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
(e.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
(f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
(g) the importance of the witness' testimony to the case;
(h) whether effective alternatives to the making of the proposed order are available in the circumstances;
(i) the salutary and deleterious effects of the proposed order; and
(j) any other factor that the judge or justice considers relevant.

No adverse inference

(4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.
2015, c. 13, s. 17, c. 20, s. 38.

– CCC

Accused Identification Ban

There is no independent authority that allows an order to prohibit the publication of the accused's name.

The only circumstances where there can be a publication ban of the accused's identity is under s. 486.4 where it is for the purpose of protecting the identification of authorized persons named under s. 486.4 or related.[1]

When such an application is made, the media should be given notice.[2]

1. *R v Southam Inc*, 1989 CanLII 7177 (ON CA), 47 CCC (3d) 21, *per* Blair JA
2. *CBC v Her Majesty The Queen*, 2013 NUCJ 6 (CanLII), *per* Johnson J, at para 20 ("However, where the Crown seeks to ban publication of the name of the accused or other details contained within the information in the court file or revealed in court, it must abide by the provisions of section 486.5 and give notice to the media as provided in 4 (b) above.")

Jury Identification Ban

Under 631(6), the court or crown may order a publication ban on any information that may tend to identify jury members where it "is necessary for the proper administration of justice":

631
[*omitted (1), (2), (2.1), (2.2), (3), (3.1), (4), (5)*]

Ban on publication, limitation to access or use of information

(6) On application by the prosecutor or on its own motion, the court or judge before which a jury trial is to be held may, if the court or judge is satisfied that such an order is necessary for the proper administration of justice, make an order

> (a) directing that the identity of a juror or any information that could disclose their identity shall not be published in any document or broadcast or transmitted in any way; or
> (b) limiting access to or the use of that information.

R.S., 1985, c. C-46, s. 631; R.S., 1985, c. 27 (1st Supp.), s. 131; 1992, c. 41, s. 1; 1998, c. 9, s. 5; 2001, c. 32, ss. 38, 82; 2002, c. 13, s. 52; 2005, c. 32, s. 20; 2011, c. 16, s. 7.

– CCC

Publication Ban of Evidence

- Statutory Publication Ban on Evidence

Review Board Evidence

Section 672.501 and 672.51 govern the limitation on publication regarding information and evidence associated with an accused who has been found not criminally responsible due to mental illness.

Youth Court

- Publication Bans Relating to Youth Prosecutions

Common Law Publication Ban

A common law publication ban is available under the *Dagenais/Mentuck* framework.[1] The applicant must establish that:

1. The order must be necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk; and
2. The salutary effects of the order must outweigh the deleterious effects on the rights and interests of the parties and the public, including the right of free expression, the right of the accused to a fair and public trial and the efficacy of the administration of justice.

The application of common law publication bans will depend on the circumstances.[2]

One type of common law publication ban includes a "Confidentiality Order".[3]

"Holdback" Information

A common law publication ban is not likely appropriate to be used to protect "holdback' information in many circumstances.[4]

1. *United Kingdom of Great Britain and Northern Ireland (Attorney General) v. LA*, 2020 NSCA 75 (CanLII), *per* Wood CJ, at para 21
2. *UK v LA*, *ibid.*, at para 20
3. *UK v LA*, *ibid.*, at para 26
4. *UK v LA*, *ibid.*, at paras 35 to 46

Rescission of Ban

A court has power to rescind its own publication ban.[1] Bans under s. 486.4(3) for offences relating to child pornography cannot be rescinded.[2]

Bans under a mandatory provision cannot be rescinded until such time that the circumstances requiring the ban change.[3]

1. *R v Adams*, 1995 CanLII 56 (SCC), [1995] 4 SCR 707, *per* Sopinka J
   R v KB, 2014 NSPC 24 (CanLII), 345 NSR (2d) 203, *per* Campbell J, at para 9
2. *KB*, *ibid.*
3. *Adams*, *supra*, at paras 30, 31

Breach of Publication Bans

- Breach of Publication and Access Bans (Offence)

Appeals by Media of Publication Ban Orders

Section 40 of the *Supreme Court Act* permits the media to appeal an order of a superior court judge.[1]

1. *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835, *per* Lamer CJ

see also *Supreme Court Act*, RSC 1985, c S-26

See Also

- Sealing and Unsealing Judicial Authorizations
- Testimonial Aids for Young, Disabled or Vulnerable Witnesses

Excluding People From Court

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79564)

< Procedure and Practice < Pre-Trial and Trial Matters < Public and Media Restrictions

General Principles

The "open court principle" creates a rebuttable presumption that all proceedings in Court, as well as all filings with the court, are to be open to the public.[1] There exist circumstances where other interests will overide this principle, resulting in limitations on the public's access to the Courts. Witnesses who are to testify in trial are regularly excluded from the trial Court before they testify. Members of the public are excluded from Court where the evidence before the judge are of a particularly sensitive character. In the most extreme example, there is also the ability to exclude the accused and defence counsel from the proceedings where any public knowledge of the contents could be dangerous, such as when dealing with confidential informers.

1. see Public and Media Restrictions

Exclusion of Parties

The trial judge can order the exclusion of the accused where his conduct makes the proceedings impractical.[1]

The accused can likewise voluntarily be absent from the trial with the court's consent.[2] However, depending on how the proceedings go in the absence of the accused, there may be a ground of appeal.[3]

1. See s.650(2)(8)
   R v Pawliw, 1985 CanLII 656 (BC SC), 23 CCC (3d) 14, *per* Murray J
2. *R v Drabinsky*, 2008 CanLII 40225 (ON SC), 235 CCC (3d) 350, *per* Benotto J
3. *R v Valeanu*, 1995 CanLII 614 (ON CA), 97 CCC (3d) 338, *per* Arbour JA

Excluding Witnesses

Before the commencement of trial it is normally expected that all prospective witnesses will be excluded from the courtroom. On application of either party, the judge has discretion to order the exclusion of witnesses.[1]

The judge does not need to give reasons for ordering the exclusion of witnesses, however, the refusal to grant the order must include grounds for making such an order.[2]

The reason for excluding witnesses is because a witness's ability to hear the evidence of other witnesses before testifying can negatively affect the credibility of the witness.[3]

Where a current witness was present for the testimony of a previous witness, the current witness's evidence should be given less weight.[4]

1. *R v Hoyt*, 1949 CanLII 391 (NB CA), CCC 306, *per* Richards CJ
   R v Dobberthien, 1974 CanLII 184 (SCC), [1975] 2 SCR 560, *per* Martland J
   R v Leitner, 1998 CanLII 13871 (SK QB), [1998] S.J. No 735 (Sask. Q.B.), *per* Dawson J
   The Law of Evidence in Canada, Sopinka Lederman & Bryant, Butterworths, 2nd edition, at pp. 826-827
   Canadian Criminal Evidence, McWilliams (3d edition) Canada Law Book, at pp. 36-2.1 - 36-3
   R v BLWD, 2008 SKPC 56 (CanLII), 317 Sask R 247, *per* Kolenick J, at para 3
2. *Re Learn and The Queen*, 1981 CanLII 3205 (ON SC), 63 CCC (2d) 191 (Ont. H.C.J.), *per* Hollingworth J
   Re Collette and the Queen; Re Richard and the Queen, 1983 CanLII 3509 (ON SC), 6 CCC (3d) 300, *per* Carruthers J
   BLWD, *supra*, at para 3
3. *R v Smuk*, 1971 CanLII 1197 (BC CA), 3 CCC (2d) 457 (BCCA), *per* McFarlane JA
   R v Grabowski, 1983 CanLII 3579 (QC CA), 8 CCC (3d) 78, *per* McCarthy JA
   Re Collette and the Queen, *supra*, at p. 306
4. *BLWD*, *supra*, at para 3
   R v Spark, 2000 CanLII 19619SK PC), [2000] S.J. No 492 (Sask. Prov. Ct.), *per* Whelan J

Excluding Public from Court

Section 486 sets out the basic premise that all criminal proceedings are held in open court but persons can be excluded where it is "in the interest of public morals, the maintenance of order, the proper administration of justice" or injury to international relations or national defence/security.

Exclusion of public

486 (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.

Application

(1.1) The application may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

Factors to be considered

(2) In determining whether the order is in the interest of the proper administration of justice, the judge or justice shall consider

(a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
(b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;
(c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;
(d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(e) the protection of justice system participants who are involved in the proceedings;
(f) whether effective alternatives to the making of the proposed order are available in the circumstances;
(g) the salutary and deleterious effects of the proposed order; and
(h) any other factor that the judge or justice considers relevant.

Reasons to be stated

(3) If an accused is charged with an offence under section 151 [*sexual interference*], 152 [*invitation to sexual touching*], 153 [*sexual exploitation*], 153.1 [*sexual exploitation of disabled*] or 155 [*incest*], subsection 160(2) [*compelling bestiality*] or (3) [*bestiality in presence of or by child*] or section 163.1 [*child pornography*], 170 [*parent or guardian procuring sexual activity*], 171 [*householder permitting prohibited sexual activity*], 171.1 [*making sexually explicit materials available to child*], 172 [*corrupting children*], 172.1 [*child luring*], 172.2 [*agree or arrange sexual offence against child*], 173 [*Indecent acts*], 271 [*sexual assault*], 272 [*sexual assault with a weapon or causing bodily harm*], 273 [*aggravated sexual assault*], 279.01 [*trafficking in persons*], 279.011 [*trafficking in persons, under 18*], 279.02 [*material benefit from trafficking*], 279.03 [*withholding or destroying docs*], 286.1 [*comm. to obtain sexual services for consideration*], 286.2 [*material benefit from sexual services provided*] or 286.3 [*procuring*] and the prosecutor or the accused applies for an order under subsection (1) [*exclusion of public during proceedings*], the judge or justice shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.

No adverse inference

> (4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.
>
> R.S., 1985, c. C-46, s. 486; R.S., 1985, c. 27 (1st Supp.), s. 203, c. 19 (3rd Supp.), s. 14, c. 23 (4th Supp.), s. 1; 1992, c. 1, s. 60(F), c. 21, s. 9; 1993, c. 45, s. 7; 1997, c. 16, s. 6; 1999, c. 25, s. 2(Preamble); 2001, c. 32, s. 29, c. 41, ss. 16, 34, 133; 2002, c. 13, s. 20; 2005, c. 32, s. 15, c. 43, ss. 4, 8; 2010, c. 3, s. 4; 2012, c. 1, s. 28; 2014, c. 25, s. 21; 2015, c. 13, s. 13, c. 20, s. 21; 2019, c. 25, s. 189.
>
> [*annotation(s) added*]
>
> – CCC

These provisions can be used at any time in a proceeding, including trial and sentencing.

Courtroom Access

The public cannot be excluded under s. 486(1) on the mere basis that the witness must give evidence of sexual behaviour that is embarrassing.[1] Or simply because the offence is of a sexual nature.[2] However, where a complainant in a sexual offence has difficulty giving evidence due to embarrassment, it may be in the interest of justice to exclude the public.[3]

Where a jury is being vetted for bias, the public may be excluded.[4]

Absent an order from the court, it is improper to lock any of the doors to the courtroom normally used by the public to access the court while a witness is testifying. Actions of this nature that impede public access to the courts can result in a mistrial.[5]

Publication

Should the publication of names of witnesses may endanger them, the judge may prohibit their publication under s. 486(2).[6]

There is no power to prohibit the publication of the accused's name unless it is to protect the identity of another party.[7]

1. *R v Quesnel*, 1979 CanLII 2883 (ON CA), 51 CCC (2d) 270, *per* Brooke JA
2. *R v Warawuk*, 1978 ALTASCAD 228 (CanLII), 42 CCC (2d) 121, *per* Clement JA
3. *R v Lefebvre*, 1984 CanLII 3601 (QC CA), 17 CCC (3d) 277, *per* Turgeon JA
   Warawuk, *supra*
4. *R v Musitano*, 1985 CanLII 1983 (ON CA), 24 CCC (3d) 65, *per curiam*
5. *R v PDT*, 2010 ABQB 37(*no CanLII links) - crown locked one of two doors for public access to the court in order to make complainant more comfortable.
6. e.g. see *R v McArthur*, 1984 CanLII 3478 (ON SC), 13 CCC (3d) 152, *per* Dupont J
7. *R v London Free Press Printing Co*, 1990 CanLII 6653 (ON SC), 75 OR (2d) 161, *per* Granger J
   Re R. and Unnamed Person, 1985 CanLII 3501 (ON CA), 22 CCC (3d) 284, *per* Zuber JA, at p. 288

In Camera Hearings

An *in camera* hearing prohibits the accused from being present in court during the evidence. These hearings are not under legislation but are a judge-created procedure.[1]

An *in camera* hearing is similar but different from a voir dire.[2] It is a trial of a single issue.[3] The judge has the discretion to decide whether written or oral evidence is needed.[4]

Evidence that may reveal the identity of confidential informers will sometimes held *in camera*, such as in the review of affidavits for wiretaps.[5] The rationale for such an *in camera* hearing is that the risk posed to informers far outweighs the right to full answer and defence and the exception to privilege for innocence at stake.[6]

During an *in camera* hearing it may be desirable for the judge to conduct an inquisitorial-style examination.[7]

Once evidence is given *in camera*, it is rare that the accused will ever get access to any information provided.[8]

For the sake of trial fairness, it may be necessary for a judge who is not the trial judge to preside over the *in camera* hearing.[9]

1. *R v Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 SCR 577, *per* McLachlin J, at para 96 ("Such procedures do not require legislation. It has always been open to the courts to devise such procedures as may be necessary to ensure a fair trial. The requirement of a voir dire before a confession can be admitted, for example, is judge-made law.")
2. *R v McCartie*, 2013 BCPC 221 (CanLII), *per* Gouge J, at para 36
3. *McCartie*, *ibid.*, at para 37
4. *McCartie*, *ibid.*, at para 38 - oral evidence should be given where credibility is an issue
5. Described in *R v Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 SCR 1421, *per* Sopinka J
   affirmed in *R v Leipert*, 1997 CanLII 367 (SCC), [1997] 1 SCR 281, *per* McLachlin J
   R v Basi, 2009 SCC 52 (CanLII), [2009] 3 SCR 389, *per* Fish J
6. *Leipert*, *supra*
   Basi, *supra*
   R v Edwards Books and Art Ltd, 1986 CanLII 12 (SCC), [1986] 2 SCR 713, *per* Dickson CJ, at para 117
7. *R v McCartie*, 2013 BCPC 289 (CanLII), *per* Gouge J
8. *R v McLellan*, 2013 BCSC 175 (CanLII), *per* Willcock J, at paras 36 to 38
9. e.g. *McCartie*, *supra*, at paras 22 to 32

Exclusion by a Youth Court Justice

Exclusion from hearing

132 (1) Subject to subsection (2), a court or justice before whom proceedings are carried out under this Act may exclude any person from all or part of the proceedings if the court or justice considers that the person's presence is unnecessary to the conduct of the proceedings and the court or justice is of the opinion that

(a) any evidence or information presented to the court or justice would be seriously injurious or seriously prejudicial to

(i) the young person who is being dealt with in the proceedings,
(ii) a child or young person who is a witness in the proceedings, or
(iii) a child or young person who is aggrieved by or the victim of the offence charged in the proceedings; or

(b) it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the court room.

Exception

(2) Subject to section 650 (accused to be present) of the Criminal Code and except if it is necessary for the purposes of subsection 34(9) (nondisclosure of medical or psychological report) of this Act, a court or justice may not, under subsection (1), exclude from proceedings under this Act

(a) the prosecutor;
(b) the young person who is being dealt with in the proceedings, the counsel or a parent of the young person or any adult assisting the young person under subsection 25(7);
(c) the provincial director or his or her agent; or
(d) the youth worker to whom the young person's case has been assigned.

Exclusion after adjudication or during review

(3) A youth justice court, after it has found a young person guilty of an offence, or a youth justice court or a review board, during a review, may, in its discretion, exclude from the court or from a hearing of the review board any person other than the following, when it is being presented with information the knowledge of which might, in its opinion, be seriously injurious or seriously prejudicial to the young person:

(a) the young person or his or her counsel;
(b) the provincial director or his or her agent;
(c) the youth worker to whom the young person's case has been assigned; and
(d) the Attorney General.

Exception

(4) The exception set out in paragraph (3)(a) is subject to subsection 34(9) (nondisclosure of medical or psychological report) of this Act and section 650 (accused to be present) of the Criminal Code.

– YCJA

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Publication Bans Relating to Youth Prosecutions

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79564)

< Sentencing < Sentencing Young Offenders

General Principles

The YCJA has provisions that limit and control the publishing of information relating to the young accused (s. 110) and any other young person relating to the case, such as victims and witnesses (s. 111).

Accused

Section 110 prohibits the publication of names of, and "other information" relating to, any young person being dealt with under the YCJA:

Identity of offender not to be published

110 (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Limitations

(2) Subsection (1) [*discretionary weapons prohibition order*] does not apply

(a) in a case where the information relates to a young person who has received an adult sentence; or
(b) [Repealed, 2019, c. 25, s. 379]
(c) in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

Exception

(3) A young person referred to in subsection (1) [*discretionary weapons prohibition order*] may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.
[*omitted (4), (5) and (6)*]
2002, c. 1, s. 110; 2012, c. 1, s. 189; 2019, c. 25, s. 379.

– YCJA

Purpose

The ban on publication of the identity of a young offender is aimed at allowing the young person to "reintegrate into their community after serving a sentence" and avoid the stigma of involvement in the justice system such that it could "hamper efforts to move on with life".[1]

Duration

Despite s. 110 being silent on the issue, it appears that the publication ban under 110 only lasts as long as there is risk that publication may "hinder rehabilitation by stigmatization or [cause] premature labelling".[2]

Charter

The shift of burden found under s. 110(2) on to a young person who has been sentenced as an adult to maintain a s. 110 publication ban is contrary to s. 7 of the *Charter of Rights and Freedoms* and is not saved by s. 1.[3]

1. *R v Munroe*, 2013 NSPC 45 (CanLII), 331 NSR (2d) 281, *per* Campbell J
2. *R v Carvery*, 2012 NSCA 107 (CanLII), 305 CCC (3d) 329, *per* Beveridge JA, at para 94
3. *R v DB*, 2008 SCC 25 (CanLII), [2008] 2 SCR 3, *per* Abella J

Exceptions to Publication Ban

110
[*omitted (1), (2) and (3)*]

Ex parte application for leave to publish

(4) A youth justice court judge shall, on the ex parte application of a peace officer, make an order permitting any person to publish information that identifies a young person as having committed or allegedly committed an indictable offence, if the judge is satisfied that

(a) there is reason to believe that the young person is a danger to others; and
(b) publication of the information is necessary to assist in apprehending the young person.

Order ceases to have effect

(5) An order made under subsection (4) [*YCJA publication ban – ex parte application for leave to publish*] ceases to have effect five days after it is made.

Application for leave to publish

(6) The youth justice court may, on the application of a young person referred to in subsection (1) [*identity of offender not to be published*], make an order permitting the young person to publish information that would identify him or her as having been dealt with under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, if the court is satisfied that the publication would not be contrary to the young person's best interests or the public interest.

2002, c. 1, s. 110; 2012, c. 1, s. 189; 2019, c. 25, s. 379.

– YCJA

Victims or Witnesses

Identity of victim or witness not to be published

111 (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Exception

(2) Information that would serve to identify a child or young person referred to in subsection (1) [*identity of victim or witness not to be published*] as having been a victim or a witness may be published, or caused to be published, by

(a) that child or young person after he or she attains the age of eighteen years or before that age with the consent of his or her parents; or
(b) the parents of that child or young person if he or she is deceased.

Application for leave to publish

(3) The youth justice court may, on the application of a child or a young person referred to in subsection (1) [*identity of victim or witness not to be published*], make an order permitting the child or young person to publish information that would identify him or her as having been a victim or a witness if the court is satisfied that the publication would not be contrary to his or her best interests or the public interest.

– YCJA

Purpose

It would appear that one of the purposes of this section is to protect young people that "are particularly vulnerable to intrusions into their privacy".[1]

Duration

The publication ban under s. 111 of the YCJA on the name of a complainant will extend beyond the duration of their life.[2]

1. *R v B(Y)*, 2014 ONCJ 390 (CanLII), *per* Cohen J, at para 35
2. *R v Canadian Broadcasting Corp.*, 1998 CanLII 6998 (NWT CA), *per* Foisey JA

Consequences of Publishing

Non-application

112. Once information is published under subsection 110(3) or (6) or 111(2) or (3), subsection 110(1) (identity of offender not to be published) or 111(1) (identity of victim or witness not to be published), as the case may be, no longer applies in respect of the information.

– YCJA

Lifting Publication Ban

[Repealed, 2019, c. 25, s. 377]

~~**Decision regarding lifting of publication ban**~~

~~75 (1) When the youth justice court imposes a youth sentence on a young person who has been found guilty of a violent offence, the court shall decide whether it is appropriate to make an order lifting the ban on publication of information that would identify the young person as having been dealt with under this Act as referred to in subsection 110(1) [*identity of offender not to be published*]. Order (2) A youth justice court may order a lifting of the ban on publication if the court determines, taking into account the purpose and principles set out in sections 3 and 38, that the young person poses a significant risk of committing another violent offence and the lifting of the ban is necessary to protect the public against that risk.~~

~~**Onus**~~

~~(3) The onus of satisfying the youth justice court as to the appropriateness of lifting the ban is on the Attorney General.~~

~~**Appeals**~~

~~(4) For the purposes of an appeal in accordance with section 37 , an order under subsection (2) is part of the sentence.~~ ~~2002, c. 1~~, s. 75; ~~2012, c. 1~~, s. ~~185~~.

– YCJA

See Also

- Access to Records Relating to Youth Prosecutions
- Statutory Publication Ban on Court Proceedings

Access to Records Relating to Youth Prosecutions

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< Sentencing < Sentencing Young Offenders

General Principles

Part 6 of the YCJA, comprising s. 110 to 129, governs keeping and disclosing of records related to young offenders. These sections set a window of time in which relevant parties, such as courts, police, and counsel, can access the files. Once the window expires, the records are inaccessible without a s. 123 YCJA Order of the court.

Purpose of Access Regime

The purpose of the restrictions on access to records relating to youth prosecutions found in Part 6 is to "avoid the premature labeling of young offenders as outlaws" which would harm rehabilitation and re-integration.[1]

History

The predecessor Youth Offender Act similarly had a purpose that included protecting the privacy of the young offenders.[2]

1. *SL v NB*, 2005 CanLII 11391 (ON CA), 195 CCC (3d) 481, *per* Doherty JA, at para 35 ("the Act seeks to avoid the premature labeling of young offenders as outlaws and to thereby facilitate their rehabilitation and their reintegration into the law-abiding community")

   See also *Toronto Star Newspaper Ltd. v Ontario*, 2012 ONCJ 27 (CanLII), 289 CCC (3d) 549, *per* Cohen J, at para 40
2. *R v Sheik-Qasim*, 2007 CanLII 52983 (ON SC), 230 CCC (3d) 531, *per* Molloy J, at para 15

Records and Record-holders

Definition of Records

Section 2 of the YCJA defines "Record" as:

2 (1) The definitions in this subsection apply in this Act.

...

"record" includes any thing containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act. (dossier)

...

– YCJA

Search warrant materials are considered "court records", not police or government records.[1]

Designated Record-holder

Sections 114 to 116 designate which entities may possess YCJA records:[2]

Records That May Be Kept
Youth justice court, review board and other courts

114 A youth justice court, review board or any court dealing with matters arising out of proceedings under this Act may keep a record of any case that comes before it arising under this Act.

– YCJA

Police Records

Police records

115 (1) A record relating to any offence alleged to have been committed by a young person, including the original or a copy of any fingerprints or photographs of the young person, may be kept by any police force responsible for or participating in the investigation of the offence.

Extrajudicial measures

(1.1) The police force shall keep a record of any extrajudicial measures that they use to deal with young persons.

Police records

(2) When a young person is charged with having committed an offence in respect of which an adult may be subjected to any measurement, process or operation referred to in the *Identification of Criminals Act*, the police force responsible for the investigation of the offence may provide a record relating to the offence to the Royal Canadian Mounted Police. If the young person is found guilty of the offence, the police force shall provide the record.

Records held by R.C.M.P.

(3) The Royal Canadian Mounted Police shall keep the records provided under subsection (2) [*police records – ICA eligible offences*] in the central repository that the Commissioner of the Royal Canadian Mounted Police may, from time to time, designate for the purpose of keeping criminal history files or records of offenders or keeping records for the identification of offenders.
2002, c. 1, s. 115; 2012, c. 1, s. 190.

– YCJA

Government Records

Government records

116 (1) A department or an agency of any government in Canada may keep records containing information obtained by the department or agency

(a) for the purposes of an investigation of an offence alleged to have been committed by a young person;
(b) for use in proceedings against a young person under this Act;
(c) for the purpose of administering a youth sentence or an order of the youth justice court;
(d) for the purpose of considering whether to use extrajudicial measures to deal with a young person; or
(e) as a result of the use of extrajudicial measures to deal with a young person.

Other records

(2) A person or organization may keep records containing information obtained by the person or organization

(a) as a result of the use of extrajudicial measures to deal with a young person; or
(b) for the purpose of administering or participating in the administration of a youth sentence.

– YCJA

1. *Telegraph Journal v QCT*, 2010 NBPC 29 (CanLII), 934 APR 164, *per* LeMesurier J, at para 22
2. *SL v NB*, 2005 CanLII 11391 (ON CA), 195 CCC (3d) 481, *per* Doherty JA, at para 37

Prohibited Access to Records

Section 118(1) requires that no person be permitted access certain types of records unless authorized by the YCJA:

> **No access unless authorized**
>
> 118 (1) Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116 [*records that may be kept*], and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.
>
> **Exception for employees**
>
> (2) No person who is employed in keeping or maintaining records referred to in subsection (1) [*no access unless authorized*] is restricted from doing anything prohibited under subsection (1) [*no access unless authorized*] with respect to any other person so employed.
>
> – YCJA

The prohibition only applies to those records that fall into s. 114 to 116.

Where Regime Does Not Apply

Restrictions under s. 118 of the YCJA do not apply to youth offenders we are subject to an adult sentence:

> **Exception — adult sentence**
>
> 117 Sections 118 to 129 [*provisions concerning youth records*] do not apply to records kept in respect of an offence for which an adult sentence has been imposed once the time allowed for the taking of an appeal has expired or, if an appeal is taken, all proceedings in respect of the appeal have been completed and the appeal court has upheld an adult sentence. The record shall be dealt with as a record of an adult and, for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.
>
> – YCJA

Criminal Records

Where the youth sentence is not a discharge, this record "in effect" converts to an adult record where there is a conviction for an adult offence within the "access period".[1]

1. see s. 119(9)
   R v PJS, 2008 NSCA 111 (CanLII), 240 CCC (3d) 204, *per* Roscoe JA, at para 15

Persons Able to Access Records

> **Persons having access to records**
>
> 119 (1) Subject to subsections (4) to (6) [*provisions related to persons having access to records*], from the date that a record is created until the end of the applicable period set out in subsection (2) [*persons having access to records – period of access*], the following persons, on request, shall be given access to a record kept under section 114 [*youth justice court, review board and other courts*], and may be given access to a record kept under sections 115 [*police records*] and 116 [*government records*]:

(a) the young person to whom the record relates;
(b) the young person's counsel, or any representative of that counsel;
(c) the Attorney General;
(d) the victim of the offence or alleged offence to which the record relates;
(e) the parents of the young person, during the course of any proceedings relating to the offence or alleged offence to which the record relates or during the term of any youth sentence made in respect of the offence;
(f) any adult assisting the young person under subsection 25(7) [*right to counsel – youth assisted by adult*], during the course of any proceedings relating to the offence or alleged offence to which the record relates or during the term of any youth sentence made in respect of the offence;
(g) any peace officer for

(i) law enforcement purposes, or
(ii) any purpose related to the administration of the case to which the record relates, during the course of proceedings against the young person or the term of the youth sentence;

(h) a judge, court or review board, for any purpose relating to proceedings against the young person, or proceedings against the person after he or she becomes an adult, in respect of offences committed or alleged to have been committed by that person;
(i) the provincial director, or the director of the provincial correctional facility for adults or the penitentiary at which the young person is serving a sentence;
(j) a person participating in a conference or in the administration of extrajudicial measures, if required for the administration of the case to which the record relates;
(k) a person acting as ombudsman, privacy commissioner or information commissioner, whatever his or her official designation might be, who in the course of his or her duties under an Act of Parliament or the legislature of a province is investigating a complaint to which the record relates;
(l) a coroner or a person acting as a child advocate, whatever his or her official designation might be, who is acting in the course of his or her duties under an Act of Parliament or the legislature of a province;
(m) a person acting under the *Firearms Act*;
(n) a member of a department or agency of a government in Canada, or of an organization that is an agent of, or under contract with, the department or agency, who is

(i) acting in the exercise of his or her duties under this Act,
(ii) engaged in the supervision or care of the young person, whether as a young person or an adult, or in an investigation related to the young person under an Act of the legislature of a province respecting child welfare,
(iii) considering an application for conditional release, or for a record suspension under the *Criminal Records Act*, made by the young person, whether as a young person or an adult,
(iv) administering a prohibition order made under an Act of Parliament or the legislature of a province, or
(v) administering a youth sentence, if the young person has been committed to custody and is serving the custody in a provincial correctional facility for adults or a penitentiary;

(o) a person, for the purpose of carrying out a criminal record check required by the Government of Canada or the government of a province or a municipality for purposes of employment or the performance of services, with or without remuneration;
(p) an employee or agent of the Government of Canada, for statistical purposes under the *Statistics Act*;
(q) an accused or his or her counsel who swears an affidavit to the effect that access to the record is necessary to make a full answer and defence;
(r) a person or a member of a class of persons designated by order of the Governor in Council, or the lieutenant governor in council of the appropriate province, for a purpose and to the extent specified in the order; and
(s) any person or member of a class of persons that a youth justice court judge considers has a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that access to the record is

(i) desirable in the public interest for research or statistical purposes, or
(ii) desirable in the interest of the proper administration of justice.

– YCJA

Disclosure of information and copies of record

122 A person who is required or authorized to be given access to a record under section 119 [*persons having access to records*], 120 [*access to RCMP records*], 123 [*where records may be made available*] or 124 [*access to record by young person*] may be given any information contained in the record and may be given a copy of any part of the record.

– YCJA

Access to record by young person

124 A young person to whom a record relates and his or her counsel may have access to the record at any time.

– YCJA

Access for the Administration of Justice

Section 119(s)(ii) permits access by anyone where it is "desirable in the interests of the proper administration of justice".

This will often be how members of the media will attempt to gain access to records.[1]

Access under s. 119(s)(ii) is a discretionary decision on the part of the judge and so should comply with the Mentuck/Dagenais requirements for restrictions on the open court principles.[2] However, given the context of the YCJA, the application of the Mentuck/Dagenais is to be applied differently.[3]

There is no presumption of access to youth records.[4]

Manner of Access

A party who is permitted to access under s. 119(1)(s) the phrase "the extent directed by the judge" permits the judge to set limitations on the form and manner of access.[5] This can include restrictions such as:[6]

- permitting inspection of the record to allow note-taking;
- providing a copy of the record and requiring it be returned to the Court or destroyed at a particular time;
- providing a copy of the record without imposing any discretionary conditions;

1. e.g. see *Toronto Star Newspaper Ltd. v Ontario*, 2012 ONCJ 27 (CanLII), 289 CCC (3d) 549, *per* Cohen J - access refused
   R v AYD, 2011 ABQB 590 (CanLII), 527 AR 242, *per* Gill J - access post-stay of proceedings granted
   Halifax Herald Limited v Sparks, 1995 CanLII 9320 (NS SC), *per* Palmeter ACJ - found media have valid interest in access
2. *Toronto Star v Ontario*, *ibid.*, at para 8
3. *AYD*, *supra*, at para 23
4. *AYD*, *ibid.*, at para 25
5. *R v NY*, 2008 CanLII 23498 (ON SC), at para 9
6. *NY*, *ibid.*, at para 9

Duration of Accessing Records

The access period depends on the disposition, stating under s. 119(2):

119
[*omitted (1)*]

Period of access

(2) The period of access referred to in subsection (1) [*persons having access to records – enumerated persons*] is

(a) if an extrajudicial sanction is used to deal with the young person, the period ending two years after the young person consents to be subject to the sanction in accordance with paragraph 10(2)(c) [*extrajudicial sanctions – consent to sanction*];
(b) if the young person is acquitted of the offence otherwise than by reason of a verdict of not criminally responsible on account of mental disorder, the period ending two months after the expiry of the time allowed for the taking of an appeal or, if an appeal is taken, the period ending three months after all proceedings in respect of the appeal have been completed;
(c) if the charge against the young person is dismissed for any reason other than acquittal, the charge is withdrawn, or the young person is found guilty of the offence and a reprimand is given, the period ending two months after the dismissal, withdrawal, or finding of guilt;
(d) if the charge against the young person is stayed, with no proceedings being taken against the young person for a period of one year, at the end of that period;
(e) if the young person is found guilty of the offence and the youth sentence is an absolute discharge, the period ending one year after the young person is found guilty;
(f) if the young person is found guilty of the offence and the youth sentence is a conditional discharge, the period ending three years after the young person is found guilty;
(g) subject to paragraphs (i) [*clock starts on end of sentence for subsequent summ. offence*] and (j) [*clock starts on end of sentence for subsequent indict. offence*] and subsection (9) [*application of usual rules*], if the young person is found guilty of the offence and it is a summary conviction offence, the period ending three years after the youth sentence imposed in respect of the offence has been completed;
(h) subject to paragraphs (i) [*clock starts on end of sentence for subsequent summ. offence*] and (j) [*clock starts on end of sentence for subsequent indict. offence*] and subsection (9) [*application of usual rules*], if the young person is found guilty of the

offence and it is an indictable offence, the period ending five years after the youth sentence imposed in respect of the offence has been completed;
(i) subject to subsection (9) [*application of usual rules*], if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an offence punishable on summary conviction committed when he or she was a young person, the latest of

(i) the period calculated in accordance with paragraph (g) [*clock starts on end of sentence for summ. offence*] or (h) [*clock starts on end of sentence for indict. offence*], as the case may be, and
(ii) the period ending three years after the youth sentence imposed for that offence has been completed; and

(j) subject to subsection (9) [*application of usual rules*], if, during the period calculated in accordance with paragraph (g) [*clock starts on end of sentence for summ. offence*] or (h) [*clock starts on end of sentence for indict. offence*], the young person is found guilty of an indictable offence committed when he or she was a young person, the period ending five years after the sentence imposed for that indictable offence has been completed.

[*omitted (3), (4), (5), (6), (7), (8), (9) and (10)*]
2002, c. 1, s. 119; 2012, c. 1, ss. 157, 191(F).

– YCJA

Duration of Access	Clock Starting Time	Section
2 years	When the offender consents to extrajudicial sanctions	119(2)(a)
2 months	on acquittal, after appeal period expires	119(2)(b)
3 months	on acquittal, after appeal proceedings are complete	119(2)(b)
2 months	withdrawn or reprimand after finding of guilt	119(2)(c)
1 year	charges are stayed	119(2)(d)
1 year	on finding of guilt, absolute discharge	119(2)(e)
3 years	on finding of guilt, conditional discharge	119(2)(f)
3 years	on completion of sentence for a summary conviction offence	119(2)(g)
5 years	on completion of sentence for a indictable conviction offence	119(2)(h)
3 to 5 years	on completion of sentence for a *subsequent* summary conviction offence	119(2)(i)
5 years	on completion of sentence for a *subsequent* indictable conviction offence	119(2)(j)

Effect of Expiration

Where a period of access has expired, the records may still be accessed by order of a youth justice.[1]

Deemed Election

Under s. 119 and 120, where no election has been made, the election will be deemed to have been summary conviction:

Deemed election

121 For the purposes of sections 119 [*persons having access to records*] and 120 [*access to RCMP records*], if no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General is deemed to have elected to proceed with the offence as an offence punishable on summary conviction.

– YCJA

1. See s. 123(1) of the YCJA
Also *F(K) v Peel Region Police Services Board*, 2008 ONCJ 382(*no CanLII links*) , at para 20
R v JK, 2009 ONCJ 534 (CanLII), [2009] OJ No 4884, *per* Weinper J

Subsequent Adult Conviction

A youth conviction (not including youth discharges) will effectively be converted to a permanent criminal record and not be subject to access restrictions of the YCJA, if a subsequent adult offence is committed during the access period under s. 119(9).[1]

> 119
> [*omitted (1), (2), (3), (4), (5), (6), (7) and (8)*]
>
> **Application of usual rules**
>
> (9) If, during the period of access to a record under any of paragraphs (2)(g) to (j) [*when clock starts on end of sentence*], the young person is convicted of an offence committed when he or she is an adult,
>
> (a) section 82 (effect of absolute discharge or termination of youth sentence) does not apply to the young person in respect of the offence for which the record is kept under sections 114 to 116 [*records that may be kept*];
> (b) this Part no longer applies to the record and the record shall be dealt with as a record of an adult; and
> (c) for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.
>
> [*omitted (10)*]
>
> – YCJA

Adult Discharges

Where the adult offender receives a conditional discharge, the effects of s. 119(9) will not apply.[2] A judge may grant a discharge in light of the "counterproductive" effects that 119(9) would have on the offender's rehabilitation.[3]

1. *R v PJS*, 2008 NSCA 111 (CanLII), 240 CCC (3d) 204, *per* Roscoe JA, at para 15
2. e.g. see *R v BS*, 2018 ONCJ 904 (CanLII), *per* Wheeler J
3. *BS*, *ibid.*

Access to Records After Expiration Period

> **Where records may be made available**
>
> 123 (1) A youth justice court judge may, on application by a person after the end of the applicable period set out in subsection 119(2) [*persons having access to records – period of access*], order that the person be given access to all or part of a record kept under sections 114 to 116 [*records that may be kept*] or that a copy of the record or part be given to that person,
>
> (a) if the youth justice court judge is satisfied that
>
> (i) the person has a valid and substantial interest in the record or part,
> (ii) it is necessary for access to be given to the record or part in the interest of the proper administration of justice, and
> (iii) disclosure of the record or part or the information in it is not prohibited under any other Act of Parliament or the legislature of a province; or
>
> (b) if the youth court judge is satisfied that access to the record or part is desirable in the public interest for research or statistical purposes.
>
> **Restriction for paragraph (1)(a)**
>
> (2) Paragraph (1)(a) [*application to access youth records – general requirements*] applies in respect of a record relating to a particular young person or to a record relating to a class of young persons only if the identity of young persons in the class at the time of the making of the application referred to in that paragraph cannot reasonably be ascertained and the disclosure of the record is necessary for the purpose of investigating any offence that a person is suspected on reasonable grounds of having committed against a young person while the young person is, or was, serving a sentence.
>
> **Notice**
>
> (3) Subject to subsection (4) [*application to access youth records – no notice req.*], an application for an order under paragraph (1)(a) [*application to access youth records – general requirements*] in respect of a record shall not be heard unless the person who makes the application has given the young person to whom the record relates and the person or body that has possession of the record at least five days notice in writing of the application, and the young person and the person or body that has possession have had a reasonable opportunity to be heard.
>
> **Where notice not required**

(4) A youth justice court judge may waive the requirement in subsection (3) [*application to access youth records – notice*] to give notice to a young person when the judge is of the opinion that

(a) to insist on the giving of the notice would frustrate the application; or
(b) reasonable efforts have not been successful in finding the young person.

Use of record

(5) In any order under subsection (1) [*application to access youth records*], the youth justice court judge shall set out the purposes for which the record may be used.

Disclosure for research or statistical purposes

(6) When access to a record is given to any person under paragraph (1)(b) [*application to access youth records – research and stats*], that person may subsequently disclose information contained in the record, but shall not disclose the information in any form that would reasonably be expected to identify the young person to whom it relates.

– YCJA

Disclosure of Records

Disclosure by peace officer during investigation

125 (1) A peace officer may disclose to any person any information in a record kept under section 114 (court records) or 115 (police records) that it is necessary to disclose in the conduct of the investigation of an offence.

Disclosure by Attorney General

(2) The Attorney General may, in the course of a proceeding under this Act or any other Act of Parliament, disclose the following information in a record kept under section 114 (court reports) or 115 (police records):

(a) to a person who is a co-accused with the young person in respect of the offence for which the record is kept, any information contained in the record; and
(b) to an accused in a proceeding, if the record is in respect of a witness in the proceeding, information that identifies the witness as a young person who has been dealt with under this Act.

Information that may be disclosed to a foreign state

(3) The Attorney General or a peace officer may disclose to the Minister of Justice of Canada information in a record that is kept under section 114 (court records) or 115 (police records) to the extent that it is necessary to deal with a request to or by a foreign state under the *Mutual Legal Assistance in Criminal Matters Act*, or for the purposes of any extradition matter under the *Extradition Act*. The Minister of Justice of Canada may disclose the information to the foreign state in respect of which the request was made, or to which the extradition matter relates, as the case may be.

Disclosure to insurance company

(4) A peace officer may disclose to an insurance company information in a record that is kept under section 114 (court records) or 115 (police records) for the purpose of investigating a claim arising out of an offence committed or alleged to have been committed by the young person to whom the record relates.

Preparation of reports

(5) The provincial director or a youth worker may disclose information contained in a record if the disclosure is necessary for procuring information that relates to the preparation of a report required by this Act.

Schools and others

(6) The provincial director, a youth worker, the Attorney General, a peace officer or any other person engaged in the provision of services to young persons may disclose to any professional or other person engaged in the supervision or care of a young person — including a representative of any school board or school or any other educational or training institution — any information contained in a record kept under sections 114 to 116 [*records that may be kept*] if the disclosure is necessary

(a) to ensure compliance by the young person with an authorization under section 91 [*reintegration leave*] or an order of the youth justice court;
(b) to ensure the safety of staff, students or other persons; or
(c) to facilitate the rehabilitation of the young person.

Information to be kept separate

(7) A person to whom information is disclosed under subsection (6) [*disclosure to schools and related*] shall

(a) keep the information separate from any other record of the young person to whom the information relates;
(b) ensure that no other person has access to the information except if authorized under this Act, or if necessary for the purposes of subsection (6) [*disclosure to schools and related*]; and
(c) destroy their copy of the record when the information is no longer required for the purpose for which it was disclosed.

Time limit

(8) No information may be disclosed under this section after the end of the applicable period set out in subsection 119(2) (period of access to records).

– YCJA

Records in the custody, etc., of archivists

126 When records originally kept under sections 114 to 116 [*records that may be kept*] are under the custody or control of the Librarian and Archivist of Canada or the archivist for any province, that person may disclose any information contained in the records to any other person if

(a) a youth justice court judge is satisfied that the disclosure is desirable in the public interest for research or statistical purposes; and
(b) the person to whom the information is disclosed undertakes not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates.

2002, c. 1, s. 126; 2004, c. 11, s. 48.

– YCJA

Disclosure with court order

127 (1) The youth justice court may, on the application of the provincial director, the Attorney General or a peace officer, make an order permitting the applicant to disclose to the person or persons specified by the court any information about a young person that is specified, if the court is satisfied that the disclosure is necessary, having regard to the following circumstances:

(a) the young person has been found guilty of an offence involving serious personal injury;
(b) the young person poses a risk of serious harm to persons; and
(c) the disclosure of the information is relevant to the avoidance of that risk.

Opportunity to be heard

(2) Subject to subsection (3) , before making an order under subsection (1) , the youth justice court shall give the young person, a parent of the young person and the Attorney General an opportunity to be heard.

Ex parte application

(3) An application under subsection (1) may be made *ex parte* by the Attorney General where the youth justice court is satisfied that reasonable efforts have been made to locate the young person and that those efforts have not been successful.

Time limit

(4) No information may be disclosed under subsection (1) after the end of the applicable period set out in subsection 119(2) (period of access to records).

– YCJA

Destruction of Records

Effect of end of access periods

128 (1) Subject to sections 123, 124 and 126, after the end of the applicable period set out in section 119 or 120 no record kept under sections 114 to 116 may be used for any purpose that would identify the young person to whom the record relates as a young person dealt with under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985.

Disposal of records

(2) Subject to paragraph 125(7)(c), any record kept under sections 114 to 116, other than a record kept under subsection 115(3), may, in the discretion of the person or body keeping the record, be destroyed or transmitted to the Librarian and Archivist of Canada or the archivist for any province, at any time before or after the end of the applicable period set out in section 119.

Disposal of R.C.M.P. records

(3) All records kept under subsection 115(3) shall be destroyed or, if the Librarian and Archivist of Canada requires it, transmitted to the Librarian and Archivist, at the end of the applicable period set out in section 119 or 120.

Purging CPIC

(4) The Commissioner of the Royal Canadian Mounted Police shall remove a record from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police at the end of the applicable period referred to in section 119; however, information relating to a prohibition order made under an Act of Parliament or the legislature of a province shall be removed only at the end of the period for which the order is in force.

Exception

(5) Despite subsections (1), (2) and (4), an entry that is contained in a system maintained by the Royal Canadian Mounted Police to match crime scene information and that relates to an offence committed or alleged to have been committed by a young person shall be dealt with in the same manner as information that relates to an offence committed by an adult for which a record suspension ordered under the *Criminal Records Act* is in effect.

Authority to inspect

(6) The Librarian and Archivist of Canada may, at any time, inspect records kept under sections 114 to 116 that are under the control of a government institution as defined in section 2 of the Library and Archives of Canada Act, and the archivist for a province may at any time inspect any records kept under those sections that the archivist is authorized to inspect under any Act of the legislature of the province.

Definition of "destroy"

(7) For the purposes of subsections (2) and (3), "destroy", in respect of a record, means

(a) to shred, burn or otherwise physically destroy the record, in the case of a record other than a record in electronic form; and
(b) to delete, write over or otherwise render the record inaccessible, in the case of a record in electronic form.

2002, c. 1, s. 128; 2004, c. 11, s. 49; 2012, c. 1, s. 159.

– YCJA

The court has jurisdiction under s. 128(2) to consider whether to order the destruction of records before the period set out in s. 119.[1]

No subsequent disclosure

129. No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any other person unless the disclosure is authorized under this Act.

– YCJAa

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1. *R v LTC*, 2009 NLCA 55 (CanLII), 896 APR 125, *per* Welsh JA

Access to Police Records

Access to R.C.M.P. records

120 (1) The following persons may, during the period set out in subsection (3), be given access to a record kept under subsection 115(3) in respect of an offence set out in the schedule:

(a) the young person to whom the record relates;
(b) the young person's counsel, or any representative of that counsel;
(c) an employee or agent of the Government of Canada, for statistical purposes under the Statistics Act;
(d) any person or member of a class of persons that a youth justice court judge considers has a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that access is desirable in the public interest for research or statistical purposes;
(e) the Attorney General or a peace officer, when the young person is or has been charged with another offence set out in the schedule or the same offence more than once, for the purpose of investigating any offence that the young person is suspected of having committed, or in respect of which the young person has been arrested or charged, whether as a young person or as an adult;
(f) the Attorney General or a peace officer to establish the existence of an order in any offence involving a breach of the order; and
(g) any person for the purposes of the *Firearms Act*.

Access for identification purposes

(2) During the period set out in subsection (3), access to the portion of a record kept under subsection 115(3) that contains the name, date of birth and last known address of the young person to whom the fingerprints belong, may be given to a person for identification purposes if a fingerprint identified as that of the young person is found during the investigation of an offence or during an attempt to identify a deceased person or a person suffering from amnesia.

Period of access

(3) For the purposes of subsections (1) and (2), the period of access to a record kept under subsection 115(3) in respect of an offence is the following:

(a) if the offence is an indictable offence, other than an offence referred to in paragraph (b), the period starting at the end of the applicable period set out in paragraphs 119(2)(h) to (j) and ending five years later; and
(b) if the offence is a serious violent offence for which the Attorney General has given notice under subsection 64(2) (intention to seek adult sentence), the period starting at the end of the applicable period set out in paragraphs 119(2)(h) to (j) and continuing indefinitely.

Subsequent offences as young person

(4) If a young person was found guilty of an offence set out in the schedule is, during the period of access to a record under subsection (3), found guilty of an additional offence set out in the schedule, committed when he or she was a young person, access to the record may be given to the following additional persons:

(a) a parent of the young person or any adult assisting the young person under subsection 25(7);
(b) a judge, court or review board, for a purpose relating to proceedings against the young person under this Act or any other Act of Parliament in respect of offences committed or alleged to have been committed by the young person, whether as a young person or as an adult; or
(c) a member of a department or agency of a government in Canada, or of an organization that is an agent of, or is under contract with, the department or agency, who is

(i) preparing a report in respect of the young person under this Act or for the purpose of assisting a court in sentencing the young person after the young person becomes an adult,
(ii) engaged in the supervision or care of the young person, whether as a young person or as an adult, or in the administration of a sentence in respect of the young person, whether as a young person or as an adult, or
(iii) considering an application for conditional release, or for a record suspension under the *Criminal Records Act*, made by the young person after the young person becomes an adult.

Disclosure for research or statistical purposes

(5) A person who is given access to a record under paragraph (1)(c) or (d) may subsequently disclose information contained in the record, but shall not disclose the information in any form that would reasonably be expected to identify the young person to whom it relates.

Subsequent offences as adult

(6) If, during the period of access to a record under subsection (3), the young person is convicted of an additional offence set out in the schedule, committed when he or she was an adult,

(a) this Part no longer applies to the record and the record shall be dealt with as a record of an adult and may be included on the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police; and
(b) for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.

2002, c. 1, s. 120; 2012, c. 1, ss. 158, 192.

– YCJA

Deemed Election

Under s. 119 and 120, where no election has been made, the election will be deemed to have been summary conviction:

> **Deemed election**
>
> 121 For the purposes of sections 119 and 120 [*provisions re access to youth records*], if no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General is deemed to have elected to proceed with the offence as an offence punishable on summary conviction.
>
> – YCJA

Schedule

> **SCHEDULE(Subsections 120(1), (4) and (6))**
>
> 1 An offence under any of the following provisions of the Criminal Code:
>
> (a) paragraph 81(2)(a) (using explosives);
> (b) subsection 85(1) (using firearm in commission of offence);
> (c) section 151 (sexual interference);
> (d) section 152 (invitation to sexual touching);
> (e) section 153 (sexual exploitation);
> (f) section 155 (incest);
> (g) [Repealed, 2019, c. 25, s. 383]
> (h) section 170 (parent or guardian procuring sexual activity by child);
> (i) and (j) [Repealed, 2014, c. 25, s. 43]
> (k) section 231 or 235 (first degree murder or second degree murder within the meaning of section 231);
> (l) section 232, 234 or 236 (manslaughter);
> (m) section 239 (attempt to commit murder);
> (n) section 267 (assault with a weapon or causing bodily harm);
> (o) section 268 (aggravated assault);
> (p) section 269 (unlawfully causing bodily harm);
> (q) section 271 (sexual assault);
> (r) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
> (s) section 273 (aggravated sexual assault);
> (t) section 279 (kidnapping);
> (t.1) section 279.011 (trafficking — person under 18 years);
> (t.2) subsection 279.02(2) (material benefit — trafficking of person under 18 years);
> (t.3) subsection 279.03(2) (withholding or destroying documents — trafficking of person under 18 years);
> (t.4) subsection 286.1(2) (obtaining sexual services for consideration from person under 18 years);
> (t.5) subsection 286.2(2) (material benefit from sexual services provided by person under 18 years);
> (t.6) subsection 286.3(2) (procuring — person under 18 years);
> (u) section 344 (robbery);
> (v) section 433 (arson — disregard for human life);
> (w) section 434.1 (arson — own property);
> (x) section 436 (arson by negligence); and
> (y) paragraph 465(1)(a) (conspiracy to commit murder).
>
> 1.1 An offence under one of the following provisions of the Criminal Code, as they read from time to time before the day on which this section comes into force:
>
> (a) subsection 212(2) (living on the avails of prostitution of person under 18 years); and
> (b) subsection 212(4) (prostitution of person under 18 years).
>
> 2 An offence under any of the following provisions of the Criminal Code, as they read immediately before July 1, 1990:
>
> (a) section 433 (arson);
> (b) section 434 (setting fire to other substance); and
> (c) section 436 (setting fire by negligence).
>
> 3 An offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read immediately before January 4, 1983:
>
> (a) section 144 (rape);
> (b) section 145 (attempt to commit rape);
> (c) section 149 (indecent assault on female);
> (d) section 156 (indecent assault on male); and
> (e) section 246 (assault with intent).
>
> 4 An offence under any of the following provisions of the Controlled Drugs and Substances Act:

(a) section 5 (trafficking);
(b) section 6 (importing and exporting); and
(c) section 7 (production of substance).

5 An offence under any of the following provisions of the Cannabis Act:

(a) section 9 (distribution and possession for purpose of distributing);
(b) section 10 (selling and possession for purpose of selling);
(c) section 11 (importing and exporting and possession for purpose of exporting);
(d) section 12 (production); and
(e) section 14 (use of young person).

2002, c. 1, Sch.; 2014, c. 25, s. 43; 2018, c. 16, s. 184; 2019, c. 25, s. 383.

– YCJA

Discharge

Effect of Termination of Youth Sentence
Effect of absolute discharge or termination of youth sentence

82 (1) Subject to section 12 (examination as to previous convictions) of the Canada Evidence Act, if a young person is found guilty of an offence, and a youth justice court directs under paragraph 42(2)(b) that the young person be discharged absolutely, or the youth sentence, or any disposition made under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, has ceased to have effect, other than an order under section 51 (mandatory prohibition order) of this Act or section 20.1 (mandatory prohibition order) of the Young Offenders Act, the young person is deemed not to have been found guilty or convicted of the offence except that

(a) the young person may plead autrefois convict in respect of any subsequent charge relating to the offence;
(b) a youth justice court may consider the finding of guilt in considering an application under subsection 64(1) (application for adult sentence);
(c) any court or justice may consider the finding of guilt in considering an application for judicial interim release or in considering what sentence to impose for any offence; and
(d) the Parole Board of Canada or any provincial parole board may consider the finding of guilt in considering an application for conditional release or for a record suspension under the *Criminal Records Act*.

Disqualifications removed

(2) For greater certainty and without restricting the generality of subsection (1), an absolute discharge under paragraph 42(2)(b) or the termination of the youth sentence or disposition in respect of an offence for which a young person is found guilty removes any disqualification in respect of the offence to which the young person is subject under any Act of Parliament by reason of a finding of guilt.

Applications for employment

(3) No application form for or relating to the following shall contain any question that by its terms requires the applicant to disclose that he or she has been charged with or found guilty of an offence in respect of which he or she has, under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, been discharged absolutely, or has completed the youth sentence under this Act or the disposition under the Young Offenders Act:

(a) employment in any department, as defined in section 2 of the Financial Administration Act;
(b) employment by any Crown corporation, as defined in section 83 of the Financial Administration Act;
(c) enrolment in the Canadian Forces; or
(d) employment on or in connection with the operation of any work, undertaking or business that is within the legislative authority of Parliament.

Finding of guilt not a previous conviction

(4) A finding of guilt under this Act is not a previous conviction for the purposes of any offence under any Act of Parliament for which a greater punishment is prescribed by reason of previous convictions, except for

(a) [Repealed, 2012, c. 1, s. 188]
(b) the purpose of determining the adult sentence to be imposed.

2002, c. 1, s. 82; 2012, c. 1, ss. 156, 160, 188.

– YCJA

See Also

- Effect of Criminal Records in Sentencing
- Publication Bans Relating to Youth Prosecutions

- Dispositions for Young Offenders

Related Legislation

- Designation of Persons Who May Access Records, NS Reg 40/2004

Access to Things Detained Under Section 490

This page was last substantively updated or reviewed *January 2014*. (Rev. # 79564)

< Procedure and Practice < Search and Seizure < Seizure of Property

Introduction

Property seized by the police is held in custody under the supervision of the Courts.[1]

1. see Detention Order for Things Seized Under Section 489 or 487.11

Access to Seized Property

Any property seized pursuant to a warrant and then detained on the basis of a Report to Justice under s. 490 may be accessed by a third party under s. 490(15) and (16).

> 490
> [*omitted (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13) and (14)*]
>
> **Access to anything seized**
>
> (15) Where anything is detained pursuant to subsections (1) to (3.1) [*detention of things seized (various means)*], a judge of a superior court of criminal jurisdiction, a judge as defined in section 552 [*definitions - judges*] or a provincial court judge may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.
>
> **Conditions**
>
> (16) An order that is made under subsection (15) [*access anything seized*] shall be made on such terms as appear to the judge to be necessary or desirable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.
>
> [*omitted (17) and (18)*]
> R.S., 1985, c. C-46, s. 490; R.S., 1985, c. 27 (1st Supp.), s. 73; 1994, c. 44, s. 38; 1997, c. 18, s. 50; 2008, c. 18, s. 14.
> [*annotation(s) added*]
>
> – CCC

The civil procedure rules of each province may provide for some rules regarding the use and release of exhibits.[1]

The right to "examine" includes the ability to make copies of any documents.[2]

Section 490(15) is not unconstitutional for being silent on the use of the section by government agencies conducting non-criminal investigations.[3]

1. See Nova Scotia Civil Procedure Rule 84.04(4)
   Ontario Rules of Civil Procedure Rule 52.04
   Alberta Rules of Court Rule 13.26
   British Columbia Supreme Court Rules Rule 40
2. *R v Sutherland*, 1977 CanLII 2028 (ON SC), 38 CCC (2d) 252, *per* Borins J - in reference to s. 446 (predecessor to s. 490)
   Canada (Attorney General) v Ontario (Attorney General), [2002] OJ No 2357 (S.C.J)(*no CanLII links)
3. *Anderson-Davis (Re)*, 1997 CanLII 4181 (BC SC), 43 CRR (2d) 356, *per* Catliff J

Sharing Seized Evidence Amongst Government Organizations

Where evidence, seized by way of a residential search warrant, does not hold a reasonable expectation of privacy, they may be shared between law enforcement and government agencies.[1]

1. *Brown v Canada*, 2013 FCA 111 (CanLII), DTC 5094, *per* Dawson JA - CRA documents found in a warrant search of accused's residence was shared with CRA

See Also

- Return of Things Seized to Lawful Owners
- Public and Media Restrictions
- Access to Court-Filed Exhibits
- Sealing and Unsealing Warrants

Sealing and Unsealing Judicial Authorizations

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79564)

< Search and Seizure < Warrant Searches

General Principles

Once a judicial authorization is executed (be it a warrant, production order or otherwise), the authorization and the supporting documents (usually the Information to Obtain) must be made available to the public unless the warrant is placed under a sealing order.[1]

Under s. 487.3(1), an application to seal a warrant and ITO can be made prohibiting disclosure of any information related to the warrant on the basis that access to it would subvert the ends of justice or the information would be put to an improper purpose.

Once an order is made, it must be made public "unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice".[2]

Section 487.3 provides statutory authority for a judge or justice to issue a sealing order:

> **Order denying access to information**
>
> 487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 [*provisions on production orders*] or an authorization under section 529 [*entry into residence to arrest*] or 529.4 [*executing a warrant to enter a residence of arrest*], or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
>
> > (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) [*sealing order in relation to warrants – grounds*] or the information might be used for an improper purpose; and
> > (b) the reason referred to in paragraph (a) [*sealing order in relation to warrants – grounds to seal*] outweighs in importance the access to the information.
>
> [*omitted (2), (3) and (4)*]
> 1997, c. 23, s. 14, c. 39, s. 1; 2004, c. 3, s. 8; 2014, c. 31, s. 22.
> [*annotation(s) added*]
>
> – CCC

Sealing orders are to be the exception to the rule of openness.[3]

It is the responsibility of the Attorney General to be the responding party to any application to unseal where privilege may be at issue.[4]

Confidential police investigations require "a high level of secrecy to be effective" at least until after the warrant is executed.[5] Once the search is complete the presumption moves to one of openness.[6]

Burden of Proof

Where a court document is subject to a discretionary sealing, the burden is upon the party seeking to maintain the sealing order.[7] The exception to this burden include the mandatory sealings provisions under s. 187(1)(a)(ii) relating to wiretaps.[8]

Duty to Unseal is On the Crown

The burden is on the Crown to unsealing judicial authorization materials. This duty is part of the Crown's Stinchcombe disclosure obligations.[9]

Effect of Sealing Order

The predominant view suggests that sealing orders function as an order restricting access to the court file rather than as a confidentiality order.[10]

Residual Authority to Control Access

Even where there is no sealing order granted, the court may also restrict and prohibit access to court-record materials where it would "subvert" the "ends of justice" or "might" be used for an "improper purpose".[11]

1. *Toronto Star Newspaper Ltd. v Ontario*, 2005 SCC 41 (CanLII), [2005] 2 SCR 188, *per* Fish J
2. *Toronto Star Newspapers Ltd. v Ontario*, *ibid.*
   Attorney General of Nova Scotia v MacIntyre, 1982 CanLII 14 (SCC), [1982] 1 SCR 175, *per* Dickson J
3. *Application by the Winnipeg Free Press*, 2006 MBQB 43 (CanLII), 70 WCB (2d) 54, *per* McKelvey J, at para 10
4. *Re Regina and Atout*, 2013 ONSC 1312 (CanLII), OJ No 899, *per* Campbell J
5. *Globe & Mail v Alberta*, 2011 ABQB 363 (CanLII), 520 AR 279, *per* Tilleman J, at para 10
6. *Globe & Mail v Alberta*, *ibid.*, at para 10
7. *R v Verrilli*, 2019 NSSC 263 (CanLII), *per* Arnold J, at para 56
   cf. *National Post Co. v Ontario*, 2003 CanLII 13 (ONSC), 176 CCC (3d) 432, *per* McKinnon J
8. *Michaud v Quebec (Attorney General)*, 1996 CanLII 167 (SCC), [1996] 3 SCR 3, *per* Lamer CJ, at to 5 paras 3 to 5{{{3}}}
9. *R v Osei*, 2007 CanLII 5681 (ON SC), 152 CRR (2d) 152, *per* Nordheimer J
10. *R v Moosemay*, 2001 ABPC 156 (CanLII), 297 AR 34, *per* Fradsham J, at paras 19 to 31
    Konstan v Berkovits, 2016 ONSC 7958 (CanLII), *per* Myers J, at paras 8 to 9
    Konstan v Berkovits, 2016 ONSC 3957 (CanLII), *per* Myers J, at para 10
11. *AG (Nova Scotia) v MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 SCR 175, *per* Dickson J, at p. 189 (SCR) ("Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercice of the right.")
    R v Garofoli, 1990 CanLII 52 (SCC), [1990] 2 SCR 1421, *per* Sopinka J ("The power to edit clearly exists and derives from the supervisory and protecting power which a court possesses over its own records")

Grounds to Sealing

Under s. 487.3(2), set out the basis of how the ends of justice would be subverted.

> 487.3
> [*omitted (1)*]
>
> **Reasons**
>
> (2) For the purposes of paragraph (1)(a) [*sealing order in relation to warrants – grounds to seal*], an order may be made under subsection (1) [*sealing order in relation to warrants*] on the ground that the ends of justice would be subverted by the disclosure
>
> (a) if disclosure of the information would
>
> (i) compromise the identity of a confidential informant,
> (ii) compromise the nature and extent of an ongoing investigation,
> (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
> (iv) prejudice the interests of an innocent person; and
>
> (b) for any other sufficient reason.
>
> [*omitted (3) and (4)*]
> 1997, c. 23, s. 14, c. 39, s. 1; 2004, c. 3, s. 8; 2014, c. 31, s. 22.
> [*annotation(s) added*]
>
> – CCC

There is a presumption in favour of access to information.[1]

Dagenais/Mentuck Test

The Dagenais/Mentuck test applies to seal orders.[2] The test permits discretionary court orders prohibiting access to legal proceeding where:

1. an order is necessary to prevent a "serious risk" to the "proper administration of justice" because "reasonably alternative measures will not prevent the risk"; and
2. the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice

Standard of Proof

The risks of keeping the record unsealed must be established to be a "risk the reality of which is well-grounded in the evidence".[3]

Proper Administration of Justice

The risk to "administration of justice" will include "real and substantial risk to the fairness of the trial".[4]

The preservation of a witness's evidence is not a justification for sealing as the witnesses are free to speak to whomever they want and thier prior statement is already preserved in their statement. [5]

It is not a general rule that the mere fact of publication that a witness cooperated with police is a reason to protect their identity. There would need to be evidence supporting a specific risk to the witness.[6]

Other Options to Sealing

It is an error of law for the authorizing judge or justice to fail "to consider alternative measures short of a full-fledged non-access order".[7]

"Ongoing investigation"

The risk posed to the investigation must be satisfied on a case-by-case basis and is not to be used as a class of prohibited records.[8] Generalized or abstract assertions of potential prejudice is insufficient.[9] However, generalized assertions are all that can be offered and that it may be that a "perceived risk may be more difficult to demonstrate in a concrete manner at that early stage".[10]

Denial of access cannot be granted on the basis that there is an "investigative advantage" to the police in having documents sealed.[11]

"innocent person"

Section 487.3(2)(iv) permits a court to seal a record where disclosure could "prejudice the interests of an innocent person".

"Innocent persons" include third parties whose premises have been searched and nothing was found.[12]This does not mean that where something is seized from the premises that they can no longer be innocent persons.[13]

Prejudice to innocent persons is "entitled to significant weight".[14]

The interests of "innocent persons" includes preventing an "innocent person subject to intense media scrutiny that may irreparably tarnish that person's reputation".[15] Where the allegations found in the ITO may be "extremely harmful to [the] reputations" of innocent persons, including the suspect, then the public interest will be against releasing information identifying them.[16]

An "innocent person" does not include the accused as "reporting of ...evidence is a price" that they must pay for "insuring the public accountability of those involved in the administration of justice" once the accused has "surrendered to the judicial process".[17]

It is unsettled whether notice is required to be given to innocent third-parties with cases going both ways.[18]

Right to a Fair Trial

Releasing information regarding an ongoing investigation can be "highly prejudicial to a person's right to a fair trial".[19]

The release of certain types of "incriminating evidence" against the accused may result in such prejudice as to be unfair to be released to the public.[20] Such evidence would have the effect of "place irreversible ideas in the minds of potential jurors that would prevent them from being impartial at trial, or that would make it impossible for them to distinguish between evidence heard during the trial and information acquired outside of the courtroom."[21]

There is some suggestion that protecting of trial rights are better protected by a publication ban rather than a sealing order.[22]

Commercial Interests

A "real and substantial risk" to commercial interests of a company in revealing the allegations in the ITO may create a public interest in confidentiality.[23]

"any other sufficient reasons"

"Other sufficient reasons" within the meaning of s. 487.3 include "serious threat to trial fairness".[24]

Procedure

The applicant must be specific on the grounds of sealing, there must be "particularized grounds". Generalized assertions are not enough.[25]

Ruling

The Judge must give reasons for any decision to issue the sealing of a public record.[26]

1. *Phillips v Vancouver Sun*, 2004 BCCA 14 (CanLII), 182 CCC (3d) 483, *per* Prowse JA
2. *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835, *per* Lamer CJ
   R v Mentuck, 2001 SCC 76 (CanLII), [2001] 3 SCR 442, *per* Iacobucci J
3. *Mentuk*, *supra* at 34 ("he first branch of the test contains several important elements that can be collapsed in the concept of 'necessity', but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or as Lamer C.J. put it at p.878 in Dagenais, a 'real and substantial' risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. ")
4. *Globe & Mail v Alberta*, 2011 ABQB 363 (CanLII), 520 AR 279, *per* Tilleman J, at para 8
5. *R v CBC*, 2018 ONSC 5167 (CanLII), *per* Goldstein J, at para 36
6. *CBC*, *ibid.*, at para 36 (". I also do not accept that as a general rule mere publication of the fact of cooperation with the police will prejudice future cooperation. It might. People might be willing to cooperate with the police only where they do not believe that the fact of cooperation is unknown. Such an assertion would require specific evidence — such as in the case of a person fearing physical harm in a gang-related case. ")
7. *R v CBC*, 2008 ONCA 397 (CanLII), 231 CCC (3d) 394, *per* Juriansz JA, at paras 18, 26
8. *R v Vice Media Canada Inc*, 2016 ONSC 1961 (CanLII), 352 CRR (2d) 60, *per* MacDonnell J, at para 64 - appealed to 2017 ONCA 231 (CanLII) and 2018 SCC 53 (CanLII)
9. *Vice Media Canada*, *ibid.*, at para 66
   Toronto Star Newspapers Ltd v Ontario, 2005 SCC 41 (CanLII), [2005] 2 SCR 188, *per* Fish J, at para 23 ("the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled")

10. *Application by the Winnipeg Free Press*, 2006 MBQB 43 (CanLII), 200 Man R (2d) 196, 70 WCB (2d) 54, at para 71 ("... the R.C.M.P. is seeking to limit public access to information on the basis that resultant publicity through the media would harm the nature and extent of an ongoing investigation and subvert the ends of justice. The R.C.M.P. is put in an unenviable position of endeavouring to support an application by reliance upon, in some respects, generalized assertions. However, to do otherwise or to give specifics could well result in jeopardizing the very information that is sought to be protected by the R.C.M.P. from coming into the public domain. ...However, " … the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage.'")
11. *Toronto Star*, *supra* ("...access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative advantage...")
12. *Globe & Mail v Alberta*, *supra*, at para 16
    MacIntyre, *supra*
13. *Globe & Mail*, *supra*, at para 16
    Phillips v Vancouver Sun, *supra*
14. *Phillips v Vancouver Sun*, *supra*, at para 66
15. *Globe & Mail v Alberta*, 2011 ABQB 363 (CanLII), 520 AR 279, *per* Tilleman J, at para 15
16. *Globe & Mail v Alberta*, *ibid.*, at para 18
17. *R v DM*, 1993 CanLII 5661 (NS CA), *per* Kelly JA
18. *Vice Media Canada Inc*, *supra*, at para 73
    R v CBC, 2013 ONSC 6983 (CanLII), *per* Nordheimer J, at para 11
    R v Esseghaier, 2013 ONSC 5779 (CanLII), *per* Durno J, at para 160
19. *Globe & Mail v Alberta*, *ibid.*, at para 21
    Flahiff v Cour Du Québec, 1998 CanLII 13149 (QC CA), [1998] RJQ 327, 157 DLR (4th) 485, *per* Rothman JA, at pp. 19 to 20
20. *Flahiff*, *ibid.*, at p. 91
    CBC, *supra*, at paras 29 to 32
21. *CBC*, *supra*, at para 32
22. *CBC*, *supra*, at paras 43 to 46
23. *Globe & Mail v Alberta*, *supra*, at para 18
    Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 (CanLII), [2002] 2 SCR 522, *per* Iacobucci J
24. *Flahiff v Cour Du Québec*, 1998 CanLII 13149 (QC CA), 123 CCC (3d) 79, *per* Rothman JA
25. *Toronto Star Newspapers Ltd v Canada*, 2005 CanLII 47737 (ON SC), 204 CCC (3d) 397, *per* Nordheimer J, at paras 36 to 42
26. *CBC*, *supra*, at para 55

Sealing Procedure

> 487.3
> [*omitted (1) and (2)*]
>
> **Procedure**
>
> (3) Where an order is made under subsection (1) [*sealing order in relation to warrants*], all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4). [*omitted (4)*]
> 1997, c. 23, s. 14, c. 39, s. 1; 2004, c. 3, s. 8; 2014, c. 31, s. 22.
> [*annotation(s) added*]
>
> – CCC

Unsealing

Under s. 487.3(4), the sealing order may be varied or terminated:

> 487.3
> [*omitted (1), (2) and (3)*]
>
> **Application for variance of order**
>
> (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.
> 1997, c. 23, s. 14, c. 39, s. 1; 2004, c. 3, s. 8; 2014, c. 31, s. 22.
>
> – CCC

Grounds for Continued Sealing After Charges

Aside from matters of privilege, the dominant reason for maintaining seal upon any part of an ITO would be for the purpose of preserving the integrity of the investigation.[1] Generalized assertions of harm to particular third-party's reputation or mere embarassment is insufficient.[2]

Expectation of privacy for third parties is reducated after the charges are laid.[3]

In it not settled whether an unsealed ITO must be vetted for legislation requiring privacy including the SOIRA provision relating to confidential information about an offender.

Unsealing Without Charges

Where a judicial authorization has been executed, an accused person is entitled to a properly vetted copy of the ITO even before charges are laid, however, a third party is not. However, before charge an accused must present some evidence that the authorization was obtained unlawfully (ie. by fraud, wilful non-disclosure or other abusive conduct) before disclosure will be permitted.[4] This rule applies whether it is a wiretap or a judicial authorization.[5]

1. *R v Canadian Broadcasting Corporation*, 2013 ONSC 6983 (CanLII), *per* Nordheimer J
   R v Canadian Broadcasting Corporation, 2018 ONSC 5167 (CanLII), *per* Goldstein J, at paras 28 to 37
2. *CBC* (2013)
   CBC (2018), at para 31
3. *CBC* (2018), at para 34
4. *R v Paugh*, 2018 BCPC 149 (CanLII), *per* Koturbash J, at para 8
   Michaud v Quebec (AG), 1996 CanLII 167 (SCC), [1996] 3 SCR 3, *per* Lamer CJ
5. *Paugh*, *supra*, at para 14

Vetting Procedure

Where unsealing an unvetted ITO, the court should follow the procedure set out in Garofoli:[1]

1. Upon opening of the packet, if the Crown objects to disclosure of any of the material, an application should be made by the Crown suggesting the nature of the matters to be edited and the basis therefor. Only Crown counsel will have the affidavit at this point.
2. The trial judge should then edit the affidavit as proposed by Crown counsel and furnish a copy as edited to counsel for the accused. Submissions should then be entertained from counsel for the accused. If the trial judge is of the view that counsel for the accused will not be able to appreciate the nature of the deletions from the submissions of Crown counsel and the edited affidavit, a form of judicial summary as to the general nature of the deletions should be provided.
3. After hearing counsel for the accused and reply from the Crown, the trial judge should make a final determination as to editing, bearing in mind that editing is to be kept to a minimum and applying the factors listed above.
4. After the determination has been made in (3), the packet material should be provided to the accused.
5. If the Crown can support the authorization on the basis of the material as edited, the authorization is confirmed.
6. If, however, the editing renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying that if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be prejudiced, it can withdraw tender of the wiretap evidence.

The application judge should begin by making inquiry into the reason that the Crown opposes the unsealing.[2] The Crown should give an unedited copy to the judge with details on what portion of the warrant is to be unsealed. [3]

1. *R v Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 SCR 1421, *per* Sopinka J
2. *R v Canadian Broadcasting Corporation*, 2008 ONCA 397 (CanLII), 231 CCC (3d) 394, *per* Juriansz JA
3. *CBC*, *ibid.*

Procedure for Confidential Informers

Step 6 can be adapted for the circumstances of a confidential informer where the redacted ITO is insufficient on its face, but the Crown wishes to rely upon redacted information without revealing details of identity.[1]

The Crown must apply to the Court to have it consider the unredacted version, while the accused receives only a "judicial summary" of the excised material. The judicial summary "should attempt to ensure the accused is sufficiently aware of the nature of the excised material to challenge it in an argument or by evidence, while still protecting the identity of the confidential informant."[2] The judge will give feed-back on any inadequacies of the judicial summary provided until such time as the draft satisfies the judge or the procedure is terminated by the Crown.[3]

Step 6 must balance the right to full answer and defence by testing the reliability of the informant's evidence and the need for confidentiality of the informant's identity.[4]

1. *R v Learning*, 2010 ONSC 3816 (CanLII), 258 CCC (3d) 68, *per* Code J, at paras 100 to 109
   R v Rocha, 2012 ONCA 707 (CanLII), 112 OR (3d) 742, *per* Rosenberg JA, at paras 54 to 59
2. *R v Prosser*, 2014 ONSC 2645 (CanLII), OJ No 2543, *per* Wilson J, at para 9
3. e.g. *Prosser*, *ibid.*, at paras 14 to 17
4. *Prosser*, *ibid.*, at para 11

Wiretaps

Sealing of Authorization

Manner in which application to be kept secret

187 (1) All documents relating to an application made pursuant to any provision of this Part [*Pt. VI – Invasion of Privacy (s. 183 to 196.1)*] are confidential and, subject to subsection (1.1) [*manner in which application to be kept secret – exception*], shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5) [*manner in which application to be kept secret – opening for further applications*].

Exception

(1.1) An authorization given under this Part [*Pt. VI – Invasion of Privacy (s. 183 to 196.1)*] need not be placed in the packet except where, pursuant to subsection 184.3(7) [*one-party consent wiretap by telewarrant – granting authorization*] or (8) [*one-party consent wiretap by telewarrant – where telecomm. produces writing*], the original authorization is in the hands of the judge, in which case that judge must place it in the packet and the facsimile remains with the applicant.
[*omitted (1.2), (1.3), (1.4), (1.5), (2), (3), (4), (5), (6), (7) and (8)*]

R.S., 1985, c. C-46, s. 187; R.S., 1985, c. 27 (1st Supp.), s. 24; 1993, c. 40, s. 7; 2005, c. 10, s. 24; 2014, c. 31, s. 10.
[*annotation(s) added*]

– CCC

Unsealing of Authorization

Defence counsel may apply to the court under s. 187(1.4) to unseal to authorization. The section states:

187
[*omitted (1) and (1.1)*]

Opening for further applications

(1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.

Opening on order of judge

(1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 [*definitions - judges*] may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.

Opening on order of trial judge

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

(a) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and
(b) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

Order for destruction of documents

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

Order of judge

(2) An order under subsection (1.2) [*manner in which application to be kept secret – opening for further applications*], (1.3) [*opening on order of judge to copy and examine packet*], (1.4) [*opening on order of trial judge to copy and examine packet for trial*] or (1.5) [*order for destruction of documents*] made with respect to documents relating to an application made pursuant to section 185 [*procedure to apply for a 186 wiretap*] or subsection 186(6) [*authorization of wiretap – renewal*] or 196(2) [*suspension while extension application pending*] may only be made after the Attorney General or the Minister of Public Safety and Emergency Preparedness by whom or on whose authority the application for the authorization to which the order relates was made has been given an opportunity to be heard.

Idem

(3) An order under subsection (1.2) [*manner in which application to be kept secret – opening for further applications*], (1.3) [*opening on order of judge to copy and examine packet*], (1.4) [*opening on order of trial judge to copy and examine packet for trial*] or (1.5) [*order for destruction of documents*] made with respect to documents relating to an application made pursuant to subsection 184.2(2) [*one-party consent wiretap – content of application*] or section 184.3 [*one-party consent wiretap by telewarrant*] may only be made after the Attorney General has been given an opportunity to be heard.

Editing of copies

(4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) [*opening on order of judge to copy and examine packet*] or (1.4) [*opening on order of trial judge to copy and examine packet for trial*], the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could

(a) compromise the identity of any confidential informant;
(b) compromise the nature and extent of ongoing investigations;
(c) endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or
(d) prejudice the interests of innocent persons.

Accused to be provided with copies

(5) After the prosecutor has deleted the parts of the copy of the document to be given to the accused under subsection (4) [*editing of copies to remove certain information before disclosure*], the accused shall be provided with an edited copy of the document.

Original documents to be returned

(6) After the accused has received an edited copy of a document, the prosecutor shall keep a copy of the original document, and an edited copy of the document and the original document shall be returned to the packet and the packet resealed.

Deleted parts

(7) An accused to whom an edited copy of a document has been provided pursuant to subsection (5) [*order for destruction of documents*] may request that the judge before whom the trial is to be held order that any part of the document deleted by the prosecutor be made available to the accused, and the judge shall order that a copy of any part that, in the opinion of the judge, is required in order for the accused to make full answer and defence and for which the provision of a judicial summary would not be sufficient, be made available to the accused.

Documents to be kept secret — related warrant or order

(8) The rules provided for in this section apply to all documents relating to a request for a related warrant or order referred to in subsection 184.2(5) [*one-party consent wiretap – other concurrent authorizations*], 186(8) [*authorization of wiretap – other concurrent authorizations*] or 188(6) [*emergency wiretaps – related warrant or order*] with any necessary modifications.
R.S., 1985, c. C-46, s. 187; R.S., 1985, c. 27 (1st Supp.), s. 24; 1993, c. 40, s. 7; 2005, c. 10, s. 24; 2014, c. 31, s. 10.
[*annotation(s) added*]

– CCC

Non-Disclosure Order for Production Orders

Order prohibiting disclosure

487.0191 (1) On ex parte application made by a peace officer or public officer, a justice or judge may make an order prohibiting a person from disclosing the existence or some or all of the contents of a preservation demand made under section 487.012 [*preservation demand*] or a preservation or production order made under any of sections 487.013 to 487.018 [*provisions on production orders*] during the period set out in the order.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.009 [*forms*] that there are reasonable grounds to believe that the disclosure during that period would jeopardize the conduct of the investigation of the offence to which the preservation demand or the preservation or production order relates.

Form

(3) The order is to be in Form 5.0091 [*forms*].

Application to revoke or vary order

(4) A peace officer or a public officer or a person, financial institution or entity that is subject to an order made under subsection (1) [*order prohibiting disclosure of preservation or production orders*] may apply in writing to the justice or judge who made the order — or to a judge in the judicial district where the order was made — to revoke or vary the order.
2014, c. 31, s. 20.
[*annotation(s) added*]

– CCC

peace officer and public officer

Section 2 defines "peace officer".[1] Section 487.011 defines "public officer".[2]

judge and justice

Section 2 defines "justice".[3] Section 487.011 defines "judge".[4]

1. Peace Officers
2. Definitions of Parties, Persons, Places and Organizations
3. Definition of Judicial Officers and Offices
4. Definition of Judicial Officers and Offices

See Also

- Privilege
- Access to Things Detained Under Section 490
- Access to Court-Filed Exhibits
- Precedent - Unsealing Authorizations

Pre-Hearing Stages

Initial Court Appearances

Arraignment and Plea

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< Procedure and Practice

Arraignment

The purpose of the arraignment is to make a public declaration of the charges against the accused and to inform the accused of the exact allegations before he decides on plea and election.[1]

An arraignment has three components:[2]

1. calling the accused to the dock or bar;
2. reading the charge to him; and
3. asking for a plea.

On summary conviction offences, s. 801 directs the arraignment to occur at the appearance for trial:

> **Arraignment**
>
> 801 (1) Where the defendant appears for the trial, the substance of the information laid against him shall be stated to him, and he shall be asked,
>
> > (a) whether he pleads guilty or not guilty to the information, where the proceedings are in respect of an offence that is punishable on summary conviction; or
> > (b) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order.
>
> [*omitted (2), (3) and "(4) and (5)"*]
> R.S., 1985, c. C-46, s. 801; R.S., 1985, c. 27 (1st Supp.), s. 177, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10.
>
> – CCC

Certain indictable offences will also require the reading of the election address as to mode of trial after the arraignment.[3]

Timing

Practice will vary on when the arraignment will happen. It can be at the first appearance, any subsequent appearance, or immediately before trial. In a jury trial, for example, the accused must be arraigned in front of the empanelled jury.

Other Notices

Other formalities required before plea, include informing the accused of his choice of language for trial.

Waiver of Reading

Even where the accused waives reading of the charges, a judge has discretion to read charges to the accused.[4] A judge who insists on consistently reading all charges despite waiver by counsel is an abuse of discretion.[5]

1. *R v Carver*, 2013 ABPC 51 (CanLII), *per* Rosborough J, at para 9
   R v Mitchell, 1997 CanLII 6321 (ON CA), 121 CCC (3d) 139, *per* Doherty JA, at para 27
2. *Carver*, *supra*, at para 8 citing Criminal Pleading and Practice in Canada, 2nd ed., Canada Law Book, at 14:0010
3. s. 536(2)
4. *R v AA*, 2000 CanLII 22813 (ON SC), 150 CCC (3d) 564, *per* Hill J aff'd 170 CCC (3d) 449
5. *AA*, *ibid.*

Election

Under s. 536(2), where "an accused is before a justice charged with an indictable offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553" the accused shall have the choice of mode of trial being:

1. trial by provincial court judge,
2. trial by Supreme court Judge Alone, with or without a preliminary inquiry; and,
3. trial by Supreme court Judge and Jury, with or without a preliminary inquiry.

Pleas

There are only three types of pleas permitted:[1]

1. plead guilty
2. plead not guilty; or,
3. special pleas authorized by Part XX

> **Pleas permitted**
>
> 606 (1) An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part [*Pt. XX – Procedure in Jury Trials and General Provisions (s. 574 to 672)*] and no others.
> [*omitted (1.1), (1.2), (2), (3), (4), (4.1), (4.2), (4.3), (4.4) and (5)*]
> R.S., 1985, c. C-46, s. 606; R.S., 1985, c. 27 (1st Supp.), s. 125; 2002, c. 13, s. 49; 2015, c. 13, s. 21.
> [*annotation(s) added*]
>
> – CCC

1. See s. 606(1)

Plea of Guilty

- Guilty Plea

Plea of Not Guilty and Other Pleas

- Plea of Not Guilty and Other Pleas

Refusal to Enter a Plea

> 606.
> [*omitted (1), (1.1) and (1.2)*]
>
> **Refusal to plead**
>
> (2) Where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty.
> [*omitted (3), (4), (4.1), (4.2), (4.3), (4.4) and (5)*]
> R.S., 1985, c. C-46, s. 606; R.S., 1985, c. 27 (1st Supp.), s. 125; 2002, c. 13, s. 49.

– CCC

Where a defence election exists, and the accused refuses to enter an election, the judge may deem the election as electing to be tried by judge and jury with a preliminary inquiry. [1]

1. See Defence Election

See Also

- Digests on Guilty Pleas
- Trial Verdicts

Plea of Not Guilty and Other Pleas

< Procedure and Practice

Introduction

Besides a plea of guilty, there exist pleas of "not guilty", "*autrefois acquit*", and "*autrefois convict*".

Plea of Not Guilty

The plea of "not guilty" will encompass any plea alleging a defence other than *autrefois acquit* or *autrefois convict*. Section 613 states:

> **Plea of not guilty**
>
> 613 Any ground of defence for which a special plea is not provided by this Act may be relied on under the plea of not guilty.
> R.S., c. C-34, s. 541.
>
> – CCC

In addition to substantive defences, this plea will also cover pleas of:

- Kienapple / *res judicata*
- Issue Estoppel (see below)

Refusal to Plead

Where an accused refuses to make a plea or otherwise does not answer the question of plea, the presumption is that a plea of not guilty will be entered into the record (s. 606(2)).

Res Judicata and Related Pleas

Other Special Pleas

Nolo Contendre

A plea of *nolo contendre* (latin for “I am unwilling to contest”) is a plea recognized in US law, but does not have any foundation in Canadian criminal law. It is prohibited by virtue of s. 606(1) which lists all valid pleas.[1] A guilty plea that in substance amounts to a plea of *nolo contendre* will be invalid.[2]

1. *R v RP*, 2013 ONCA 53 (CanLII), 295 CCC (3d) 28, *per* Watt JA, at para 38
2. *RP*, *ibid.*

Special Plea for Defamatory Libel

See Defamatory Libel (Offence)

Not Guilty Plea By Young Persons

36
[*omitted (1)*]

When young person pleads not guilty

(2) If a young person charged with an offence pleads not guilty to the offence or pleads guilty but the youth justice court is not satisfied that the facts support the charge, the court shall proceed with the trial and shall, after considering the matter, find the young person guilty or not guilty or make an order dismissing the charge, as the case may be.

– YCJA

See Also

- Arraignment and Plea

Autrefois Acquit and Autrefois Convict

This page was last substantively updated or reviewed *January 2019*. (Rev. # 79564)

< Procedure and Practice < Res Judicata

General Principles

Special Pleas

607 (1) An accused may plead the special pleas of

(a) autrefois acquit;
(b) autrefois convict;
(c) pardon; and
(d) an expungement order under the *Expungement of Historically Unjust Convictions Act*.

[*omitted (2)*]

Disposal

(3) The pleas of autrefois acquit, autrefois convict, pardon and an expungement order under the *Expungement of Historically Unjust Convictions Act* shall be disposed of by the judge without a jury before the accused is called on to plead further.

Pleading over

(4) When the pleas referred to in subsection (3) [*special pleas taken without jury*] are disposed of against the accused, he may plead guilty or not guilty.

Statement sufficient

(5) Where an accused pleads autrefois acquit or autrefois convict, it is sufficient if he

(a) states that he has been lawfully acquitted, convicted or discharged under subsection 730(1) [*order of discharge*], as the case may be, of the offence charged in the count to which the plea relates; and
(b) indicates the time and place of the acquittal, conviction or discharge under subsection 730(1) [*order of discharge*].

[*omitted (6)*]
R.S., 1985, c. C-46, s. 607; R.S., 1985, c. 27 (1st Supp.), s. 126, c. 30 (3rd Supp.), s. 2, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, s. 60(F); 1995, c. 22, s. 10; 2000, c. 24, s. 45; 2013, c. 13, s. 9; 2018, c. 11, s. 29.
[*annotation(s) added*]

– CCC

What determines identity

609 (1) Where an issue on a plea of autrefois acquit or autrefois convict to a count is tried and it appears

(a) that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and
(b) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of autrefois acquit or autrefois convict is pleaded,

the judge shall give judgment discharging the accused in respect of that count.

Allowance of special plea in part

(2) The following provisions apply where an issue on a plea of autrefois acquit or autrefois convict is tried:

(a) where it appears that the accused might on the former trial have been convicted of an offence of which he may be convicted on the count in issue, the judge shall direct that the accused shall not be found guilty of any offence of which he might have been convicted on the former trial; and
(b) where it appears that the accused may be convicted on the count in issue of an offence of which he could not have been convicted on the former trial, the accused shall plead guilty or not guilty with respect to that offence.

R.S., c. C-34, s. 537.

– CCC

Circumstances of aggravation

610 (1) Where an indictment charges substantially the same offence as that charged in an indictment on which an accused was previously convicted or acquitted, but adds a statement of intention or circumstances of aggravation tending, if proved, to increase the punishment, the previous conviction or acquittal bars the subsequent indictment.
[*omitted (2), (3) and (4)*]
R.S., 1985, c. C-46, s. 607; R.S., 1985, c. 27 (1st Supp.), s. 126, c. 30 (3rd Supp.), s. 2, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, s. 60(F); 1995, c. 22, s. 10; 2000, c. 24, s. 45.

– CCC

An accused is not acquitted until all available appeals have been exhausted.[1]

An accused cannot plead to autrefois acquit where the victim in the first trial is different from the victim in the second trial.[2]

Where the facts and offence are substantially the same, the accused can rely on autrefois acquit or autrefois convict.[3]

Where the crown abandons a prosecution after an adverse evidentiary decision, the defence cannot plead autrefois acquit at a later new trial on the same offence.[4]

Evidence

Evidence of identity of charges

608 Where an issue on a plea of autrefois acquit or autrefois convict is tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court pursuant to section 551 on the charge that is pending before that court are admissible in evidence to prove or to disprove the identity of the charges.
R.S., c. C-34, s. 536.

– CCC

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1. *Corp. professionelle des médecins v Thibault*, 1988 CanLII 32 (SCC), [1988] 1 SCR 1033, *per* Lamer J, at para 21
2. *Rex v Sweetman*, 1939 CanLII 107 (ON CA), [1939] 2 DLR 70, [1939] OJ No 455, *per curiam*
3. *R v Tyhy*, 2008 MBQB 126 (CanLII), 233 CCC (3d) 520, *per* Sinclair J -- autrefois acquit accepted
4. *R v Button*, 2010 NLCA 66 (CanLII), 932 APR 345, *per* Barry JA (3:0)

Election

< Procedure and Practice

Introduction

The election refers to the ability of the Crown and Defence to select which court will have jurisdiction over a criminal charge. The choice of each side is separate and distinct. For the Crown, they have the right to the "Crown Election" on offences that are hybrid.[1] The Crown may chose to classify the offence as a summary offence, keeping the jurisdiction to provincial court, or as an indictable offence, enabling the Defence's right to "Defence election" which permits the accused to select the venue of trial amongst a variety of choices.

1. See also Types of Offences

Topics

- Crown Election
- Defence Election

See Also

- Types of Offences
- Jurisdiction of the Courts

Absolute and Exclusive Jurisdiction Offences

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< Procedure and Practice < Election

General Principles

Under s. 553, the Provincial Court has jurisdiction that is "absolute and does not depend on the consent of the accused where the accused is charged in an information" with several classes of offences. These are classified as "absolute jurisdiction" offences.[1]

Section 553 states:

> **Absolute jurisdiction**
>
> 553 The jurisdiction of a provincial court judge, or in Nunavut, of a judge of the Nunavut Court of Justice, to try an accused is absolute and does not depend on the consent of the accused where the accused is charged in an information
>
> (a) with
>
> (i) theft, other than theft of cattle [*theft not exceeding $5,000*],
> (ii) obtaining money or property by false pretences [*false pretence or false statement*],
> (iii) unlawfully having in his possession any property or thing or any proceeds of any property or thing knowing that all or a part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment or an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment [*possession of stolen property*],
> (iv) having, by deceit, falsehood or other fraudulent means, defrauded the public or any person, whether ascertained or not, of any property, money or valuable security [*fraud*], or
> (v) mischief under subsection 430(4) [*mischief – not exceeding $5,000*],
>
> where the subject-matter of the offence is not a testamentary instrument and the alleged value of the subject-matter of the offence does not exceed five thousand dollars;
> (b) with counselling or with a conspiracy or attempt to commit or with being an accessory after the fact to the commission of
>
> (i) any offence referred to in paragraph (a) in respect of the subject-matter and value thereof referred to in that paragraph, or
> (ii) any offence referred to in paragraph (c); or
>
> (c) with an offence under
>
> (i) section 201 (keeping gaming or betting house),
> (ii) section 202 (betting, pool-selling, book-making, etc.),
> (iii) section 203 (placing bets),
> (iv) section 206 (lotteries and games of chance),
> (v) section 209 (cheating at play),
> (vi) [Repealed, 2019, c. 25, s. 251.1]
> (vii) [Repealed, 2000, c. 25, s. 4]
> (viii) section 393 (fraud in relation to fares),
> (viii.01) section 490.031 (failure to comply with order or obligation),

(viii.02) section 490.0311 (providing false or misleading information),
(viii.1) section 811 (breach of recognizance),
(ix) subsection 733.1(1) (failure to comply with probation order), or
(x) paragraph 4(4)(a) of the *Controlled Drugs and Substances Act* [possession of Schedule II (cannaboids) controlled substance, indictable election].
(xi) [Repealed, 2018, c. 16, s. 219]

R.S., 1985, c. C-46, s. 553; R.S., 1985, c. 27 (1st Supp.), s. 104; 1992, c. 1, s. 58; 1994, c. 44, s. 57; 1995, c. 22, s. 2; 1996, c. 19, s. 72; 1997, c. 18, s. 66; 1999, c. 3, s. 37; 2000, c. 25, s. 4; 2010, c. 17, s. 25; 2012, c. 1, s. 33; 2018, c. 16, s. 219; 2019, c. 25, s. 251.1.
[*annotation(s) added*]

– CCC

Exclusive Jurisdiction

Under section 469, courts of criminal jurisdiction, being provincial courts, have jurisdiction over all indictable offences except for those listed in the section. These are commonly referred to as "exclusive jurisdiction" offences and cannot be tried at provincial court. While under section 553, only provincial courts have jurisdiction to try these offences unless they are accompanied by a different offence of greater jurisdiction.

Absolute Jurisdiction (s. 553)	Exclusive Jurisdiction (s. 469)
▪ "theft, other than theft of cattle" (where value =< $5,000) [s.553(a)(i)] ▪ "obtaining money or property by false pretences", (where value =< $5,000) [s.553(a)(ii)] ▪ "possess stolen property" (value =< $5,000) [s.553(a)(iii)] ▪ Fraud (value =< $5,000) [s.553(a)(iv)] ▪ "mischief under subsection 430(4)" (value =< $5,000) [s.553(a)(v)] ▪ Gaming and betting-related offences (s. 201 - 210) [s.553(c)(i-v)] ▪ "fraud in relation to fares" under s 393 [s.553(c)(viii)] ▪ Breach of SOIRA Order under s. 490.031 or 490.0311 [s.553(c)(viii.01 to viii.02)] ▪ "failure to comply with probation order" under s. 733.1 [s.553(c)(viii.1)] ▪ "breach of recognizance" under s. 811 [s.553(c)(ix)] ▪ Possession of a Schedule II Drug under s. 4(4)(a) of the CDSA [s.553(c)(x)] ▪ "counselling or with a conspiracy or attempt to commit or with being an accessory after the fact" of the above offences [s.553(b)]	▪ "treason" under s. 47 (469(a)(i)) ▪ "intimidating Parliament or a legislature" under s. 51 (469(a)(iii)) ▪ "inciting to mutiny" under s. 53 (469(a)(iv)) ▪ "seditious offences" under s. 61 (469(a)(v)) ▪ "piracy" under s. 74 (469(a)(vi)) and "piratical acts" under s. 75 (469(a)(vii)) ▪ attempts of any of the above listed (469(d)) ▪ murder under s. 235 (469(a)(viii)) and conspiracy to commit murder ▪ offences under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act* (469(c.1); ▪ the offence of being an accessory after the fact to high treason or treason or murder; ▪ bribery by a holder of a judicial office under s. 119 (469(c))

All indictable offences offence are presumptive judge and jury election.[2] However, "exclusive jurisdiction" offences are those which can only be re-elected to superior court Judge-alone under s. 473, requiring the consent of both parties.

1. See also s. 536 which requires the judge to "remand" the accused to appear before a judge in the territorial jurisdiction of the offence

2. see s. 471

Judge Trials on Absolute Jurisdiction Offences

Remand by justice to provincial court judge in certain cases

536 (1) Where an accused is before a justice other than a provincial court judge charged with an offence over which a provincial court judge has absolute jurisdiction under section 553 [*absolute jurisdiction offences*], the justice shall remand the accused to appear before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed.
[*omitted (2), (2.1), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3) and (5)*]
R.S., 1985, c. C-46, s. 536; R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.
[*annotation(s) added*]

– CCC

Judge-alone Trials on Exclusive Jurisdiction Offences

Section 473 permits an accused who is charged with a 469 exclusive jurisdiction offence to elect to be tried by a superior judge sitting without a jury.

Trial without jury

473 (1) Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 [*exclusive jurisdiction offences*] may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

Joinder of other offences

(1.1) Where the consent of the accused and the Attorney General is given in accordance with subsection (1) [*s. 469 triable without jury on consent*], the judge of the superior court of criminal jurisdiction may order that any offence be tried by that judge in conjunction with the offence listed in section 469 [*exclusive jurisdiction offences*].

Withdrawal of consent

(2) Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1) [*s. 469 triable without jury on consent*], that consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal.
R.S., 1985, c. C-46, s. 473; R.S., 1985, c. 27 (1st Supp.), s. 63; 1994, c. 44, s. 30.
[*annotation(s) added*]

– CCC

Crown Election

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< Procedure and Practice < Election

General Principles

The Crown has the power of election on hybrid criminal offences. A hybrid offence is an offence defined in the Criminal Code as having both summary and indictable classes of punishment.

The election process is a "means by which the criminal law provides the Attorney General with sufficient flexibility to take the specific circumstances of each case into account and ensure that, in each case, the interests of justice are served." [1]

No offences with a maximum penalty of 14 years or life are hybrid.[2]

Timing of Election

Elections are not necessarily made at with full knowledge of the case, nor it is expected to be the case.[3]

Election Procedure

Interpretation of the meaning of the Crown's words when making an election or re-election should be read in the context of the entire court record.[4]

Appeal Standard

Whether a matter is part of the discretionary core functions of the Attorney General is a question of law.[5]

1. *R v Century 21 Ramos Realty Inc and Ramos*, 1987 CanLII 171 (ON CA), 32 CCC (3d) 353, *per curiam*
2. See List of Offences by Penalty
3. *R v Nur*, 2015 SCC 15 (CanLII), [2015] 1 SCR 773, *per* McLachlin CJ (6:3), at para 97
4. *R v Smickle*, 2012 ONSC 602 (CanLII), 280 CCC (3d) 365, *per* Molloy J, at para 110
4. *R v Horton*, 2014 ONCA 414 (CanLII), *per* Goudge JA, - ambiguous comment regarding election not interpreted as implicit re-election
5. *R v Nixon*, 2009 ABCA 289 (CanLII), 448 AR 289, *per curiam*, at para 13

Presumptions

Hybrid offences are deemed to be indictable until the Crown elects to proceed summarily.[1]

Hybrid offences are treated as indictable during the proceedings until such time as the Crown makes their election.[2] Where the Crown fails to make their election, they are deemed to have made a summary election.[3]

Where a proceeding progresses to its conclusion without the Crown having made an election on a hybrid offence and the charge was within 6 months of the incident, the Crown is deemed to have elected to proceed by "summary conviction".[4]

However, where the accused elects mode of trial even though the Crown failed to make an election, the trial will be deemed indictable.[5]

Where the offence is prosecuted by indictment there is a statutory presumption under s. 471 that the trial will be by judge and jury.[6]

1. *R v Paul-Marr*, 2005 NSCA 73 (CanLII), 199 CCC (3d) 424, *per* Cromwell JA, at para 20
   R v Dudley, 2009 SCC 58 (CanLII), [2009] 3 SCR 570, *per* Fish J, at para 21
   R v Belair, 1988 CanLII 7110 (ON CA), 41 CCC (3d) 329, *per* Martin JA ("The [hybrid] offence charge was at all times triable by indictment, and indeed the information charged an indictable offence until the Crown elected to treat the offence as one punishable on summary conviction")
   Re Abarca and The Queen, 1980 CanLII 2958 (ON CA), 57 CCC (2d) 410, *per* Lacourciere JA(*complete citation pending*)
2. cf. see s. 34 of the Interpretation Act (Election is deemed to be indictable "unless and until the Crown elects to proceed summarily")
3. *R v Dudley*, 2009 SCC 58 (CanLII), [2009] 3 SCR 570, *per* Fish J, at paras 18, 21
   R v Dixon, 2013 BCCA 41 (CanLII), *per* Chiasson JA, at paras 21 to 25, 42
   see also *Paul-Marr*, *supra*, at para 20
4. *R v Mitchell*, 1997 CanLII 6321 (ON CA), 121 CCC (3d) 139, *per* Doherty JA
   R v Marcotullio, 1978 CanLII 2332, 39 CCC (2d) 478, *per* Arnup JA
   R v W(WW), 1985 CanLII 3641 (MB CA), 20 CCC (3d) 214, *per* Huband JA (2:1)
5. *R v Mitchell*, 1997 CanLII 6321 (ON CA), 121 CCC (3d) 139, *per* Doherty JA
6. see "471. Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury."

Crown Discretion

The power to elect mode of procedure for prosecution is at the discretion of the Crown.[1]

1. *R v Smythe*, 1971 SCR 680 (CanLII), [1971] SCR 680, *per* Fauteux CJ

Review of Crown Election

The Crown election may only be reviewable by a court where the election amounts to an abuse of process.

The decision of the Crown to make an indictable election must amount to flagrant impropriety.[1]

1. *R v Slaney*, 2013 NLCA 70 (CanLII), [1971] SCR 680, *per* Barry JA, at para 6

Re-Election

The Crown has the common law right of re-election after making an initial election. In certain cases consent of defence or the judge will be required.[1]

It is an open question whether a re-election constitutes a commencement of a new proceedings under s. 786(2).[2]

A re-election to an indictable charge to proceed by summary election while the charge is before a superior court judge is permissible, but once re-election is complete the matter should be remitted to provincial court for guilty plea and sentencing. The superior court does not have jurisdiction to handle sentencing.[3]

1. *R v DME*, 2014 ONCA 496 (CanLII), 313 CCC (3d) 70, *per* Watt JA ("the common law equally permits the Crown, having once elected one mode of proceeding in connection with a hybrid offence, to re-elect later the other mode of proceeding. In some instances consent of the accused and approval of the presiding judge may be required.")
2. *DME*, *ibid.*, at para 45
3. *DME*, *ibid.*

Summary Election Time Limitation

Proceedings on summary offences must commence within 12 months of the incident date unless the Crown and Defence agree to waive the time limitation. Section 786(2) states:

> 786
> [*omitted (1)*]
>
> **Limitation**
>
> (2) No proceedings shall be instituted more than 12 months after the time when the subject matter of the proceedings arose, unless the prosecutor and the defendant so agree.
> R.S., 1985, c. C-46, s. 786; 1997, c. 18, s. 110; 2019, c. 25, s. 315.
>
> – CCC

Prior to September 19, 2019, the time limitation was 6 months instead of 12 months.

The Crown has no jurisdiction to make a summary election outside of the 12 month period of time.[1] Summary elections on an information sworn more than 12 months after the subject matter of the proceedings is "null and of no effect".[2]

The 12-month limitation under s. 786 does not count from the beginning of the offence where it spans several days. An offence spanning a timeframe will be valid for the entire span as long as the end date is within the 12 month limit.[3]

It is acceptable practice to elect indictable in order to allow the prosecution to proceed, such as where the 12 month time limit has expired, and then re-elect summarily with consent.[4] The judge cannot interfere by refusing to allow re-election.[5]

If the Crown elects by summary conviction despite being outside the permissible time limitation, the Crown has several options:[6]

- may change its election and proceed by indictment once it has discovered its error. It is not bound by the initial election.[7]
- withdraw the original information, lay a new information and elect to proceed by indictment
- seek consent of the accused to continue by summary conviction.

1. *R v Karpinski*, 1957 CanLII 9 (SCC), [1957] SCR 343, 117 CCC 241, *per* Fauteux J, at p. 249 (CCC) stating (there are “no rights for the Crown to elect to proceed by way of summary conviction and no jurisdiction for the Magistrate to accept and act upon the election by receiving a plea”)
2. *R v PWK*, 1998 CanLII 7145 (ON CA), 128 CCC (3d) 206, *per* Austin JA, at para 31
3. *R v Nadir*, 2004 CanLII 59965 (ON CA), *per curiam*
4. *R v Burke*, 1992 CanLII 7121 (NL CA), 78 CCC (3d) 163, *per* Steele JA
5. *R v Linton*, 1994 CanLII 7272 (ON SC), 90 CCC 528, *per* Moldaver J
6. *R v Roulette*, 2009 MBPC 3 (CanLII), 246 Man R (2d) 1, *per* Harapiak J
7. *R v Burke*, 1992 CanLII 7121 (NL CA), 78 CCC (3d) 163, *per* Steele JA, at para 14 citing Ewaschuk
   See also *R v Belair*, 1988 CanLII 7110 (ON CA), 26 OAC 340, 41 CCC (3d) 329, *per* Martin JA

Crown's Failure to Elect

Crown's election can be "deemed" by means of "the way in which the pleadings were conducted".[1]

This usually means they are deemed to have made a summary election.[2]

Section 34(1)(a) of the Interpretation Act creates a presumption of an indictable election.[3] Where the presumption is not displaced, and the pleadings did not include a proper election address any verdict can be quashed and become a nullity.[4]

Where a proceedings progresses to its conclusion without the Crown having made an election on a hybrid offence and the laying of the charge was within 6 months of the incident, the Crown is deemed to have elected to proceed by "summary conviction".[5] This will vary in some circumstances.[6]

However, where the accused elects mode of trial even though the Crown failed to make an election, the trial will be deemed indictable.[7]

1. *R v Matthews*, 2015 NSCA 4 (CanLII), *per* Farrar JA, at para 13
2. *R v Dudley*, 2009 SCC 58 (CanLII), [2009] 3 SCR 570, *per* Fish J, at paras 18, 21
   R v Dixon, 2013 BCCA 41 (CanLII), *per* Chiasson JA, at paras 21 to 25, 42
   see also *R v Paul-Marr*, 2005 NSCA 73 (CanLII), 199 CCC (3d) 424, *per* Cromwell JA, at para 20
3. *Matthews*, *supra*, at para 12
4. *Matthews*, *supra*, at para 18
   see also *Paul-Marr*, *supra*, at para 33
5. *R v Mitchell*, 1997 CanLII 6321 (ON CA), 121 CCC (3d) 139, *per* Doherty JA
   R v Marcotullio, 1978 CanLII 2332, 39 CCC (2d) 478, *per* Arnup JA
   R v W(WW), 1985 CanLII 3641 (MB CA), 20 CCC (3d) 214, *per* Huband JA (2:1)
   see also *R v Ashoona*, 1985 CanLII 3476 (NWT SC), 19 CCC (3d) 377, *per* De weerdt J
   R v Gal, 1985 CanLII 1483 (AB QB), 60 AR 333, *per* Wachowich J
6. *Matthews*, *supra*, at para 17
7. *R v Mitchell*, 1997 CanLII 6321 (ON CA), 121 CCC (3d) 139, *per* Doherty JA

See Also

- Defence Election
- Purpose and Principles of Sentencing - for details on election as a factor in sentencing

Defence Election

< Procedure and Practice < Election

General Principles

Where an accused is charged with an indictable offence, or a hybrid offence which was elected to proceed by indictment, the accused has the right to chose (or "elect") the mode of trial under s. 536(2), unless the Code specifies otherwise.[1]

Where the offence has a maximum penalty of less than 14 years, the defence election consists of the following:

1. trial by a provincial court judge;
2. trial by a superior court judge with a judge alone, *without* a preliminary inquiry
3. trial by a superior court judge with a judge and jury, *without* a preliminary inquiry

Where the offence has a maximum penalty of 14 years or life, the defence election consists of the following:

1. trial by a provincial court judge;
2. trial by a superior court judge with a judge alone, *without* a preliminary inquiry
3. trial by a superior court judge with a judge and jury, *without* a preliminary inquiry
4. trial by a superior court judge with a judge and jury, with a preliminary inquiry
5. trial by a superior court judge with a judge alone, with a preliminary inquiry

Section 554(1) authorizes a provincial court judge to have jurisdiction to try indictable matters (other than offences listed in 469 or 553) only where the accused elects to be tried by a provincial court judge. That section states:

> **Trial by provincial court judge with consent**
>
> 554 (1) Subject to subsection (2) [*trial by provincial court judge with consent – nunavut*], if an accused is charged in an information with an indictable offence other than an offence that is mentioned in section 469 [*exclusive jurisdiction offences*], and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553 [*absolute jurisdiction offences*], a provincial court judge may try the accused if the accused elects to be tried by a provincial court judge.
> [*omitted (2)*]
> R.S., 1985, c. C-46, s. 554; R.S., 1985, c. 27 (1st Supp.), ss. 105, 203; 1999, c. 3, s. 38; 2002, c. 13, s. 31.
> [*annotation(s) added*]
>
> – CCC

Presumption

Under s. 471, a person charged with an indictable offence is presumed to be tried by a judge and jury unless they consent to otherwise

> **Trial by jury compulsory**
>
> 471 Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.
>
> R.S., c. C-34, s. 429
>
> – CCC

Election to the entire information

The election chosen by defence must be applied to the entire information, not divided between counts.[2]

1. The right of election is not available for indictable offences that are either "absolute jurisdiction" offences or "exclusive jurisdiction offences". See below for details

2. *R v Anderson*, 1971 CanLII 1304 (BC SC), 3 WWR 200, *per* Macfarlane J

Procedure

An election to provincial court under s. 536(3) requires that the judge endorse the information showing the election and direct the matter before a provincial court judge for the purpose of taking a plea:

> 536
> [*omitted (1), (2) and (2.1)*]
>
> **Procedure where accused elects trial by provincial court judge**
>
> (3) Where an accused elects to be tried by a provincial court judge, the justice shall endorse on the information a record of the election and shall
>
> (a) where the justice is not a provincial court judge, remand the accused to appear and plead to the charge before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed; or
> (b) where the justice is a provincial court judge, call on the accused to plead to the charge and if the accused does not plead guilty, proceed with the trial or fix a time for the trial.
>
> [*omitted (4), (4.1), (4.11), (4.12), (4.2), (4.3) and (5)*]
> R.S., 1985, c. C-46, s. 536 R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.

– CCC

A failure to take an election from the accused does not lose jurisdiction of the court.[1]

No Judge Seized

Once an election has been made, the provincial court level judge does not get seized with either the trial or the preliminary inquiry.[2]

Waiver of Procedure

When electing the mode of trial, the accused or his counsel may waive formal compliance to the procedural requirements found in s. 536(2). To be valid, the waiver must be "clear, unequivocal, and informed."[3]

1. *R v Geszthelyi*, 1977 CanLII 1921 (BC CA), 33 CCC (2d) 543 (BCCA), *per* Seaton J
2. *R v Danchella*, 1985 CanLII 639 (BC CA), 33 CCC (2d) 543), *per* Craig JA
3. *R v George*, 2016 BCCA 229 (CanLII), 33 CCC (2d) 543 (BCCA), *per* Lowry JA, at para 4
   Korponay v Canada (Attorney General), 1982 CanLII 12 (SCC), [1982] 1 SCR 41, *per* Lamer J
   R v Mitchell, 1997 CanLII 6321 (ON CA), 121 CCC (3d) 139, *per* Doherty JA
   R v Vuong, 2010 ONCA 798 (CanLII), 264 CCC (3d) 39, *per* Sharpe JA

Two or More Accused

Conflicting elections may arise where there is two or more accused. Section 567 addresses this issue, stating:

> **Mode of trial when two or more accused**
>
> 567 Despite any other provision of this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], if two or more persons are jointly charged in an information, unless all of them elect or re-elect or are deemed to have elected the same mode of trial, the justice, provincial court judge or judge may decline to record any election, re-election or deemed election for trial by a provincial court judge or a judge without a jury.
> R.S., 1985, c. C-46, s. 567; R.S., 1985, c. 27 (1st Supp.), s. 111; 2002, c. 13, s. 43.
> [*annotation(s) added*]
>
> – CCC

This section provides the discretionary power to ignore the conflicting elections and record a judge and jury election for all parties.

Upon receiving conflicting elections, a provincial court judge may *not* hold a trial simultaneously with a preliminary inquiry.[1]

Election for Preliminary Inquiry

> 536
> [*omitted (1), (2), (2.1), (3), (4), (4.1), (4.11) and (4.12)*]
>
> **Preliminary inquiry if two or more accused**
>
> (4.2) If two or more persons are jointly charged in an information and one or more of them make a request for a preliminary inquiry under subsection (4) [*request for preliminary inquiry*], a preliminary inquiry must be held with respect to all of them.
> [*omitted (4.3) and (5)*]
> R.S., 1985, c. C-46, s. 536 R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.
> [*annotation(s) added*]
>
> – CCC

1. *R v Christie*, 2003 CanLII 24397 (ON SC), *per* Dambrot J , at para 20

Endorsement for Section 469 Offences

536
[*omitted (1), (2), (2.1), (3), (4) and (4.1)*]

Endorsement on the information — other accused charged with an offence punishable by 14 years or more of imprisonment

(4.11) If an accused is before a justice, charged with an offence listed in section 469 that is punishable by 14 years or more of imprisonment, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing whether the accused or the prosecutor has requested that a preliminary inquiry be held.
[*omitted (4.12), (4.2), (4.3) and (5)*]
R.S., 1985, c. C-46, s. 536 R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.

– CCC

Endorsement for Mixed Prelim Offences

536
[*omitted (1), (2), (2.1), (3), (4), (4.1) and (4.11)*]

Endorsement on the information — accused referred to in subsection (2.1)

(4.12) If an accused referred to in subsection (2.1) elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under paragraph 565(1)(a) [*deemed election where lower judge declined to record*] to have elected to be tried by a court composed of a judge and jury, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing the nature of the election or deemed election of the accused or that the accused did not elect, as the case may be.
[*omitted (4.2), (4.3) and (5)*]
R.S., 1985, c. C-46, s. 536 R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.

– CCC

Election Address

The Court is required to read the "election address" unless it is waived by the accused. The address is set out in s. 536:

s. 536
[*omitted (1)*]

Election before justice — 14 years or more of imprisonment

(2) If an accused is before a justice, charged with an indictable offence that is punishable by 14 years or more of imprisonment, other than an offence listed in section 469 [*exclusive jurisdiction offences*], the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

Election before justice — other indictable offences

(2.1) If an accused is before a justice, charged with an indictable offence — other than an offence that is punishable by 14 years or more of imprisonment, an offence listed in section 469 that is not punishable by 14 years or more of imprisonment or an offence over which a provincial court judge has absolute jurisdiction under section 553 [*absolute jurisdiction offences*]—, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> You have the option to elect to be tried by a provincial court judge without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. How do you elect to be tried?

[*omitted (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3) and (5)*]
R.S., 1985, c. C-46, s. 536 R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.
[*annotation(s) added*]

– CCC

Waiver of Address

The duty to read the election address under s. 536(2) can be waived by the accused, either by himself or by counsel.[1]

The address can be waived expressly or by implication.[2] Instructions to "set the matter down for trial" when it is before the provincial court can be sufficient to amount to a waiver of the address and a choice of provincial court.[3]

Procedural Errors

Some cases suggest that any irregularities in the reading of the election causes a jurisdictional error that cannot be cured.[4] Others suggest that such errors are curable under the curative proviso under s. 686(1)(b) where there is no prejudice to the accused.[5]

There suggestion that where the election was not properly entered would require either an appeal or a mistrial.[6]

1. *R v Mitchell*, 1997 CanLII 6321 (ON CA), 121 CCC (3d) 139, *per* Doherty JA, at para 30 ("An accused may personally, or through counsel, waive compliance with a procedure like s.536(2) which has been enacted for the protection of the accused")
2. *R v Carver*, 2013 ABPC 51 (CanLII), *per* Rosborough J, at para 12
3. see *R v Wunderlich*, 2014 ABCA 94 (CanLII), 572 AR 174, *per curiam* (2:1)
4. See *R v Leske*, 1967 CanLII 681 (AB CA), [1968] 1 CCC 347, 60 WWR 760 (Alta SC AD), *per* Cairns JA
   also referenced in *R v Lamoureux*, 2013 ABCA 85 (CanLII), 542 AR 386, *per curiam* - comments that this is not applicable anymore since the addition of the curative proviso in s. 686
   See also *R v Trites*, 2011 NBCA 5 (CanLII), 268 CCC (3d) 206, *per* Richard JA, at para 41
   R v Sewell, 2003 SKCA 52 (CanLII), 175 CCC (3d) 242, *per* Bayda CJ , at para 62
5. See *Lamoureux*, *supra*
   R v Joinson, 1986 CanLII 1195 (BC CA), 32 CCC (3d) 542, *per* MacFarlane JA
   R v Cloutier, 1988 CanLII 199 (ON CA), 43 CCC (3d) 35, *per* Goodman JA
6. see comments *Wunderlich*, *supra*, at para 13

Judge-Alone Election

Judge's Jurisdiction with Consent
Trial by judge without a jury

558 If an accused who is charged with an indictable offence, other than an offence mentioned in section 469 [*exclusive jurisdiction offences*], elects under section 536 [*trial of absolute jurisdiction offences*] or 536.1 [*trial of absolute jurisdiction offences – Nunavut*] or re-elects under section 561 [*right of re-election*] or 561.1 [*right of re-election - Nunavut*] to be tried by a judge without a jury, the accused shall, subject to this Part, be tried by a judge without a jury.
R.S., 1985, c. C-46, s. 558; R.S., 1985, c. 27 (1st Supp.), s. 108; 1999, c. 3, s. 41.
[*annotation(s) added*]

– CCC

Duty of judge

560 (1) If an accused elects, under section 536 [*trial of absolute jurisdiction offences*] or 536.1 [*trial of absolute jurisdiction offences – Nunavut*], to be tried by a judge without a jury, a judge having jurisdiction shall

> (a) on receiving a written notice from the sheriff or other person having custody of the accused stating that the accused is in custody and setting out the nature of the charge against him, or
> (b) on being notified by the clerk of the court that the accused is not in custody and of the nature of the charge against him,

fix a time and place for the trial of the accused.

Notice by sheriff, when given

(2) The sheriff or other person having custody of the accused shall give the notice mentioned in paragraph (1)(a) [*duty to set trial on election for judge-alone trial – accused in custody*] within twenty-four hours after the accused is ordered to stand trial, if the accused is in custody pursuant to that order or if, at the time of the order, he is in custody for any other reason.

Duty of sheriff when date set for trial

(3) Where, pursuant to subsection (1), a time and place is fixed for the trial of an accused who is in custody, the accused

(a) shall be notified forthwith by the sheriff or other person having custody of the accused of the time and place so fixed; and
(b) shall be produced at the time and place so fixed.

Duty of accused when not in custody

(4) Where an accused is not in custody, the duty of ascertaining from the clerk of the court the time and place fixed for the trial, pursuant to subsection (1) [*duty to set trial on election for judge-alone trial*], is on the accused, and he shall attend for his trial at the time and place so fixed.
(5) [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 109]
R.S., 1985, c. C-46, s. 560; R.S., 1985, c. 27 (1st Supp.), ss. 101(E), 109; 1999, c. 3, s. 42; 2002, c. 13, s. 36.
[*annotation(s) added*]

– CCC

Election Without Requesting Preliminary Inquiry

536
[*omitted (1), (2), (2.1), (3), (4), (4.1), (4.11), (4.12) and (4.2)*]

When no request for preliminary inquiry

(4.3) If no request for a preliminary inquiry is made under subsection (4) [*request for preliminary inquiry*], the justice shall fix the date for the trial or the date on which the accused must appear in the trial court to have the date fixed.
[*omitted (5)*]
R.S., 1985, c. C-46, s. 536; R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.
[*annotation(s) added*]

– CCC

Deeming an Electing

A party who by action or inaction refuses to make a choice of election the court may "deem" an election by entering an election on the accused's behalf under s. 565 for a judge and jury trial with a preliminary inquiry.

Section 565 states:

Election deemed to have been made

565 (1) If an accused is ordered to stand trial for an offence that, under this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], may be tried by a judge without a jury, the accused shall, for the purposes of the provisions of this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury if

(a) the justice of the peace, provincial court judge or judge, as the case may be, declined to record the election or re-election of the accused under section 567 [*mode of trial where more than one accused*] or subsection 567.1(1) [*mode of trial where more than one accused – Nunavut*]; or
(b) the accused does not elect when put to an election under section 536 [*trial of absolute jurisdiction offences*] or 536.1 [*trial of absolute jurisdiction offences – Nunavut*].

(1.1) [Repealed, 2019, c. 25, s. 260]

[*omitted (2) [*deemed election on direct indictment*] and (3) [*notice of re-election on direct indictment*]*]

Application

(4) Subsections 561(6) [*time and place for re-election*] and (7) [*proceedings on re-election*], or subsections 561.1(8) [*time and place for re-election — Nunavut*] and (9) [*proceedings on re-election — Nunavut*], as the case may be, apply to a re-election made under subsection (3) [*notice of re-election on direct indictment*].

R.S., 1985, c. C-46, s. 565; R.S., 1985, c. 27 (1st Supp.), s. 111; 1999, c. 3, s. 46; 2002, c. 13, s. 41; 2008, c. 18, s. 23; 2019, c. 25, s. 260.
[*annotation(s) added*]

– CCC

A judge may deem an election even where full disclosure is not complete.[1]

1. *R v Jonsson*, 2001 SKCA 53 (CanLII), 154 CCC (3d) 474, *per* Lane JA - court overturns quashing of a deemed election. QB quashed order as disclosure was not complete.

Recording Supreme Court Election

536
[*omitted (1), (2), (2.1), (3) and (4)*]

Endorsement on the information — accused referred to in subsection (2)

(4.1) If an accused referred to in subsection (2) [*election before justice – 14 years or more of imprisonment*] elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under paragraph 565(1)(a) [*deemed election where lower judge declined to record*] to have elected to be tried by a court composed of a judge and jury, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing

(a) the nature of the election or deemed election of the accused or that the accused did not elect, as the case may be; and
(b) whether the accused or the prosecutor has requested that a preliminary inquiry be held.

[*omitted (4.11), (4.12), (4.2), (4.3) and (5)*]
R.S., 1985, c. C-46, s. 536; R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.
[*annotation(s) added*]

– CCC

Young Accused Persons

- Defence Election for Young Accused

Attorney General Override

Section 568 provides for a rarely used power of the attorney general to override any Defence election that is not for trial by judge and jury and require that the trial be held before a jury.

Attorney General may require trial by jury

568 Even if an accused elects under section 536 [*trial of absolute jurisdiction offences*] or re-elects under section 561 [*right of re-election*] or subsection 565(2) [*deemed election on direct indictment*] to be tried by a judge or provincial court judge, as the case may be, the Attorney General may require the accused to be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable with imprisonment for five years or less. If the Attorney General so requires, a judge or provincial court judge has no jurisdiction to try the accused under this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] and a preliminary inquiry must be held if requested under subsection 536(4) [*request for preliminary inquiry*], unless one has already been held or the re-election was made under subsection 565(2) [*deemed election on direct indictment*].
R.S., 1985, c. C-46, s. 568; R.S., 1985, c. 27 (1st Supp.), s. 111; 2002, c. 13, s. 43; 2008, c. 18, s. 24.
[*annotation(s) added*]

– CCC

This authority under s. 568 to force a judge and jury election can likely still be exercised even where the Crown had previously consented to a re-election.[1]

The discretionary exercise of section 568, forcing the accused to have a jury trial can potentially result in an abuse of process.[2]

1. *R v Pontbriand*, 1978 CanLII 2180 (QC CS), 39 CCC (2d) 145 (QCSC), *per* Hugessen ACJ, at para 7 ("It was suggested that the Crown, having once consented under s. 492(5) to a re-election by the accused, is precluded from exercising the rights given to it under s. 498 to require a trial before judge and jury. This argument cannot stand in the light of the text of s. 498, which gives the right to the Attorney General to require a jury trial...") -- however this case concerned a previous version of s. 568 with different wording

2. *R v Vittorio (Vic) De Zen et al*, 2010 ONSC 974 (CanLII), 251 CCC (3d) 547, *per* MF Brown J — Abuse of Process

Absolute and Exclusive Jurisdiction Offences

- Absolute and Exclusive Jurisdiction Offences

Judge Trials on Absolute Jurisdiction Offences

> **Remand by justice to provincial court judge in certain cases**
>
> 536 (1) Where an accused is before a justice other than a provincial court judge charged with an offence over which a provincial court judge has absolute jurisdiction under section 553 [*absolute jurisdiction offences*], the justice shall remand the accused to appear before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed.
> [*omitted (2), (2.1), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3) and (5)*]
> R.S., 1985, c. C-46, s. 536; R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 25; 2004, c. 12, s. 9; 2019, c. 25, s. 239.
> [*annotation(s) added*]
>
> – CCC

Judge-alone Trials on Exclusive Jurisdiction Offences

Section 473 permits an accused who is charged with a 469 exclusive jurisdiction offence to elect to be tried by a superior judge sitting without a jury.

> **Trial without jury**
>
> 473 (1) Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 [*exclusive jurisdiction offences*] may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.
>
> **Joinder of other offences**
>
> (1.1) Where the consent of the accused and the Attorney General is given in accordance with subsection (1) [*s. 469 triable without jury on consent*], the judge of the superior court of criminal jurisdiction may order that any offence be tried by that judge in conjunction with the offence listed in section 469 [*exclusive jurisdiction offences*].
>
> **Withdrawal of consent**
>
> (2) Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1) [*s. 469 triable without jury on consent*], that consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal.
> R.S., 1985, c. C-46, s. 473; R.S., 1985, c. 27 (1st Supp.), s. 63; 1994, c. 44, s. 30.
> [*annotation(s) added*]
>
> – CCC

Re-Election

- Defence Re-Election

See Also

- Crown Election
- Direct Indictments)

Defence Election for Young Accused

< Procedure and Practice < Election

General Principles

Those charged with an offence as a young person (under 18 years of age) may have the right to elect the mode of trial where one of the following situations arise:[1]

1. the Crown has given notice of intention to seek an adult sentence for an offence with a maximum penalty greater than 2 years and the accused was 14 years or older;
2. the charge is murder (first or second degree) and the accused was 12 or 13 years old at the time of the offence; or
3. it is not clear whether the accused was a young person at the time of the offence but would have had an election if an adult.

> **Election — adult sentence**
>
> 67 (1) The youth justice court shall, before a young person enters a plea, put the young person to his or her election in the words set out in subsection (2) if
>
> (a) [Repealed, 2012, c. 1, s. 178]
> (b) the Attorney General has given notice under subsection 64(2) of the intention to seek an adult sentence for an offence committed after the young person has attained the age of fourteen years;
> (c) the young person is charged with first or second degree murder within the meaning of section 231 of the Criminal Code; or
> (d) the person to whom section 16 (status of accused uncertain) applies is charged with having, after attaining the age of fourteen years, committed an offence for which an adult would be entitled to an election under section 536 of the Criminal Code, or over which a superior court of criminal jurisdiction would have exclusive jurisdiction under section 469 of that Act [*exclusive jurisdiction offences*].
>
> [*omitted (2), (3), (4), (5), (6), (7), (7.1), (7.2), (8) and (9)*]
> 2002, c. 1, s. 67, c. 13, s. 91; 2012, c. 1, s. 178; 2019, c. 13, s. 166.
> [*annotation(s) added*]
>
> – YCJA

If the accused elects trial by superior court judge or judge and jury, s. 13(2) and (3) deems the superior court of criminal jurisdiction to be a Youth Justice Court.

> 13
> [*omitted (1)*]
>
> **Deemed youth justice court**
>
> (2) When a young person elects to be tried by a judge without a jury, the judge shall be a judge as defined in section 552 of the Criminal Code [*definitions - judges*], or if it is an offence set out in section 469 of that Act [*exclusive jurisdiction offences*], the judge shall be a judge of the superior court of criminal jurisdiction in the province in which the election is made. In either case, the judge is deemed to be a youth justice court judge and the court is deemed to be a youth justice court for the purpose of the proceeding.
>
> **Deemed youth justice court**
>
> (3) When a young person elects or is deemed to have elected to be tried by a court composed of a judge and jury, the superior court of criminal jurisdiction in the province in which the election is made or deemed to have been made is deemed to be a youth justice court for the purpose of the proceeding, and the superior court judge is deemed to be a youth justice court judge.
>
> **Court of record**
>
> (4) A youth justice court is a court of record.
>
> – YCJA

1. see s. 67

Election Address

> 67
> [*omitted (1)*]

Wording of election

(2) The youth justice court shall put the young person to his or her election in the following words:

> You have the option to elect to be tried by a youth justice court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

[*omitted (3), (4), (5), (6), (7), (7.1), (7.2), (8) and (9)*]
2002, c. 1, s. 67, c. 13, s. 91; 2012, c. 1, s. 178; 2019, c. 13, s. 166.

– YCJA

Crown Override

For an accused under the Youth Criminal Justice Act, the Attorney General may similarly override the youth's election under s. 67(6) of the YCJA:

67
[*omitted (1), (2), (3), (4) and (5)*]

Attorney General may require trial by jury

(6) The Attorney General may, even if a young person elects under subsection (1) or (3) to be tried by a youth justice court judge without a jury or a judge without a jury, require the young person to be tried by a court composed of a judge and jury.
[*omitted (7), (7.1), (7.2), (8) and (9)*]
2002, c. 1, s. 67, c. 13, s. 91; 2012, c. 1, s. 178; 2019, c. 13, s. 166.

– YCJA

The override of the accused's election must be done by the Attorney General or Deputy Attorney General.[1]

The use of the override in a manner that is inconsistent with the purposes and objectives of the YCJA may be an abuse of process.[2]

The Crown invocation of s. 67(6) of the YCJA is not part of the core prosecutorial discretion and therefore is not subject to deference on appeal.[3]

1. *R v GC*, 2010 ONSC 115 (CanLII), 258 CCC (3d) 550, *per* Molloy J, at para 12
2. *GC*, *ibid.* - election overridden without explanation
3. *R v JSR*, 2012 ONCA 568 (CanLII), 291 CCC (3d) 394, *per* Feldman JA

Defence Re-Election

< Procedure and Practice < Election

General Principles

On indictable offences where the defence has a right to elect the mode of trial, there is a limited right to re-elect to a different mode of trial. The limitations depend on the type of offence, the desired mode of trial, and the timing of the re-election.

The relevant provisions state as follows:

Right to re-elect

561 (1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect,

> (a) if the accused is charged with an offence for which a preliminary inquiry has been requested under subsection 536(4) [*request for preliminary inquiry*],
>
> > (i) at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge,

(ii) at any time before the completion of the preliminary inquiry or before the 60th day following the completion of the preliminary inquiry, as of right, another mode of trial other than trial by a provincial court judge, and
(iii) on or after the 60th day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor; or

(b) if the accused is charged with an offence for which they are not entitled to request a preliminary inquiry or if they did not request a preliminary inquiry under subsection 536(4) [*request for preliminary inquiry*],

(i) as of right, not later than 60 days before the day first appointed for the trial, another mode of trial other than trial by a provincial court judge, or
(ii) any mode of trial with the written consent of the prosecutor.

Right to re-elect

(2) An accused who elects to be tried by a provincial court judge may, not later than 60 days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so after that time with the written consent of the prosecutor.

Notice of re-election under paragraph (1)(a)

(3) If an accused intends to re-elect under paragraph (1)(a) [*right to re-elect – superior court with preliminary inquiry*] before the completion of the preliminary inquiry, they shall give notice in writing of their intention to re-elect, together with the written consent of the prosecutor, if that consent is required, to the justice presiding at the preliminary inquiry who shall on receipt of the notice,

(a) in the case of a re-election under subparagraph (1)(a)(ii) [*re-elect from superior court to same level within 60 days of prelim*], put the accused to their re-election in the manner set out in subsection (7) [*proceedings on re-election*]; or
(b) if the accused intends to re-elect under subparagraph (1)(a)(i) [*re-elect from superior court with prelim to provincial with consent*] and the justice is not a provincial court judge, notify a provincial court judge or clerk of the court of the accused's intention to re-elect and send to the provincial court judge or clerk any information, appearance notice, undertaking or release order given by or issued to the accused and any evidence taken before a coroner that is in the possession of the justice.

Notice of re-election under paragraph (1)(b) or subsection (2)

(4) If an accused intends to re-elect under paragraph (1)(b) [*re-elect from superior where prelim not available*] or subsection (2) [*right to re-elect – from provincial court at 60 days to trial*], they shall give notice in writing that they intend to re-elect together with the written consent of the prosecutor, if that consent is required, to the provincial court judge before whom the accused appeared and pleaded or to a clerk of the court.

Notice and transmitting record

(5) If an accused intends to re-elect under paragraph (1)(a) [*right to re-elect – superior court with preliminary inquiry*] after the completion of the preliminary inquiry, they shall give notice in writing, together with the written consent of the prosecutor, if that consent is required, to a judge or clerk of the court of the accused's original election. The judge or clerk shall, on receipt of the notice,

(a) notify the judge or provincial court judge or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect; and
(b) send to that judge or provincial court judge or clerk any information, evidence, exhibits and statement of the accused taken down in writing in accordance with section 541 [*hearing witnesses and accused*], any appearance notice, undertaking or release order given by or issued to the accused and any evidence taken before a coroner that is in the possession of the first-mentioned judge or clerk.

[*omitted (6) and (7)*]
R.S., 1985, c. C-46, s. 561; R.S., 1985, c. 27 (1st Supp.), s. 110; 2002, c. 13, s. 37; 2019, c. 25, s. 254.
[*annotation(s) added*]

– CCC

After the initial election, the Defence may change the mode of trial by re-electing under s. 561. The Defence is permitted to elect from provincial court to Superior Court judge alone or judge and jury (s.561(2)). This will only be possible without consent of the Prosecution when it is within the 60 day time limit.

There may be some discretionary right to re-elect without the consent of the Crown where the accused was not properly informed of his rights and relevant issues at the time that the initial election was made.[1]

There is a discretion with the provincial court judge to allow re-election during a trial to allow the accused to re-elect without the Crown's consent.[2]

The accused has the right to re-elect only once, after which they have no further discretion of election.[3]

The procedure on re-election can be waived.[4]

Initial Election	Final Election	Timing of Notice	Enabling Sections	Crown Consent	Notice To
Provincial Court	Sup Crt Trial - Any Mode	More than 60 days before trial	561(2), 561(4)	No Consent Needed	Provincial Court Judge
Provincial Court	Sup Crt Trial - Any Mode	60 days before trial or less	561(2), 561(4), 561(6), 561(7)	Consent Needed	Provincial Court Judge
Sup Crt Trial - Any Mode (with preliminary inquiry)	Provincial Court	Anytime	561(1)(a)(i), 561(3)(b), 561(5), 561(6), 561(7)	Consent Needed	Prelim. Judge
Sup Crt Trial - Any Mode (without preliminary inquiry)	Provincial Court	Anytime	561(1)(b)(ii), 561(4), 561(7)	Consent Needed	Trial Judge
Sup Crt Trial - Mode 1[5] (with preliminary inquiry)	Sup Crt Trial - Mode 2[6]	60 days or less after prelim.	561(1)(a)(ii), 561(3)(a), 561(7)	No Consent Needed	Supreme Court Judge
Sup Crt Trial - Mode 1 (with preliminary inquiry)	Sup Crt Trial - Mode 2	greater than 60 days after prelim.	561(1)(a)(iii), 561(3), 561(5), 561(6), 561(7)	No Consent Needed	Supreme Court Judge
Sup Crt Trial - Mode 1 (without preliminary inquiry)	Sup Crt Trial - Mode 2	greater than 60 days before trial	561(1)(b)(i), 561(4), 561(6), 561(7)	No Consent Needed	Supreme Court Judge
Sup Crt Trial - Mode 1 (without preliminary inquiry)	Sup Crt Trial - Mode 2	60 days or less before trial	561(1)(b)(ii), 561(4), 561(7)	Consent Needed	Supreme Court Judge
SC Judge and Jury (direct indictment)	SC Judge-alone	After the Indictment is preferred	565(2), 565(3)[7]	No Consent Needed	Supreme Court Judge
SC Judge and Jury (s. 469)	SC Judge-alone	After the Indictment is preferred	473	Consent Needed	Supreme Court Judge

Once an election to Superior Court (either judge-alone or jury and jury) has been made, the Defence cannot re-elect to provincial court *without* the consent of the Crown.

1. *R v Edmunds*, 2013 CM 4015 (CanLII), *per* Perron J , at para 19
2. *Re Diamonti*, 1981 CanLII 372 (BC SC), 61 CCC (2d) 483 (BCSC), *per* Toy J
3. *R v Ishmail*, (1981) 6 WCB 148, BCJ No 1802 (BCSC)(*no CanLII links)
   R v Savoie, 2012 QCCQ 3864 (CanLII), *per* Chapdelaine J
4. *Korponay v Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 SCR 41, *per* Lamer J
5. * be it judge alone or judge and jury
6. the alternative to Mode 1. So Judge alone if Mode 1 is judge and jury, and vice versa.
7. see Direct Indictments#Deemed Election

Effect of Re-Election

Proceedings following re-election

562 (1) If the accused re-elects under subparagraph 561(1)(a)(i) [*re-elect from superior court with prelim to provincial with consent*] before the completion of the preliminary inquiry, under paragraph 561(1)(a) [*right to re-elect – superior court with preliminary inquiry*] after the completion of the preliminary inquiry or under paragraph 561(1)(b) [*re-elect from superior where prelim not available*], the provincial court judge or judge, as the case may be, shall proceed with the trial or appoint a time and place for the trial.

Proceedings following re-election

(2) If the accused re-elects under subparagraph 561(1)(a)(ii) [*re-elect from superior court to same level within 60 days of prelim*] before the completion of the preliminary inquiry, or under subsection 561(2) [*right to re-elect – from provincial court at 60 days to trial*], and requests a preliminary inquiry under subsection 536(4), the justice shall proceed with the preliminary inquiry.

R.S., 1985, c. C-46, s. 562; R.S., 1985, c. 27 (1st Supp.), s. 110; 2019, c. 25, s. 256.
[*annotation(s) added*]

– CCC

Proceedings on re-election to be tried by provincial court judge without jury

563 Where an accused re-elects under section 561 [*right of re-election*] to be tried by a provincial court judge,

(a) the accused shall be tried on the information that was before the justice at the preliminary inquiry, if applicable, subject to any amendments to the information that may be allowed by the provincial court judge by whom the accused is tried; and
(b) the provincial court judge before whom the re-election is made shall endorse on the information a record of the re-election.

R.S., 1985, c. C-46, s. 563; R.S., 1985, c. 27 (1st Supp.), s. 110; 2019, c. 25, s. 258.
[*annotation(s) added*]

– CCC

Timing

Right to re-elect

561
[*omitted (1), (2), (3), (4) and (5)*]

Time and place for re-election

(6) Where a provincial court judge or judge or clerk of the court is notified under paragraph (3)(b) [*right to re-elect from superior with prelim – notice*] or subsection (4) [*right to re-elect with no prelim – notice*] or (5) [*right to re-elect from superior with prelim – notice and transmitting record*] that the accused wishes to re-elect, the provincial court judge or judge shall forthwith appoint a time and place for the accused to re-elect and shall cause notice thereof to be given to the accused and the prosecutor.
[*omitted (7)*]
R.S., 1985, c. C-46, s. 561 R.S., 1985, c. 27 (1st Supp.), s. 110; 2002, c. 13, s. 37; 2019, c. 25, s. 254.
[*annotation(s) added*]

– CCC

After Beginning of Trial

It is generally understood that the Defence cannot re-elect after the trial has begun and the trier-of-fact has become seized with the matter, even if both sides consent.[1]

1. *R v MacLean*, 2002 NSSC 283 (CanLII), 210 NSR (2d) 150, *per* Hall J

Notice

Right to re-elect

561
[*omitted (1) and (2)*]

Notice of re-election under paragraph (1)(a)

(3) If an accused intends to re-elect under paragraph (1)(a) [*right to re-elect – superior court with preliminary inquiry*] before the completion of the preliminary inquiry, they shall give notice in writing of their intention to re-elect, together with the written consent of the prosecutor, if that consent is required, to the justice presiding at the preliminary inquiry who shall on receipt of the notice,

> (a) in the case of a re-election under subparagraph (1)(a)(ii) [*re-elect from superior court to same level within 60 days of prelim*], put the accused to their re-election in the manner set out in subsection (7) [*proceedings on re-election*]; or
> (b) if the accused intends to re-elect under subparagraph (1)(a)(i) [*re-elect from superior court with prelim to provincial with consent*] and the justice is not a provincial court judge, notify a provincial court judge or clerk of the court of the accused's intention to re-elect and send to the provincial court judge or clerk any information, appearance notice, undertaking or release order given by or issued to the accused and any evidence taken before a coroner that is in the possession of the justice.

Notice of re-election under paragraph (1)(b) or subsection (2)

(4) If an accused intends to re-elect under paragraph (1)(b) [*re-elect from superior where prelim not available*] or subsection (2) [*right to re-elect – from provincial court at 60 days to trial*], they shall give notice in writing that they intend to re-elect together with the written consent of the prosecutor, if that consent is required, to the provincial court judge before whom the accused appeared and pleaded or to a clerk of the court.

Notice and transmitting record

(5) If an accused intends to re-elect under paragraph (1)(a) [*right to re-elect – superior court with preliminary inquiry*] after the completion of the preliminary inquiry, they shall give notice in writing, together with the written consent of the prosecutor, if that consent is required, to a judge or clerk of the court of the accused's original election. The judge or clerk shall, on receipt of the notice,

> (a) notify the judge or provincial court judge or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect; and
> (b) send to that judge or provincial court judge or clerk any information, evidence, exhibits and statement of the accused taken down in writing in accordance with section 541 [*hearing witnesses and accused*], any appearance notice, undertaking or release order given by or issued to the accused and any evidence taken before a coroner that is in the possession of the first-mentioned judge or clerk.

[*omitted (6) and (7)*]
R.S., 1985, c. C-46, s. 561; R.S., 1985, c. 27 (1st Supp.), s. 110; 2002, c. 13, s. 37; 2019, c. 25, s. 254.
[*annotation(s) added*]

– CCC

Procedure

561
[*omitted (1), (2), (3), (4), (5) and (6)*]

Proceedings on re-election

(7) The accused shall attend or, if in custody, shall be produced at the time and place appointed under subsection (6) [*time and place for re-election*] and shall be put to a re-election after

> (a) the charge on which the accused has been ordered to stand trial or the indictment, if an indictment has been preferred under section 566 [*charges on indictment*], 574 [*authority to prefer an indictment*] or 577 [*direct indictments*] or is filed with the court before which the indictment is to be preferred under section 577 [*direct indictments*], has been read to the accused; or
> (b) the information, in the case of a re-election under paragraph (1)(a) [*right to re-elect – superior court with preliminary inquiry*], before the completion of the preliminary inquiry, or under paragraph (1)(b) [*re-elect from superior where prelim not available*] or subsection (2) [*right to re-elect – from provincial court at 60 days to trial*], has been read to the accused.

The accused shall be put to their re-election in the following words or in words to the like effect:

> You have given notice of your intention to re-elect the mode of your trial. You now have the option to do so. How do you intend to re-elect?

R.S., 1985, c. C-46, s. 561; R.S., 1985, c. 27 (1st Supp.), s. 110; 2002, c. 13, s. 37; 2019, c. 25, s. 254.
[*annotation(s) added*]

– CCC

Form of Re-Election

Elections and re-elections in writing

536.2 An election or a re-election by an accused in respect of a mode of trial may be made by submission of a document in writing without the personal appearance of the accused.
2002, c. 13, s. 27.

– CCC

Crown Consent

The Crown decision to refuse re-election cannot be challenged except as an abuse of process.[1] The decision would have to be "arbitrary, capricious, or for improper motive.[2]

The Court has no jurisdiction to override the Crown decision to refuse consent.[3]

The Crown does not need to give reasons for refusing to consent.[4]

On Direct Indictment

Where a direct indictment has been laid, the accused does not need the Crown consent to re-elect.[5]

1. *R v LE*, 1994 CanLII 1785 (ON CA), 94 CCC (3d) 228, *per* Finalyson JA
2. *R v Ng*, 2003 ABCA 1 (CanLII), 173 CCC (3d) 349, *per curiam* (2:1) See Abuse of Process by Crown Counsel
   Ng, *supra*
   LE, *supra*

3. *R v Effert*, 2011 ABCA 134 (CanLII), 502 AR 276, *per curiam* (2:1)
4. *Ng*, *supra*, at para 68
   Effert, *supra*
5. see Direct Indictments#Right to Re-Elect

Re-Election of Exclusive Jurisdiction Offences

Offences of exclusive jurisdiction are presumptively elected as trial by judge and jury.[1] Section 473 permits an exclusive jurisdiction offence to be re-elected as trial by superior court judge-alone trial.

> **Trial without jury**
>
> 473 (1) Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 [*exclusive jurisdiction offences*] may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.
>
> **Joinder of other offences**
>
> (1.1) Where the consent of the accused and the Attorney General is given in accordance with subsection (1) [*s. 469 triable without jury on consent*], the judge of the superior court of criminal jurisdiction may order that any offence be tried by that judge in conjunction with the offence listed in section 469.
>
> **Withdrawal of consent**
>
> (2) Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1) [*s. 469 triable without jury on consent*], that consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal.
> R.S., 1985, c. C-46, s. 473; R.S., 1985, c. 27 (1st Supp.), s. 63; 1994, c. 44, s. 30.
> [*annotation(s) added*]
>
> – CCC

Where an accused charged with an offence under s. 469, but is committed for trial on a non-469 offence such as manslaughter, he is not entitled to a new election. He may only re-elect under s. 561(1)(b) within 61 days of the committal order.[2]

1. see s. 471
2. *R v Wright*, 2011 ABQB 145 (CanLII), 517 AR 169, *per* Germain J

Judge-Imposed Re-Election

> **If charge should be prosecuted by indictment**
>
> 555 (1) If in any proceedings under this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] an accused is before a provincial court judge and it appears to the provincial court judge that for any reason the charge should be prosecuted in superior court, the provincial court judge may, at any time before the accused has entered a defence, decide not to adjudicate and shall then inform the accused of the decision.
>
> **Election before justice**
>
> (1.1) If the provincial court judge has decided not to adjudicate, the judge shall put the accused to an election in the following words:
>
> > You have the option to elect to be tried by a superior court judge without a jury or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you are entitled to one and you or the prosecutor requests one. How do you elect to be tried?
>
> **Continuing proceedings**
>
> (1.2) If the accused is entitled to a preliminary inquiry and they or the prosecutor requests one, the provincial court judge shall continue the proceedings as a preliminary inquiry.
>
> **If subject matter is testamentary instrument or exceeds $5,000 in value**
>
> (2) If an accused is before a provincial court judge, charged with an offence prosecuted by indictment mentioned in paragraph 553(a) [*absolute jurisdiction offences – property offences*] or subparagraph 553(b)(i) [*absolute jurisdiction offences – party to property offences*], and, at any time before the provincial court judge makes an adjudication, the evidence establishes that the subject matter of the offence is a testamentary instrument or that its value exceeds $5,000, the provincial court judge shall put the accused to their election in accordance with subsection 536(2.1) [*election before justice – other indictable offences*].
>
> **Continuing proceedings**

(3) If an accused is put to their election under subsection (1.1) [*election address*] or (2) [*election address if subject matter is testamentary instr. or exceeding $5,000*], the following provisions apply:

(a) if the accused elects to be tried by a superior court judge without a jury or a court composed of a judge and jury or does not elect when put to their election, the provincial court judge shall endorse on the information a record of the nature of the election or deemed election; and
(b) if the accused elects to be tried by a provincial court judge, the provincial court judge shall endorse on the information a record of the election and continue with the trial.

R.S., 1985, c. C-46, s. 555; R.S., 1985, c. 27 (1st Supp.), ss. 106, 203; 1994, c. 44, s. 58; 2002, c. 13, s. 32; 2019, c. 25, s. 252. [*annotation(s) added*]

– CCC

See Also

- Notice of Re-Election Template

Calculator

- **Defence Re-Election to Provincial Court** (< 61 days): Time and Date Calculator - to calculate the due date, input the date of the order for committal and add 60 days to ensure less than 61 *clear* days notice.
- **Defence Re-Election to Supreme Court** (60 days): Time and Date Calculator - to calculate the due date, input first day of trial and subtract 61 days to ensure 60 *clear* days notice.

Choice of Language

< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

Part XVII deals with powers of the court to accommodate the language of the accused.

PART XVII
Language of Accused

530 (1) On application by an accused whose language is one of the official languages of Canada, made not later than the time of the appearance of the accused at which their trial date is set, a judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

Idem

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than the time of the appearance of the accused at which their trial date is set, a judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

Accused to be advised of right

(3) The judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) [*language of accused – official languages*] or (2) [*language of accused – non-official languages*] and of the time before which such an application must be made.

Remand

(4) If an accused fails to apply for an order under subsection (1) [*language of accused – official languages*] or (2) [*language of accused – non-official languages*] and the judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace before whom the accused is to be tried, in this Part [*Pt. XVII – Language of Accused (s. 530 to 533.1)*] referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.

Variation of order

(5) An order under this section that a trial be held in one of the official languages of Canada may, if the circumstances warrant, be varied by the court to require that it be held in both official languages of Canada, and vice versa.

Circumstances warranting order directing trial in both official languages

(6) The facts that two or more accused who are to be tried together are each entitled to be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak one of the official languages of Canada and that those official languages are different may constitute circumstances that warrant that an order be granted directing that they be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages of Canada.

R.S., 1985, c. C-46, s. 530; R.S., 1985, c. 27 (1st Supp.), ss. 94, 203; 1999, c. 3, s. 34; 2008, c. 18, s. 18; 2019, c. 25, s. 237.
[*annotation(s) added*]

– CCC

Section 530 has "quasi-constitutional" status. It "reflects 'certain basic goals of our society' and must be so interpreted 'as to advance the broad policy considerations underlying it'" which requires a "broad and purposive interpretation" of the provision. [1]

A failure to provide the accused with the proper choice of language can result in a stay of proceedings.[2]

"Language of the accused" refers to one of the official languages of Canada to which the accused has a "sufficient connection".[3]

Section 16 of the Charter states, in part:

Official languages of Canada

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
[*omitted (2)*]

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

– CCRF

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1. *R v MacKenzie*, 2004 NSCA 10 (CanLII), 181 CCC (3d) 485, *per* Fichaud JA, at paras 58 to 60
   R v Schneider, 2004 NSCA 99 (CanLII), 188 CCC (3d) 137, *per curiam* - s.16(3) of Charter does not "constitutionalize" s. 530
2. *MacKenzie*, *supra* -- stay of proceedings overturned
   Latour c SMLR, 2013 CSTNO 22 (CanLII), *per* LA Charbonneau J - charges stayed
3. *R v Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 SCR 768, *per* Bastarache J

Translation of Documents

Translation of documents

530.01 (1) If an order is granted under section 530 [*language of accused*], a prosecutor — other than a private prosecutor — shall, on application by the accused,

(a) cause the portions of an information or indictment against the accused that are in an official language that is not that of the accused or that in which the accused can best give testimony to be translated into the other official language; and
(b) provide the accused with a written copy of the translated text at the earliest possible time.

Original version prevails

(2) In the case of a discrepancy between the original version of a document and the translated text, the original version shall prevail.
2008, c. 18, s. 19.
[*annotation(s) added*]

– CCC

If order granted

530.1 If an order is granted under section 530 [*language of accused*],

(a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;
(b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;
(c) any witness may give evidence in either official language during the preliminary inquiry or trial;
(c.1) the presiding justice or judge may, if the circumstances warrant, authorize the prosecutor to examine or cross-examine a witness in the official language of the witness even though it is not that of the accused or that in which the accused can best give testimony;
(d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language of the accused or both official languages, as the case may be;
(e) the accused has a right to have a prosecutor — other than a private prosecutor — who speaks the official language of the accused or both official languages, as the case may be;
(f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;
(g) the record of proceedings during the preliminary inquiry or trial shall include

(i) a transcript of everything that was said during those proceedings in the official language in which it was said,
(ii) a transcript of any interpretation into the other official language of what was said, and
(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and

(h) any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused.

R.S., 1985, c. 31 (4th Supp.), s. 94; 2008, c. 18, s. 20.

– CCC

Language used in proceeding

530.2 (1) If an order is granted directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages, the justice or judge presiding over a preliminary inquiry or trial may, at the start of the proceeding, make an order setting out the circumstances in which, and the extent to which, the prosecutor and the justice or judge may use each official language.

Right of the accused

(2) Any order granted under this section shall, to the extent possible, respect the right of the accused to be tried in his or her official language.
2008, c. 18, s. 21.

– CCC

Change of venue

531. Despite any other provision of this Act but subject to any regulations made under section 533 [*power of province to make regulations re language rights*], if an order made under section 530 [*language of accused*] cannot be conveniently complied with in the territorial division in which the offence would otherwise be tried, the court shall, except if that territorial division is in the Province of New Brunswick, order that the trial of the accused be held in another territorial division in the same province.
R.S., 1985, c. C-46, s. 531; R.S., 1985, c. 27 (1st Supp.), s. 203; 2008, c. 18, s. 21.
[*annotation(s) added*]

– CCC

Regulations

533. The Lieutenant Governor in Council of a province may make regulations generally for carrying into effect the purposes and provisions of this Part [*Pt. XVII – Language of Accused (s. 530 to 533.1)*] in the province and the Commissioner of Yukon, the Commissioner of the Northwest Territories and the Commissioner of Nunavut may make regulations generally for carrying into effect the purposes and provisions of this Part [*Pt. XVII – Language of Accused (s. 530 to 533.1)*] in Yukon, the Northwest Territories and Nunavut, respectively.
R.S., 1985, c. C-46, s. 533; 1993, c. 28, s. 78; 2002, c. 7, s. 144.
[*annotation(s) added*]

– CCC

Part XVII - Language of Accused

PART XVII Language of Accused
Saving

532 Nothing in this Part [*Pt. XVII – Language of Accused (s. 530 to 533.1)*] or the Official Languages Act derogates from or otherwise adversely affects any right afforded by a law of a province in force on the coming into force of this Part [*Pt. XVII – Language of Accused (s. 530 to 533.1)*] in that province or thereafter coming into force relating to the language of proceedings or testimony in criminal matters that is not inconsistent with this Part [*Pt. XVII – Language of Accused (s. 530 to 533.1)*] or that Act.
1977-78, c. 36, s. 1.
[*annotation(s) added*]

– CCC

Review

533.1 (1) Within three years after this section comes into force, a comprehensive review of the provisions and operation of this Part [*Pt. XVII – Language of Accused (s. 530 to 533.1)*] shall be undertaken by any committee of the Senate, of the House of Commons or of both Houses of Parliament that may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

Report

(2) The committee referred to in subsection (1) [*parl. to review of language amendments after 3 years*] shall, within a year after a review is undertaken under that subsection or within any further time that may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends.
2008, c. 18, s. 21.1.
[*annotation(s) added*]

– CCC

Case Management

< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

Trial judges have an obligation to "make reasonable efforts to control and manage the conduct of trials".[1]

Appellate courts must defer to the case management choices of the trial judge in order to ensure that the trial proceeds efficiently.[2]

Duties to Streamline Cases

Both Crown and defence are "under an ethical duty to make reasonable admissions of facts that are not legitimately in dispute".[3]

A Court should encourage "efforts to frame reasonable admissions".[4]

Where a reasonable admission has been made by defence, the judge has the authority to "require the Crown to accept a properly framed admission and to exclude evidence on that issue".[5]

Where the accused is self-represented and the case is considered complex, the judge has the common law power to appoint an *amicus curae*.[6]

Rendering decisions

"It is often necessary, in order to ensure the efficiency of the trial, for the presiding judge to render his decision promptly on a question of evidence or a Charter application and not give reasons for these decisions until a date. later ": R v Tesky

Standard of Review

a reviewing court must give deference to a judges case management decisions unless there is a "extricable legal error" or the decision is manifestly unjust.[7]

1. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJA, at para 139
   R v Polanco, 2018 ONCA 444 (CanLII), *per* Nordheimer JA
2. *Jordan*, *ibid.*, at para 139
3. LeSage, Patrick J., and Michael Code. Report of the Review of Large and Complex Criminal Case Procedures. Toronto: Ontario Ministry of the Attorney General, 2008.
4. *LeSage and Code*, *ibid.*
5. *LeSage and Code*, *ibid.*
6. *LeSage and Code*, *ibid.* ("Trial Judges should exercise their common law power to appoint amicus curiae in any long complex trial where the accused in unrepresented or chooses to be self-represented and where such appointment is likely to assist in ensuring the fairness of the trial.")
7. *R v Herritt*, 2019 NSCA 92 (CanLII), 384 CCC (3d) 25, *per* Beveridge JA, at para 91 ("Absent an extricable legal error or manifest injustice, we afford deference to trial judges' case management decisions")

Organizational Pre-Trials

Under s. 625.1(1) the Court has the power to order that a conference be held between the parties to speed up the trial processs. The section states that:

> **Pre-hearing conference**
>
> 625.1 Subject to subsection (2) [*mandatory pre-trial hearing for jury trials*], on application by the prosecutor or the accused or on its own motion, the court, or a judge of the court, before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters.
>
> **Mandatory pre-trial hearing for jury trials**
>
> (2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, before the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under sections 482 [*powers of the superior and appellate court to make rules*] and 482.1 [*powers of the superior and appellate court to make case management rules*] to consider any matters that would promote a fair and expeditious trial.
> R.S., 1985, c. 27 (1st Supp.), s. 127, c. 1 (4th Supp.), s. 45(F); 1997, c. 18, s. 73; 2002, c. 13, s. 50.
> [*annotation(s) added*]
>
> – CCC

This is also addressed through section 482.1:

> (1) A court referred to in subsection 482(1) or (2) may make rules for case management, including rules
>
> (a) for the determination of any matter that would assist the court in effective and efficient case management;

Pre-Trial conferences can be helpful for a number of reasons:

1. Narrow issues for trial -- parties may be able to agree on certain facts not in dispute at trial
2. Learn the opponent's theory and strategy
3. Gauge potential sentences -- in certain circumstances possible sentencing proposals can be bounced off the judge to get a sense of the likely outcome in a disputed sentencing hearing.
4. Settle the case

The purpose of enacting these sections "is to promote a fair and expeditious hearing or trial of the merits of a case".[1]

1. *R v SSS*, 1999 CanLII 15049 (ON SC), 136 CCC (3d) 477, *per* Watt J, at para 44

Case Management Judge

PART XVIII.1
Case Management Judge
Appointment

551.1 (1) On application by the prosecutor or the accused or on his or her own motion, the Chief Justice or the Chief Judge of the court before which a trial is to be or is being held or the judge that the Chief Justice or the Chief Judge designates may, if he or she is of the opinion that it is necessary for the proper administration of justice, appoint a judge as the case management judge for that trial at any time before the jury selection, if the trial is before a judge and jury, or before the stage at which the evidence on the merits is presented, if the trial is being heard by a judge without a jury or a provincial court judge.

Conference or hearing

(2) The Chief Justice or the Chief Judge or his or her designate may order that a conference between the prosecutor and the accused or counsel for the accused or a hearing be held for the purpose of deciding if it is necessary for the proper administration of justice to proceed with the appointment.

(3) [Repealed, 2019, c. 25, s. 250]

Same judge

(4) The appointment of a judge as the case management judge does not prevent him or her from becoming the judge who hears the evidence on the merits.

2011, c. 16, s. 4; 2019, c. 25, s. 250.

– CCC

Role

551.2 The case management judge shall assist in promoting a fair and efficient trial, including by ensuring that the evidence on the merits is presented, to the extent possible, without interruption.
2011, c. 16, s. 4.

– CCC

Trial continuous

551.5 Even if the judge who hears the evidence on the merits is not the same as the case management judge, the trial of an accused shall proceed continuously, subject to adjournment by the court.
2011, c. 16, s. 4.

– CCC

Case Management Powers

Part XVIII.1 was added in 2011 to provide courts with powers over case management.

Powers before evidence on merits presented

551.3 (1) In performing their duties before the stage of the presentation of the evidence on the merits, the case management judge, as a trial judge, exercises the powers that a trial judge has before that stage in order to assist in promoting a fair and efficient trial, including by

(a) assisting the parties to identify the witnesses to be heard, taking into account the witnesses' needs and circumstances;
(b) encouraging the parties to make admissions and reach agreements;
(c) encouraging the parties to consider any other matters that would promote a fair and efficient trial;
(d) establishing schedules and imposing deadlines on the parties;
(e) hearing guilty pleas and imposing sentences;
(f) assisting the parties to identify the issues that are to be dealt with at the stage at which the evidence on the merits is presented;
(g) subject to section 551.7 [*decision whether to hold joint hearing*], adjudicating any issues that can be decided before that stage, including those related to

(i) the disclosure of evidence,
(ii) the admissibility of evidence,
(iii) the Canadian Charter of Rights and Freedoms,
(iv) expert witnesses,
(v) the severance of counts, and
(vi) the separation of trials on one or more counts when there is more than one accused; and

(h) ordering, in each case set out in subsection 599(1) [*reasons for change of venue*], that the trial be held in a territorial division in the same province other than that in which the offence would otherwise be tried.

Hearing

(2) The case management judge shall order that a hearing be held for the purpose of exercising the power referred to in paragraph (1)(g) [*power of case management judge to adjudicate issues*].

Power exercised at trial

(3) When the case management judge exercises the power referred to in paragraph (1)(g) [*power of case management judge to adjudicate issues*], he or she is doing so at trial.

Decision binding

(4) A decision that results from the exercise of the power referred to in paragraph (1)(g) [*power of case management judge to adjudicate issues*] is binding on the parties for the remainder of the trial — even if the judge who hears the evidence on the merits is not the same as the case management judge — unless the court is satisfied that it would not be in the interests of justice because, among other considerations, fresh evidence has been adduced.

2011, c. 16, s. 4; 2019, c. 25, s. 251.
[*annotation(s) added*]

– CCC

Requiring Issues Be Placed on Record

Information relevant to presentation of evidence on merits to be part of court record

551.4 (1) When the case management judge is of the opinion that the measures to promote a fair and efficient trial that can be taken before the stage of the presentation of the evidence on the merits have been taken — including adjudicating the issues that can be decided — he or she shall ensure that the court record includes information that, in his or her opinion, may be relevant at the stage of the presentation of the evidence on the merits, including

(a) the names of the witnesses to be heard that have been identified by the parties;
(b) any admissions made and agreements reached by the parties;
(c) the estimated time required to conclude the trial;
(d) any orders and decisions; and
(e) any issues identified by the parties that are to be dealt with at the stage of the presentation of the evidence on the merits.

Exception

(2) This section does not apply to a case management judge who also hears the evidence on the merits.
2011, c. 16, s. 4.

– CCC

The case management powers include the power to determine the nature of the evidence that will be considered on a constitutional voir dire.[1]

Adjudicating Issues

Issues referred to case management judge

551.6 (1) During the presentation of the evidence on the merits, the case management judge shall adjudicate any issue referred to him or her by the judge hearing the evidence on the merits.

Powers at stage of presentation of evidence on merits

(2) For the purposes of adjudicating an issue, the case management judge may exercise the powers of a trial judge.
2011, c. 16, s. 4.

– CCC

Joint Hearing

Decision whether to hold joint hearing

551.7 (1) If an issue referred to in any of subparagraphs 551.3(1)(g)(i) to (iii) [*power of case management judge to adjudicate issues – partial list*] is to be adjudicated in related trials that are to be or are being held in the same province before a court of the same jurisdiction, the Chief Justice or the Chief Judge of that court or his or her designate may, on application by the prosecutor or the accused or on his or her own motion, determine if it is in the interests of justice, including ensuring consistent decisions, to adjudicate that issue at a joint hearing for some or all of those trials.

Considerations

(2) To make the determination, the Chief Justice or the Chief Judge or his or her designate

(a) shall take into account, among other considerations, the degree to which the evidence relating to the issue is similar in the related trials; and
(b) may order that a conference between the prosecutor and the accused or counsel for the accused or a hearing be held.

Order for joint hearing

(3) If the Chief Justice or the Chief Judge or his or her designate determines that it is in the interests of justice to adjudicate the issue at a joint hearing for some or all of the related trials, he or she shall issue an order

(a) declaring that a joint hearing be held to adjudicate the issue in the related trials that he or she specifies;
(b) naming the parties who are to appear at the hearing;
(c) appointing a judge to adjudicate the issue; and
(d) designating the territorial division in which the hearing is to be held, if the trials are being held in different territorial divisions.

Limitation — indictable offence

(4) However, the order may only be made in respect of a trial for an indictable offence, other than a trial before a provincial court judge, if the indictment has been preferred.

Order in court record and transmission to parties

(5) The Chief Justice or the Chief Judge or his or her designate shall cause a copy of the order to be included in the court record of each of the trials specified in the order and to be provided to each of the parties named in it.

Transmission of court record

(6) If one of the specified trials is being held in a territorial division other than the one in which the joint hearing will be held, the officer in that territorial division who has custody of the indictment or information and the writings relating to the trial shall, when he or she receives the order, transmit the indictment or information and the writings without delay to the clerk of the court before which the joint hearing is to be held.

Order to appear at joint hearing

(7) The judge appointed under the order shall require the parties who are named in it to appear at the joint hearing.

Removal of prisoner

(8) The order made under subsection (2) [*decision whether to hold joint hearing – considerations*] or (3) [*decision whether to hold joint hearing – order for joint hearing*] is sufficient warrant, justification and authority to all sheriffs, keepers of prisons and peace officers for an accused's removal, disposal and reception in accordance with the terms of the order, and the sheriff may appoint and

authorize any peace officer to convey the accused to a prison for the territorial division in which the hearing, as the case may be, is to be held.

Powers of judge

(9) The judge appointed under the order may, as a trial judge and for the purpose of adjudicating the issue at the joint hearing, exercise the powers of a trial judge.

Adjudication at trial

(10) When the judge adjudicates the issue, he or she is doing so at trial.

Decision in court records and return of documents

(11) Once the judge has adjudicated the issue, he or she shall cause his or her decision, with reasons, to be included in the court record of each of the related trials in respect of which the joint hearing was held and, in the case of a trial for which an indictment, information or writings were transmitted by an officer under subsection (6), the judge shall have the documents returned to the officer.
2011, c. 16, s. 4.
[*annotation(s) added*]

– CCC

Making Case Management Rules

Power to make rules respecting case management

482.1 (1) A court referred to in subsection 482(1) [*powers of the superior and appellate court to make rules*] or (2) [*powers of provincial and territorial coruts to make rules*] may make rules for case management, including rules

(a) for the determination of any matter that would assist the court in effective and efficient case management;
(b) permitting personnel of the court to deal with administrative matters relating to proceedings out of court if the accused is represented by counsel; and
(c) establishing case management schedules.

Compliance with directions

(2) The parties to a case shall comply with any direction made in accordance with a rule made under subsection (1) [*powers of the superior and appellate court to make case management rules – types of rules*].

Summons or warrant

(3) If rules are made under subsection (1) [*powers of the superior and appellate court to make case management rules – types of rules*], a court, justice or judge may issue a summons or warrant to compel the presence of the accused at case management proceedings.

Provisions to apply

(4) Sections 512 [*certain actions not to preclude issue of warrant*] and 512.3 [*warrant to appear under section 524*] apply, with any modifications that the circumstances require, to the issuance of a summons or a warrant under subsection (3) [*power to issue summons or warrant to atnted case management proceedings*].

Subsections 482(4) and (5) to apply

(5) Subsections 482(4) [*rules must be published*] and (5) [*governor-in-council regulations to secure uniformity*] apply, with any modifications that the circumstances require, to rules made under subsection (1) [*powers of the superior and appellate court to make rules*].

[(6) repealed, 2019, c. 25, s. 188] c
2002, c. 13, s. 18; 2019, c. 25, s. 187.
[*annotation(s) added*]

– CCC

Youth Justice

Conferences may be convened

19 (1) A youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act.

Mandate of a conference

(2) The mandate of a conference may be, among other things, to give advice on appropriate extrajudicial measures, conditions for judicial interim release, sentences, including the review of sentences, and reintegration plans.

Rules for conferences

(3) The Attorney General or any other minister designated by the lieutenant governor in council of a province may establish rules for the convening and conducting of conferences other than conferences convened or caused to be convened by a youth justice court judge or a justice of the peace.

Rules to apply

(4) In provinces where rules are established under subsection (3), the conferences to which those rules apply must be convened and conducted in accordance with those rules.

– YCJA

Applications and Motions Procedure

This page was last substantively updated or reviewed *July 2021*. (Rev. # 79564)

< Procedure and Practice < Pre-Trial and Trial Matters

Motions and Applications Generally

All motions are to be made inter partes, with notice to all the interested parties rather than ex parte, without notice to the other parties, "unless there is a compelling need, established by evidence, for an ex parte order."[2]

Applications made by persons against the Federal Crown outside of criminal proceedings will generally be governed by the *Crown Liability and Proceedings Act*.[3]

1. R v 2019 QCCS 5099 (CanLII)(*complete citation pending*) at para 361 fn R v Felderhof (2003), 2003 CanLII 37346 (ON CA) , 180 CCC (3d) 498 , at para. 57 R v Snow (2004), 2004 CanLII 34547 (ON CA) , 190 CCC (3d) 317 , at para. 24 ; R. c. Zalat , 2019 QCCA 1829 , par. 27 R. c. Auclair, 2013 QCCA 671 , para. 173-174 , appeal dismissed 2014 SCC 6, [2014] 1 SCR 83 ; R. c. Rice , 2018 QCCA 198 , para. 62 ; R. c. Leventis , 2018 QCCS 1283 ; R. c. Dancause , 2018 QCCS 1565 , par. 34
2. *Mercier v Nova Scotia (Attorney General)*, 2012 NSCA 25 (CanLII), *per* Fichaud JA
3. See Crown Liability and Proceedings Act, RSC 1985, c C-50

Notice

Notice of Application must set out sufficient particulars to be meaningful. A notice without particulars will not constitute notice at all.[1]

Objections to the admissibility of evidence must be made at or before the evidence is tendered.[2]

Sufficiency of Proof

The sufficiency of proof of notice for any application under the Code is governed by s. 4(6).[3]

1. *R v Kutynec*, 1992 CanLII 7751 (ON CA), 70 CCC (3d) 289, *per* Finlayson JA ("if the facts as alleged by the defence in its summary provide no basis for a finding of a Charter infringement... then the trial judge should dismiss the motion without hearing evidence.") *R v Kovac*, 1998 CanLII 14961 (ON SC), [1998] OJ No 2347 (Gen. Div.), *per* Hill J ("In the adversarial trial system, the court, the accused, and the community are entitled to have two informed and prepared litigants conducting the case…The Crown is entitled to be represented in name and substance")
2. *R v Phillips*, 2003 SKQB 330 (CanLII), 239 Sask R 161, *per* Wilson J, at para 9
3. see Miscellaneous Document Issues#Notice and Service of Documents

Standing

Any application or motion, be it procedural or substantive, must be made by someone with standing (*locus standi*).[1]

Standing concerns "the appropriateness of the court's dealing with the particular issue presented" by the applicant.[2] It includes "the legal entitlement of [the applicant] to invoke the jurisdiction of the Court."[3]

This right of standing can be obtained in one of two ways. The claimant can invoke private interest standing, also known as standing as of right, or claim public interest standing with leave of the court. [4]

Courts have generally given private interest standing to any person who can show that "he has a particular interest or will suffer an injury peculiar to himself if he would sue to enjoin it."[5]

In order to get a prerogative remedy, the applicant has been described as needing to be "aggrieved", "affected" or have "sufficient interest". [6]

An aggrieved person is one who "has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something" and does not include a "mere busybody".[7]

Whether standing is granted is in the discretion of the court.[8] This discretion is "liberal and generous".[9] In considering the exercise of discretion, the courts weigh three factors:[10]

- whether the case raises a serious justiciable issue,
- whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court

An accused person will generally have standing in relation to applications directly concerning the criminal proceedings.

The principle of natural justice may provide standing. They are engaged "when a party with a discernible interest in the outcome seeks an opportunity to be heard."[11]

1. E.g. see *Canadians for the Abolition of the Seal Hunt et al. v Minister of Fisheries and the Environment*, 1980 CanLII 2501 (FC), [1981] 1 F.C. 733 *per* Walsh J, at para 7 which includes prerogative writs as well as constitutional challenges
2. Thomas Crowell, Locus Standi: A Commentary on the Law of Standing in Canada (Toronto: Carswell, 1986), at p. 3
3. *Saanich Inlet Preservation Society v Cowichan Valley (Regional District)*, 1983 CanLII 382 (BC CA), [1983] 4 WWR 673 (BCCA), *per* Hutcheon JA, at p. 674
4. *604598 Saskatchewan Ltd. (c.o.b. Great Canadian Superbar) v Saskatchewan (Liquor and Gaming Authority)*, 1998 CanLII 12308 (SK CA), 157 DLR (4th) 82, *per* Jackson JA, at paras 16, 109
5. *Thorson v A.G. Can. (No. 2)*, 1975 CanLII 38 (SCC), [1977] 1 SCR 827, *per curiam*, at p. 150
6. *Antigonish/Guysborough Federation of Agriculture v Antigonish County (Municipality)*, 2012 NSSC 352 (CanLII), {{{4}}}, *per* Rosinski J, at para 107
7. *R v Comte*, 1990 CanLII 2064 (BC SC), *per* Cashman J citing Lord Denning
8. *Attorney General of Canada v Downtown Eastside Sex Workers United Against Violent Society and Sheryl Kiselbach*, 2012 SCC 45 (CanLII), 10 WWR 423, *per* Cromwell J, at para 2
   Antigonish/Guysborough Federation of Agriculture, *supra*, at para 107
9. *Downtown Eastside*, *supra*, at para 2
10. *Downtown Eastside*, *supra*, at para 2
11. See *LLA v AB*, 1995 CanLII 52 (SCC), [1995] 4 SCR 536, *per* Lamer CJ and Sopinka J, at paras 27, 28
    applied in *R v Oleksiuk*, 2013 ONSC 5258 (CanLII), 55 MVR (6th) 107, *per* James J, at para 32

Filings of Written Argument

A judge or justice may refuse to accept written arguments from a party where a due date has been ordered by the court and counsel do not comply with the due date.[1] The right to be fully heard exists as a right for an "opportunity" to be heard, which does not include a right to extensions of time to submit argument.[2]

The proper procedure where a deadline has been passed or will not be met would be to file a request for an extension of time and should include reasons for failing to meet the scheduled deadline.[3]

1. *R v Jeffrey*, 2012 SKPC 12 (CanLII), 383 Sask R 287, *per* Agnew J, at paras 6 to 11
2. *Jeffrey*, *ibid.*
3. *Jeffrey*, *ibid.*

Summary Dismissal

There are certain provinces that have superior court civil procedure rules (CPR) that govern applications including for criminal matters.

Ontario CPR Rule 34.02 permits dismissal of an application, based on materials filed, to be dismissed where there is "no reasonable prospect" of success. This rule promotes efficiency and the correct results.[1] The procedure must be informal or else will defeat the purpose of the power.[2]

It is important for judges to dismiss applications that have no reasonable prospects of success as it "unclutters the proceedings", "weeds out the hopeless", and puts the judge's attention to the matters that have reasonable prospects of success.[3]

1. *R v Glegg*, 2021 ONCA 100 (CanLII), *per* Watt JA, at para 36
2. *Glegg*, *ibid.* at para 37
3. *Glegg*, *ibid.* at para 36
   R v Imperial Tobacco Canada Ltd, 2011 SCC 42 (CanLII), [2011] 3 S.C.R. 45, *per* J, at para 19

Voir Dire

- Voir Dire

Charter Motions

- Charter Applications

Prerogative Writs

An application of certiorari challenging a judicial authorization such as a search warrant is a criminal and not civil proceeding.[1]

1. *R v Canadian Broadcasting Corporation*, 2006 NLCA 21 (CanLII), 207 CCC (3d) 309, *per* Wells CJ

Declaratory Judgments

A declaratory judgement is an order "confirming or denying a legal right of the applicant".[1]

Declaratory judgements are not available where "controversy is not presently existing but merely possible or remote". The dispute should not be "contingent upon the happening of some future event which may never take place". It should not be "academic" or "speculative".[2]

A declaratory order has only the ability to "confirm or deny a legal right" but has no ability to grant consequential relief.[3]

1. *R v Armstrong*, 2012 BCCA 242 (CanLII), 350 DLR (4th) 457, *per* Newbury JA, at para 38 citing Lazar Sarna, The Law of Declaratory Judgments (3rd ed., 2007) at 1
2. *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441, *per* Dickson J citing Fager, The Declaratory Judgment Action (1971), at p. 5
   Whynot v Nova Scotia, (1988), 86 NSR (2d) 50(*no CanLII links)
3. *Wood v Canada (Atlantic Institution)*, 2014 NBQB 135 (CanLII), 1114 APR 205, *per* Walsh J, at para 33

Re-opening Motions or Applications

A motion, application or appeal that has not been decided on its merits can be re-opened at the discretion of the court. The applicant has a "heavy onus" to show that it is in the "interests of justice" to reopen the matter.[1]

Factors to consider include:[2]

1. the length of delay between the dismissal and the application for reinstatement, and the adequacy of the explanation offered for that delay;[3]
2. whether the Appellant contributed to the delay;[4]
3. whether the Appellant had a bona fide intention to pursue the appeal throughout the proceedings;[5]
4. whether the initial Order was made in error, or the Court was operating under some misunderstanding of the material facts;[6]
5. the effect reinstatement would have on public confidence in the administration of justice;[7]
6. the seriousness of the charges[8]
7. the merit of the appeal[9]

1. *R v Blaker*, 1983 CanLII 308 (BC CA), 6 CCC (3d) 385, *per* Craig JA, at pp. 392, 393 (CCC)
2. *R v TLC*, 2012 BCCA 131 (CanLII), 285 CCC (3d) 486, *per* Frankel JA, at para 26
3. *R v Findlay*, 1996 CanLII 2691 (BC CA), (1996), 79 BCAC 106, *per curiam*, at para 13
4. *Blaker*, *supra*, at p. 393
5. *R v Clymore*, 1999 BCCA 225 (CanLII), 134 CCC (3d) 476, *per* Finch JA, at para 14
6. *R v Henry*, 1997 CanLII 3139 (BC CA), BCAC 183, *per curiam*, at para 18
7. *Clymore*, *supra*, at para 16
8. *Blaker*, *supra*, at p. 392
9. *Blaker*, *supra*, at p. 392
   Clymore, *supra*, at para 14

Vexatious Litigants

Under the doctrine of abuse of process a judge may declare a party to be a "vexatious litigant".[1] An order against a vexatious litigant can include an order that prohibits the party from making further applications without further leave of the Court.[2]

A judge has inherent jurisdiction to address "vexatious litigants".[3]

1. *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 237 (CanLII), 54 Alta LR (6th) 135, *per* Thomas J, at paras 79 to 88
2. *Ewanchuk*, *ibid.*
3. *R v Grabowski*, 2015 ABCA 391 (CanLII), 609 AR 217, *per curiam*

See Also

- Precedents

Voir Dire

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General Principles

A *Voir Dire* is a hearing to determine a question of law, including the admissibility of evidence.[1] It is typically held during a trial but is considered a separate hearing from the trial itself. It is known as a "trial within a trial" and designed to determine an issue separate from the trial on matters of procedure or admissibility of evidence.

Purpose

The fundamental purpose of a voir dire is to determine the admissibility of disputed evidence separate from the merits of the trial.[2] The separation from the trial permits and exploration and testing of the evidence without affecting the integrity of the trial process.[3]

1. *R v Sadikov*, 2014 ONCA 72 (CanLII), 305 CCC (3d) 421, *per* Watt JA, at para 30 (A voir dire is to "determine the admissibility of evidence proposed for admission by a party to a criminal proceeding")
2. *R v Wanihadie*, 2021 ABCA 173 (CanLII), at para 11 ("The fundamental purpose of a voir dire is to determine the admissibility of disputed evidence. This is distinct from assessing the merits of the case on consideration of all of the admissible evidence...")

Erven v The Queen, 1978 CanLII 19 (SCC), [1979] 1 SCR 926, *per* Dickson J at p 931

3. *Wanihadie*, *supra*, at para 11

Procedure

The procedure in holding a voir dire is at the discretion of the judge based on the issue and nature of the "means of proof available".[1]

Establishing Basis for Voir Dire

A party seeking a voir dire has an obligation to "demonstrate a reasonable basis for holding a voir dire". The trial judge is permitted to screen out application where "remedy cannot reasonably be granted".[2]

Failure to Follow Procedure

The failure of holding a voir dire to determine if potentially inadmissible evidence should be heard will not not always be fatal to the trial. Where the evidence is still tested and there is no prejudice to the accused to may still be valid. The court must consider whether the process was followed that served the same purpose as the voir dire.[3]

Directed Verdict

There seems to be some ability to make a motion for "non-suit or directed verdict" motion by the responding party to a voir dire application.[4]

Jury Trials

A voir dire should always be held in absence of the jury.[5] It is important that the jury not be told anything about the purpose of the voir dire or the result of the hearing.[6]

Timing of *voir dire*

It has been recommended that judges ruling on voir dires "should resist making final rulings until such time as they required to do so". As the trial progresses many issues may resolve themselves. However, where the "proposed evidence is likely to have a significant impact on the outcome of the trial" then it should be dealt with early. [7]

Multiple Void Dies

Each evidentiary issue should be treated as a separate voir dire and their evidence cannot be joined without consent.[8] That being said, particular pieces of evidence may raise multiple issues of admissibility and are usually treated together. Caution must be taken by the judge to ensure their ruling reflect "an informed understanding" of the governing law.[9]

1. *R v Sadikov*, 2014 ONCA 72 (CanLII), 305 CCC (3d) 421, *per* Watt J, at para 32
2. *R v Edwardsen*, 2019 BCCA 259 (CanLII), *per* Harris JA, at para 62 ("the issue of whether a voir dire should be held is not simply a question of standing. In these circumstances, Mr. Edwardsen was required to demonstrate a reasonable basis for holding a voir dire. The purpose of a Vukelich hearing is to screen out proposed pre-trial applications where a remedy cannot reasonably be granted. Accordingly, the judge was entitled to take into account the likelihood of a remedy being granted on the substance of the application regardless of standing.")
3. *R v DAR*, 2012 NSCA 31 (CanLII), 994 APR 331, *per* Bryson J
4. *R v Gartland*, 1981 CarswellOnt 1845, 7 WCB 110 (*no CanLII links) , at para 26 (the accused person must be afforded "every essential procedural step and safeguard available to him on his trial on the merits of the substantive offence, in so far as it can be applicable...") cited also in *R v BT*, 2012 NSPC 59 (CanLII), 1010 APR 39, *per* Derrick J
5. *R v Viszlai*, 2012 BCCA 442 (CanLII), 293 CCC (3d) 127, *per* Frankel J, at paras 69 to 72
6. *Viszlai*, *ibid.*
7. *R v Harris*, 1997 CanLII 6317 (ON CA), 118 CCC (3d) 498, *per* Moldaver JA, at para 38
8. *Sadikov*, *supra*, at para 31
9. *Sadikov*, *supra*, at para 33

Types of Voir Dires

Applying Rules Evidence

The judge must determine whether the "conditions precedent" to the admission of evidence have been met.[1]

1. *R v Sadikov*, 2014 ONCA 72 (CanLII), 305 CCC (3d) 421, *per* Watt JA, at para 30

Constitutional Challenges to the Admissibility of Evidence

The process of challenging the constitutionality of the admissibility of evidence requires first an inquiry into the constitutionality of the state's conduct and then second, should a finding of unconstitutionality is found, an inquiry into the "admissibility of the evidence obtained by the infringement".[1]

Provincial Rules of Court may also provide guidance on procedure.[2]

1. *R v Sadikov*, 2014 ONCA 72 (CanLII), 305 CCC (3d) 421, *per* Watt JA, at para 35
2. e.g. Ontario: Rule 31 of the Criminal Proceedings Rules

Challenging Warrant Validity

Procedurally, a voir dire on the for the validity of a warrant should proceed as follows:[1]

> (a) The trial judge should determine whether a voir dire is necessary and, if so, whether the calling of evidence should be permitted;
> (b) If the judge accedes to the request to hold a voir dire and the accused wishes to cross-examine the informant, then the accused must obtain leave of the judge to do so. If the judge grants leave, then he or she can limit the scope of the cross-examination;
> (c) Cross-examination should proceed to the extent permitted by the order granting leave;
> (d) Re-examination, if any, should follow the cross-examination; and
> (e) The trial judge should determine whether the record as amplified on the review could support the issuance of the warrant.

1. *R v Wilson*, 2011 BCCA 252 (CanLII), 272 CCC (3d) 269, *per* Frankel JA, at para 69

Waiver

A voir dire cannot be waived by mere silence of counsel.[1]

Unequivocal admission of the issue by an opposing party should generally be sufficient to forgo a voir dire.[2] The judge should be be satisfied that counsel understood the matter and has made an informed decision.[3]

1. *Powell v R*, 1976 CanLII 155 (SCC), [1977] 1 SCR 362, *per* De Grandpre J
   Park v R, 1981 CanLII 56 (SCC), [1981] 2 SCR 64, *per* Dickson J
2. e.g. *R v Dietrich*, 1970 CanLII 377 (ON CA), 1 CCC (2d) 49, *per* Gale CJ
3. *Park*, *supra*, at p. 73 (SCR)

Voir Dire Evidence

Charter applications require a factual record. They cannot be argued in a vacuum.[1]

There is no strict requirement in law that voir dires must be conducted on viva voce evidence.[2] The court may, as a matter of efficiency and judicial economy, decide the issues on the basis of counsel summation of evidence.[3]

Affidavits that are based on hearsay should be given little weight and generally should not be considered admissible as evidence on a Charter application.[4]

Since evidence in a voir dire is separate and apart from evidence in the trial proper, each exhibit should be marked to be distinguished from the trial such as "V.D. Exhibit 1, etc".[5]

The accused can be cross-examined at trial on evidence that they gave during a voir dire.[6] During the voir dire, he may be questioned on the truthfulness of a previous statement.[7]

1. See *MacKay v Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 SCR 357, *per* Cory J
   Danson v Ontario, 1990 CanLII 93 (SCC), [1990] 2 SCR 1086, *per* Sopinka J
2. *R v Kematch*, 2010 MBCA 18 (CanLII), 252 CCC (3d) 349, *per* Monnin JA
   R v Garnier, 2017 NSSC 239 (CanLII), *per* Arnold J, at para 12
3. *Garnier*, *ibid.*, at para 13
   United States of America v Anderson, 2007 ONCA 84 (CanLII), 218 CCC (3d) 225, *per* Doherty JA, at para 37
   R v S(DG), 2012 MBQB 19 (CanLII), 274 Man R (2d) 313, *per* Spivak J, at paras 6 to 7, aff'd 2013 MBCA 69 (CanLII), *per* Chartier JA
4. *R v Darrach*, 2000 SCC 46 (CanLII), [2000] 2 SCR 443, *per* Gonthier J
   R v Harris, 1994 CanLII 2986 (ON CA), 93 CCC (3d) 478, *per curiam*
   R v Herter, 2009 ONCJ 378 (CanLII), *per* Nicholas J, at para 1
5. *R v Grey*, 2013 BCCA 232 (CanLII), 338 BCAC 121, *per* Frankel JA, at para 42
6. *Darrach*, *supra*
7. *R v DeClercq*, 1968 CanLII 24 (SCC), [1968] SCR 902, *per* Martland J

Admissibility of Voir Dire Evidence Within the Trial

A *voir dire* is considered a separate hearing and so evidence admitted in the *voir dire* is not automatically evidence in the trial proper.[1]

The evidence heard in a voir dire can become evidence of the trial proper where it has been found admissible in the voir dire and both parties consent (known as a "blended" voir dire).[2]

Consent for a blended voir dire can be applied only to some of the evidence to the exclusion of the rest of the evidence heard.[3]

However, where there has been evidence accepted at the voir dire that would otherwise be inadmissible at trial, and which was consented as applicable to the trial, the validity of the verdict may be in question.[4]

The choice of whether to consent to a blended voir dire will have an effect on the manner in which evidence is presented. A non-blended voir dire may require the defence to lead evidence to establish the violation. A blended voir dire will require the evidence to be lead by the Crown.[5]

1. *R v Gauthier*, 1975 CanLII 193 (SCC), [1977] 1 SCR 441, *per* Pigeon J at 452
   R v Viszlai, 2012 BCCA 442 (CanLII), 293 CCC (3d) 127, *per* Frankel JA, at para 68
   R v Erven, 1978 CanLII 19 (SCC), [1979] 1 SCR 926, *per* Dickson J, at p. 932
   R v Darrach, 2000 SCC 46 (CanLII), [2000] 2 SCR 443, *per* Gonthier J, at para 66
   R v Dela Cruz, 2007 MBCA 55 (CanLII), 220 CCC (3d) 272, *per* Freedman JA, at para 24
   Gauthier, *supra*, at p. 454
   R v Sadikov, 2014 ONCA 72 (CanLII), 305 CCC (3d) 421, *per* Watt JA, at para 30
   R v Frederickson, 2018 BCCA 2 (CanLII), *per* Fisher JA, at para 38 ("each admissibility voir dire is a separate inquiry, and without express incorporation, the evidence adduced on the voir dire is not available for use at trial or in a later voir dire")
2. *R v Jir*, 2010 BCCA 497 (CanLII), 264 CCC (3d) 64, *per* Frankel JA, at para 10
   R v Ballendine, 2011 BCCA 221 (CanLII), 271 CCC (3d) 418, *per* Frankel J, at para 84
   Dela Cruz, *supra*, at para 26
3. e.g. *R v Smith*, 2016 BCSC 1725 (CanLII), *per* Kent J, at paras 45 to 47
4. *R v Wilson*, 2011 BCCA 252 (CanLII), 272 CCC (3d) 269, *per* Frankel JA, at para 71
5. See Charter Applications for details on burden

See Also

- Charter Applications

Charter Applications

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< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

A Charter motion is a defence application alleging a breach of a provision of the *Charter of Rights and Freedoms*.

Who Can Raise

Where the defence have not made application to challenge the reasonable grounds to that underly police action such as a breath demand, there is no obligation on the Crown to present any evidence that underlies the authority that was executed.[1]

In certain circumstances, trial judges may have a duty to raise a charter issue on behalf of the accused, particularly where they are self-represented.[2] However, interference of the judge by raising a Charter issue against the intent of counsel may amount to a reasonable apprehension of bias.[3]

Proper Court

A Charter application must be heard by a "court of competent jurisdiction". This is a court that has jurisdiction over the subject matter, the person and the remedy.[4] This will generally be the trial judge.[5] However, it will *not* include a preliminary inquiry judge.[6] A superior court has "constant, complete and concurrent jurisdiction with the trial court for applications under s. 24(1) of the Charter."[7]

Territorial Jurisdiction

The Charter does not apply to Canadian authorities outside of Canada except when:[8]

1. the foreign jurisdiction consents to its application; or
2. the do cut of the Canadian authorities violates international human rights obligations.

Standard of Appellate Review

A finding of a Charter violation deserves deference absent a palpable and overriding error.[9]

The interpretation of the scope of a right is a question of law and is reviewable without reference.[10]

Standard of Appellate Review

The standard of review on appeal for constitutional questions is on the standard of correctness.[11]

1. *R v Charette*, 2009 ONCA 310 (CanLII), 243 CCC (3d) 480, *per*

Moldaver JA, at paras 48 to 49
2. *R v Travers*, 2001 NSCA 71 (CanLII), 154 CCC (3d) 426, *per* Oland JA
3. *R v Youngpine*, 2009 ABCA 89 (CanLII), 242 CCC (3d) 441, *per* Fraser CJ
4. *R v Hynes*, 2001 SCC 82 (CanLII), [2001] 3 SCR 623, *per* McLachlin CJ
5. *R v Rahey*, 1987 CanLII 52 (SCC), [1987] 1 SCR 588
6. Hynes
7. *R v Blencowe*, 1997 CanLII 12287 (ON SC), 118 CCC (3d) 529, *per* Watt J
8. *R v Tan*, 2014 BCCA 9 (CanLII), 299 CRR (2d) 73, *per* Bennett JA
9. *R v Hills*, 2020 ABCA 263 (CanLII), 2 WWR 31, at para 12 (“ A finding that a Charter right has or has not been violated deserves deference absent an overriding and palpable error.”)
10. *Hills*, *ibid.* at 12 (“Whether a first-instance judge correctly interpreted the scope of the right is a question of law and this Court is free to substitute its opinion: R v Ngo, 2003 ABCA 121 at para 15, 327 AR 320.“)
11. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), *per curiam*, at para 53

Procedure

The onus of proof is upon the party advancing the motion.[1] The opposing party must be given notice of the motion and a chance to challenge the evidence as well as present evidence as well.[2]

Relief under the Charter must flow from a motion, it is not automatic.[3] The motion must be based on evidence before the court.[4]

The responding Crown is entitled to wait until the completion of the applicant's evidence before deciding on how they wish to respond to the motion, including calling rebuttal witnesses.[5]

Evidence

In some cases, the judge may seek to have the defence summarize the evidence it anticipates to call. If the evidence does not reveal a basis upon which the evidence may be excluded the judge may refuse to let the defence enter into a voir dire on the issue.[6]

The evidence can take the form of an affidavit and may in cases contain hearsay as to what the accused will testify to at trial.[7]

Concession of Law

The decision of Crown counsel to concede a point of law does not bind the court to the legal content or effect.[8]

The Supreme Court “has traditionally taken a dim view of concessions in constitutional cases, given their potentially wide ramifications for persons or governments not parties to the particular case”.[9]

1. *R v Currie*, 2008 ABCA 374 (CanLII), 446 AR 41, *per* Côté JA, at para 39
2. *Currie*, *ibid.*, at para 39
3. *Currie*, *ibid.*, at para 39
4. *Currie*, *ibid.*, at para 39
5. *R v Deveau*, 2011 NSCA 85 (CanLII), 976 APR 5, *per* Fichaud JA
6. *R v Kutynec*, 1992 CanLII 7751 (ON CA), 70 CCC (3d) 289, *per* Finlayson JA
   R v Durette, 1992 CanLII 2779 (ON CA), 72 CCC (3d) 421, *per* Finlayson JA, at p. 436 ("when an accused makes a Charter motion he or she can be asked to stipulate a sufficient foundation for the claim or its constituent issues.")
7. e.g. *R v McCaw*, 2018 ONSC 3464 (CanLII), 48 CR (7th) 359, *per* Spies J, at paras 3 and 5
8. *R v Hills*, 2020 ABCA 263 (CanLII), 2 WWR 31, at para 29 (“ Crown counsel’s position was a concession, it does not bind this Court as to its legal content or effect. ... As has been noted on numerous occasions, concessions of law are not binding on courts”)
   R v Duguay, 1989 CanLII 110 (SCC), [1989] 1 SCR 93, *per* L'Heureux-Dube J (in dissent)
   United States of America v Cotroni, 1989 CanLII 106 (SCC), [1989] 1 SCR 1469, *per* La Forest J
   R v Elshaw, 1991 CanLII 28, [1991] 3 SCR 24, *per* Iacobucci J
   R v Silveira, 1995 CanLII 89 (SCC), [1995] 2 SCR 297, at para 100(*complete citation pending*)
9. *M v H*, 1999 CanLII 686 (SCC), [1999] 2 SCR 3, at para 210(*complete citation pending*)

Discretion to Dismiss Charter Applications

There is "no absolute right to a voir dire" where a *Charter* right is claimed to have been violated.[1]

The judge may summarily dismiss Charter motions where there is non-compliance with the notice requirements or the motion is "frivolous".[2] Before doing so the judge must give the applicant notice of the intention and permit an opportunity to make submissions.[3]

The threshold to grant an evidentiary hearing is a "low" one.[4] It is only necessary that the evidentiary hearing "would assist" or "can assist" to determine the "real issue".[5]

A judge may decline to hold an evidentiary hearing into a alleged Charter breach if there is no remedy available.[6] The decision is a discretionary one and is highly contextual.[7]

Summary Dismissal Hearing

Parties may request the trial judge to hold a summary dismissal hearing (sometimes called a "Cody hearing" or a "Vukelich hearing") to determine whether the Court should decline any request to hold a voir dire, including *Charter* motions.[8]

Even where the voir dire is found to have sufficient merit to be held, the judge has the obligation to dismiss the application the moment it becomes apparent as being frivolous.[9]

Certain other provinces have similar powers under civil procedure rules to dismiss applications for lack of merit.[10]

The hearing is premised on the notion that there "is no point to the airing of a Charter issue in a criminal or quasi-criminal proceeding unless resolution of the issue might lead to the end of the prosecution or to the exclusion of evidence".[11]

1. *R v Bains*, 2010 BCCA 178 (CanLII), 254 CCC (3d) 170, *per* D. Smith J, at para 69
   R v Mehan, 2017 BCCA 21 (CanLII), *per* D. Smith J
2. *R v Iraheta*, 2020 ONCA 766 (CanLII), *per* Paciocco JA
3. *Iraheta*, *ibid.*
4. *R v Hamdan*, 2017 BCSC 562 (CanLII), *per* Butler J
5. *R v Mehan*, 2017 BCCA 21 (CanLII), *per* D. Smith JA, at paras 44 to 47
6. *R v Mastronardi*, 2015 BCCA 338 (CanLII), *per* Kirkpatrick JA, at para 63
7. *R v McDonald*, 2013 BCSC 314 (CanLII), *per* Fitch J, at para 21
8. *R v Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 38 ("trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the voir dire and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily ... ...This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.")
   R v Vukelich, 1996 CanLII 1005 (BC CA), [1996] BCJ No 1535; 108 CCC (3d) 193, *per* McEachern JA, at paras 25 to 26
   see also *R v Kapp*, 2006 BCCA 277 (CanLII), 271 DLR (4th) 70, *per* Low JA, appeal dismissed at 2008 SCC 41 (CanLII), *per* McLachlin CJ and Abella J
   R v Kutynec, 1992 CanLII 7751 (ON CA), 70 CCC (3d) 289, *per* Finlayson JA at pp. 287-89
9. *Cody*, *supra*, at para 38 ("trial judges should not hesitate to summarily dismiss “applications and requests the moment it becomes apparent they are frivolous”")
10. *R v Sutherland*, 2017 BCPC 42 (CanLII), *per* Gouge J, at para 11
11. *Kapp*, *ibid.*, at paras 94 to 95

Burden and Standard of Proof

The burden of proving a violation of any constitutional right, with some exception, is upon the applicant.[1] This requires that the applicant bear the "initial burden of presenting evidence".[2]

When Burden is Upon the Applicant

Generally, the burden is upon the applicant for violations of:

- the Right to Silence
- the Warrant Searches and
- the Right to Counsel.

When Burden is Upon the Crown

Violations for a warrantless search and seizure puts the burden upon the Crown.[3] However, the defence must first establish a foundation that there was a search and it was warrantless.[4]

The burden for a challenge to voluntariness of a statement is upon the Crown.

Also where delay ceiling to bring a matter to a conclusion has been surpassed the burden is upon the Crown to prove s. 11(b) of the Charter has *not* be violated.[5]

Standard of Proof

The evidence must be "sufficiently clear, convincing and cogent" to establish the breach on a balance of probabilities.[6]

If the evidence is not sufficiently persuasive one way or another, the court must find there was no Charter violation.[7]

Courts must be mindful that "the Charter must receive contextual application. The scope of a particular Charter right or freedom may vary according to the circumstances."[8]

1. *R v Collins*, 1987 CanLII 84 (SCC), [1987] 1 SCR 265, *per* Lamer J
   R v Kutynec, 1992 CanLII 7751 (ON CA), 70 CCC (3d) 289, *per* Finlayson JA ("As a basic proposition, an accused person asserting a Charter remedy bears both the initial burden of presenting evidence that his or her Charter rights or freedoms have been infringed or denied, and the ultimate burden of persuasion that there has been a Charter violation.")
2. *Collins*, *supra*, at para 21
3. see Warrantless Searches
4. *Collins*, *supra*, at para 22 ("The standard of persuasion required is only the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not")
   R v Caslake, 1998 CanLII 838 (SCC), [1998] 1 SCR 51, *per* Lamer CJ, at para 11 ("Hence, once the accused has demonstrated that the search was warrantless, the Crown has the burden of showing that the search was, on the balance of probabilities, reasonable")
5. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ
6. *Collins*, *supra*, at para 30 ("the standard of persuasion required can only be the civil standard of the balance of probabilities")
   FH v McDougall, 2008 SCC 53 (CanLII), [2008] 3 SCR 41, *per* Rothstein J, at para 46
7. *R v Hardenstine*, 2010 BCSC 899 (CanLII), *per* Savage J, at paras 27, 34, referring to *R v Collins*
8. *R v Jarvis*, 2002 SCC 73 (CanLII), [2002] 3 SCR 757, *per* Iacobucci and Major JJ, at para 63

Standing

A person must have personal Charter-protected rights to make a claim of a violation under the Charter and seek a remedy under s. 24(2) of the Charter.[1]

There is no rule of automatic standing in challenging a search. Only a party who can establish a personal right to privacy (i.e. a "reasonable expectation of privacy") can challenge a search.[2]

In section 8 Charter applications, standing exists where it has been established that the accused had a Reasonable Expectation of Privacy to the target of the search.

Where the accused asserts a s. 8 privacy right, they cannot, in the defence evidence assert facts that contradict this right. For example, a privacy right over a residence requires that the accused acknowledge living there.[3]

Burden and Standard of Proof

The onus is upon the applicant to prove standing on a balance of probabilities.[4]

Discharge of Burden by Relying on Allegations as True

An accused need not tender evidence to establish standing to enforce a Charter right. The court may assume as true any fact alleged by the Crown instead of tendering defence evidence.[5] This permits an accused to invoke a s. 8 Charter right while maintaining their denial of identity as the culprit.[6]

Enforcing Rights of Another Person

An accused is not entitled to rely on a possible violation of the Charter rights of a co-accused.[7]

For example, where the accused is a passenger of the vehicle, the accused will not have standing to bring a Charter application as there is no privacy interest as a passenger, at least so diminished as to not have any Charter protection.[8]

Young Person Under 12 Years of Age

A child under the age of 12 cannot be charged with an offence [9]and so they do not have standing to make any claim for a breach of s. 8 Charter rights.

Crown Standing to Respond to an Application

Where there has been a prior ruling of unconstitutionality within the province that was not appealed by the Crown does not estop the Crown from making submissions against a subsequent application on a new proceeding.[10]

1. *R v Edwards*, 1996 CanLII 255 (SCC), [1996] 1 SCR 128, *per* Cory J
   R v Rahey, 1987 CanLII 52 (SCC), [1987] 1 SCR 588, at p. 619
2. e.g. *R v Fankhanel*, 1999 CanLII 19075 (AB QB), 249 AR 391, *per* Veit J, at para 12 citing *R v Edwards*, 1996 CanLII 255 (SCC), [1996] 1 SCR 128
3. See *R v Farrah (D.)*, 2011 MBCA 49 (CanLII), 274 CCC (3d) 54, *per* Chartier JA, at paras 18 to 25
4. *R v Pasian*, 2015 ONSC 1557 (CanLII), *per* Goodman J, at para 17
   R v Logan, 2005 ABQB 321 (CanLII), 388 AR 255, *per* Macklin J, at para 81
5. *R v Jones*, 2017 SCC 60 (CanLII), [2017] 2 SCR 696, *per* Côté J, at para 32
6. *Jones*, *ibid.*
7. *R v Sandhu*, 1993 CanLII 1429 (BC CA), (1993) 28 BCAC 203 (BCCA), *per* Prowse JA
8. *R v Ramos*, 2011 SKCA 63 (CanLII), 371 Sask R 308, *per* Ottenbreit JA
9. YCJA s.2 defines "young person" as age 12 to 18
10. *R v McCaw*, 2018 ONSC 3464 (CanLII), 48 CR (7th) 359, *per* Spies J, at para 53

State Agent

The impugned conduct that implicates the Charter must be that of a state agent. This will generally be of concern for Charter rights such as:

- the right to silence;
- voluntariness of a statement made to a person in authority;
- the right against search and seizure; or
- detention, including through citizen's arrest or private security

Application of the Charter

Section 32 of the Charter provides that:

> 32 (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
>
> – CCRF

Incriminating evidence collected by private persons "is routinely admitted without Charter scrutiny".[1]

Independent actions of an informer to collect information from an offender in order to deliver the information to police is not an agent.[2]

1. *R v Dell*, 2005 ABCA 246 (CanLII), 199 CCC (3d) 110, *per* Fruman JA, at para 29
2. *R v McInnis*, 1999 CanLII 2671 (ON CA), 134 CCC (3d) 515, *per* Rosenberg JA

Notice

An Accused must prove a Charter violation through conducting a *voir dire*. Notice must give notice of a Charter application or else the application can be rejected without hearing evidence.[1]

There is a duty upon defence to raise any Charter issues before trial.[2]

A threshold examination must be made to determine if on a balance of probabilities that the accused may be entitled to a Charter remedy and that the right was asserted as reasonably early as possible.[3] Where there is no timely notice, the Court may refuse an application.[4]

Where the court rules have not been complied with, the court “has wide discretion in respect of procedure to facilitate a fair and expeditious determination of Charter issues”[5] Thus, even a late request for a Charter application can still be heard by the court.

Since the crown may not know the whole charter evidence before the motion, they are entitled to call evidence after hearing from the defence.[6]

The defence cannot object to the admission of evidence on the basis of a Charter violation where it is first raised in closing.[7]

Prior to trial, the court may make inquiries into what Charter issues to be presented at trial.[8]

Rules of Court

Many provinces have rules that govern the notice requirements of Charter applications.[9]

Under the Ontario Rules of Criminal Proceedings, the trial judge has discretion in whether to penalize non-compliance by refusing to permit the application. The judge must review several factors in the process[10] including:[11]

- preference to have applications heard
- prejudice to the opposite party
- the efficient management of the courts,
- the fair and orderly conduct of the trial and
- the particularization of the Notice.

Absence of Notice

The court may refuse to hear a Charter application where no notice is given.[12]

The right to make full answer and defence does not include right to trial by ambush.[13]

Failure to comply with rules of motion is not always fatal to the motion.[14]

1. *R v Hamill*, 1984 CanLII 39 (BC CA), (1984) 13 CCC 338 (BCCA), *per* Esson JA
   R v Kutynec, 1992 CanLII 7751 (ON CA), 70 CCC (3d) 289, *per* Finlayson JA at 16
   R v Vukelich, 1996 CanLII 1005 (BC CA), 108 CCC 193 (BCCA), *per* McEachern JA
   e.g. *R v Graham*, 2008 NSPC 83 (CanLII), *per* Embree J - charter application rejected due to lack of notice
2. *R v Kovac*, 1998 CanLII 14961 (ON SC), [1998] OJ No 2347 (Ont. C.J.), *per* Hill J, at p. 9
3. *Vukelich*, *supra*
4. see *Kutynec*, *supra*, at para 19
5. *R v Blom*, 2002 CanLII 45026 (ON CA), OR (3d) 51, *per* Sharpe JA at 21 and 22
6. *R v Deveau*, 2011 NSCA 85 (CanLII), 976 APR 5, *per* Fichaud JA
7. *R v Kovac*, 1998 CanLII 14961 (ON SC), [1998] OJ 2347 (Gen. Div.), *per* Hill J
   R v Nagda [2000] OJ No 5694 (Ont. C.J.)(*no CanLII links) - Charter raised 10 months after trial, but before closing submission
8. *R v Yorke*, 1992 CanLII 2521 (NS CA), 77 CCC (3d) 529, *per* Roscoe JA ("It is basic to any adversarial system that a litigant applying for curial relief advise the court and the opponent of the application")
   R v Kingsbury, [1997] OJ No 5438 (Ont. C.J.)(*no CanLII links)
9. e.g. Rule 30 of the Rules of Criminal Proceedings (Ontario)
10. *R v Blom*, 2002 CanLII 45026 (ON CA), [2002] OJ No 3199 (ONCA), *per* Sharpe JA, at paras 21 to 22
11. *R v Tash*, 2008 CanLII 1541 (ON SC), [2008] OJ No 200 (ON SCJ), *per* Hill J, at para 15
12. *R v Rambissoon*, 2012 ONSC 3032 (CanLII), [2012] OJ 2305 (SCJ), *per* Trotter J
13. *R v Darrach*, 2000 SCC 46 (CanLII), [2000] 2 SCR 443, *per* Gonthier J, at para 55
14. *R v Tillotson*, 2011 ONSC 3390 (CanLII), 94 WCB (2d) 847, *per* Reid J

Sufficiency

Notice must outline some facts, sometimes with a supporting affidavit. [1]

There is no "absolute entitlement to an evidentiary hearing", rather there must be a "factual and legal basis" for any motion.[2]

Where insufficient notice is given on a constitutional challenge the court may refuse to entertain the argument.[3]

1. *R v Vukelich*, 1996 CanLII 1005 (BC CA), 108 CCC (3d) 193, *per* McEachern JA, at para 17
   R v Pires; R v Lising, 2005 SCC 66 (CanLII), [2005] 3 SCR 343, *per* Charron J, at para 35
2. *R v Clancey*, [1992] OJ 3968 (Ont CJ (Gen Div))(*no CanLII links)
3. *R v Purtill* [2012] OJ 2769 (SCJ)(*no CanLII links)

Timing

Before Trial

Verbal notice on the day of trial can be found insufficient notice.[1]

During Trial

The defence should not generally be permitted to raise a Charter motion at any point after the close of the Crown's case.[2]

After Trial

Where a Charter issue is raised after the Crown's case, it cannot be based on the lack of evidence on the particular issue. By requiring the crown to present evidence supporting non-existent Charter motion is tantamount to shifting the burden on the crown to prove the absence of a breach.[3]

1. e.g. *R v Mide*, 1998 ABPC 126 (CanLII), [1998] AJ No 1384 (Alta. P.C.), *per* Fraser J
2. *R v Chamberlain*, 1994 CanLII 1165 (ON CA), (1994), 30 CR (4th) 275, *per curiam* - judge was correct in exercising discretion to refuse to hear application
   R v Dwernychuk, 1992 ABCA 316 (CanLII), 77 CCC (3d) 385, *per curiam*
3. *R v Furlong*, 2012 NLCA 29 (CanLII), 1004 APR 77, *per* Hoegg JA

Failure to Given Timely Notice

Discretion

It is in the ultimate discretion of the trial judge to decide whether to permit a late Charter application.[1]

The trial judge had discretion to refuse to hear any motions with no notice or insufficient notice.[2] The Court must balance the efficient use of court resources with the determination of court matters. [3]

1. *R v Habhab*, [1997] AJ No 175 (Alta P.C.)(*no CanLII links) p. 9-10
2. *R v Smith*, 2004 SCC 14 (CanLII), [2004] 1 SCR 385, *per* Binnie J, at para 39
3. *R v Loveman*, 1992 CanLII 2830 (ON CA), 71 CCC (3d) 123, *per* Doherty JA

Motion to Dismiss Charter Motions

A trial judge may dismiss a motion under its powers to control proceedings for those applications that lack merit or are not brought in time.[1]

The judge should be "reluctant to foreclose an inquiry into an alleged violation" of the Charter.[2]

The judge should give consideration "whether there is an 'air of reality' to the alleged breach.[3]

The court may consider factors including:[4]

1. whether or not there is any statutory rule or practice direction requiring notice;
2. the notice which was given to the Crown;
3. the point during the trial proceedings when the appellants' counsel first indicated he intended to bring a Charter motion;
4. the extent to which the Crown was prejudiced by the absence of any specific reference to a Charter-based argument in the notice given to the Crown; and
5. the specific nature of the Charter argument which counsel propose to advance and the impact the application could have on the course of the trial.

Timing of the Charter Application

A significant factor on the discretion to dismiss a Charter application is the timing when the motion was made.[5]

Procedure

The procedure to dismiss any motion will be dictated by the particular rules of court for the particular jurisdiction.[6]

1. *R v Henneberry*, 2015 NSPC 96 (CanLII), *per* Chisholm J - re provincial court has authority even if not specifically mentioned in the Rules of Court
   R v Bugden, 2015 CanLII 27426 (NL PC), *per* Skanes J, at para 27
2. *R v Loveman*, 1992 CanLII 2930 (ON CA), [1992] OJ 346, *per* Doherty JA
3. *Bugden*, *supra*
   R v Gauvin, 2014 ONSC 4108 (CanLII), *per* Quigley J

4. *Loveman*, *supra*
5. *Loveman*, *ibid.* ("The trial judge ought to consider whether the basis for the Charter motion was known or could reasonably have been known to the Defence prior to trial.")
6. NS, Prov Crt: Nova Scotia Court Rules
   NS, Sup. Crt: Nova Scotia Civil Procedure Rules

Appeals

Reviewing a judge's decision a whether there was a Charter breach is determined on the standard of correctness.[1] However, the evidence underlying the Charter matter can only be reviewed on the standard of "palpable and overriding error".[2]

1. *R v Farrah*, 2011 MBCA 49 (CanLII), 274 CCC (3d) 54, *per* Chartier JA, at para 7
2. ibid

Preserving Right of Appeal

A guilty plea after a failed Charter application extinguishes all rights of appeal.[1]

When an application fails, "the proper procedure to follow when an accused wishes to preserve his or her right to appeal an adverse voir dire ruling is to admit the facts alleged by the Crown and invite the judge to convict".[2] There are various options available including a joint statement of fact, no submissions no guilt or innocence, or agreement that a conviction be entered.[3]

1. see Guilty Plea
   cf. *R v Liberatore*, 2014 NSCA 109 (CanLII), 318 CCC (3d) 441, *per* Fichaud JA, at paras 9, 13
2. *R v Webster*, 2008 BCCA 458 (CanLII), 238 CCC (3d) 270, *per* Frankel JA, at para 21
3. *R v Herritt*, 2019 NSCA 92 (CanLII), 384 CCC (3d) 25, *per curiam*, at para 69
   R v Hunt, 2021 ABCA 49 (CanLII), *per* Beveridge JA at footnote 64

On Appeal but Not Raised at Trial

An accused may raise a new issue on appeal only with leave of the court.[1]

Even where leave is not requested, particularly where the accused is self-represented on appeal, the court may still consider whether to grant leave.[2]

1. *R v Aisthorpe*, 2006 NLCA 40 (CanLII), 143 CRR (2d) 352, *per* Rowe JA
2. *R v O'Keefe (No. 2)*, 2012 NLCA 25 (CanLII), NJ No 167, *per* Harrington JA, at paras 24 to 27

Briefs

The crown does not need to file a brief responding to an accused's Charter motion. He may instead wait until the conclusion of the accused's evidence to decide.[1]

Affiant Reviewing Applicant's Brief

Giving the factum or brief to the affiant to read is not impermissible however should be avoided where the factual inconsistencies may be used to undermine the witnesses credibility.[2]

1. *R v Deveau*, 2011 NSCA 85 (CanLII), 976 APR 5, *per* Fichaud JA
2. *R v Lajeunesse, Paris*, 2006 CanLII 11655 (ON CA), 208 OAC 385, [2006] OJ No 1445, *per* MacFarland JA, at paras 24 to 28 ("It would have been preferable had Crown counsel not supplied the factum to the main witness, particularly on the facts here where it would be argued that the factual inconsistencies undermined the credibility of the witness.")

R v Mahmood, 2011 ONCA 693 (CanLII), 282 CCC (3d) 314, *per* Watt JA, at para 63 ("No bright line rule prohibits a party from disclosing to a witness on a Garofoli application the arguments to be advanced in support of the application, and thus the thrust of the proposed cross-examination. Each ... case depends and must be decided on its own facts. What would be improper in one case may be entirely appropriate in another")

Charter Application to Evidence Collected in Foreign Countries

Actions of a foreign state outside of Canada cannot be subject to Charter review.[1]

Proof of foreign law is a question of fact.[2] The judge, in determining whether foreign law has been compiled with, may hear expert evidence from legal experts. The judge must not engage in interpreting the law themselves.[3]

The extent to which the experts agree there will be a "strong presumption" that the propositions in agreement accurately represents foreign law.[4]

1. *Schreiber v Canada*, 1998 CanLII 828 (SCC), [1998] 1 SCR 841, *per* L'Heureux-Dubé J J
2. *R v Guilbride*, 2002 BCPC 254 (CanLII), *per* Arnold J, at para 61
3. *Guilbride*, *ibid.*, at para 61
4. *Guilbride*, *ibid.*, at para 62
   Re McDonald, 1935 CanLII 301 (NS CA), 4 DLR 342, *per* Mellish J

Remedies

Charter remedies include:

- Exclusion of Evidence Under Section 24(2) of the Charter
- Stay of Proceedings
- Costs

See Also

- Voir Dire
- Precedent - Charter Applications

Charter Remedies

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< Procedure and Practice

Section 24(1) of the Charter

The choice of remedy upon violation of a constitutional provision is entitled to discretion.[1]

Where there is an error in principle, relies on irrelevant factors, or is unreasonable, the appellate court may intervene.[2]

Unreasonable Detention

Where an officer detains someone for longer than what is permitted under s. 503(1)(a), the remedies include sentence credit at sentencing.[3]

Abuse of Process

- Abuse of Process Remedies

1. *R v Simpson*, 1995 CanLII 120 (SCC), [1995] 1 SCR 449 rev'g (1994), 1994 CanLII 4528 (NL CA), 117 Nfld & PEIR 110, at paras 67 to 69 (CCC)
2. *R v Babos*, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, *per* Moldaver J, at paras 48 to 49
3. *R v B(S)*, 2014 ONCA 527 (CanLII), 121 OR (3d) 145, *per* Rosenberg JA, at para 13
   R v Rashid, 2010 ONCA 591 (CanLII), 259 CCC (3d) 289, *per curiam*, at paras 6-7

Section 24(2) of the Charter

See Also

- Costs
- Remedy for Breach of Disclosure Obligation

Adjournments

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< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

An adjournment is re-scheduling of a court proceeding, be it arraignment, plea, trial, sentencing, or otherwise.

The granting of an adjournments is at the discretion of the judge (e.g. see s.571 and 645; 669.1(2)), but in practice is a frequent occurrence.

Powers of Clerk to Adjourn on Instructions

A judge may direct a clerk to adjourn court to a subsequent day.

> 474
> [*omitted (1)*]
>
> **Adjournment on instructions of judge**
>
> (2) A clerk of the court for the trial of criminal cases in any territorial division may, at any time, on the instructions of the presiding judge or another judge of the court, adjourn the court and the business of the court to a subsequent day.
> R.S., 1985, c. C-46, s. 474; 1994, c. 44, s. 31.
>
> – CCC

The procedure found in s. 474(2) cannot be extended to municipal or regulatory provisions whereby the clerk can adjourn a summary trial on behalf of the justice of the peace.[1]

1. *R v 1283499 ontario Inc*, 2003 CanLII 33934 (ON CA), 176 CCC (3d) 522, *per* Doherty JA

Jurisdiction to Adjourn a Matter

The statutory authority to adjourn a matter comes from different sections of the Code depending on the level of court and the class of offence charged.

Summary Offence Matters

Provincial Court Judge power to adjourn summary trial

A provincial court judge dealing with a summary matter is governed by s. 803 found in Part XXVII [*Pt. XXVII – Summary Convictions (s. 785 to 840)*]:

> **Adjournment**
>
> 803 (1) The summary conviction court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their counsel or agents.
>
> [*omitted (2), (3) and (4)*]
> R.S., 1985, c. C-46, s. 803; 1991, c. 43, s. 9; 1994, c. 44, s. 79; 1997, c. 18, s. 112; 2008, c. 18, s. 45.
>
> – CCC

This section permits the judge to adjourn a matter where the accused fails to appear without issuing a bench warrant.[1]

Adjourn summary proceedings other than trial

General adjournments of summary offences is found in Part XX [*Pt. XX – Procedure in Jury Trials and General Provisions (s. 574 to 672)*]:

> 669.1
> [*omitted (1) [Jurisdiction]*]
>
> **Adjournment**
>
> (2) Any court, judge or provincial court judge having jurisdiction to try an accused or a defendant, or any clerk or other proper officer of the court, or in the case of an offence punishable on summary conviction, any justice, may, at any time before or after the plea of the accused or defendant is taken, adjourn the proceedings.
> R.S.C. 1985, c. 27 (1st Supp.), s. 137
>
> – CCC

1. *R v Szoboszloi*, 1970 CanLII 1083 (ON CA), 5 CCC 366, *per* Aylesworth JA

Indictable Matters

Preliminary inquiry judge

A Preliminary Inquiry Judge may adjourn under s.537:

> **Powers of justice**
>
> 537 (1) A justice acting under this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] may

(a) adjourn an inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits or for any other sufficient reason;

[*omitted (1.01), (1.02), (1.1), (2), (3) and (4)*]
R.S., 1985, c. C-46, s. 537; 1991, c. 43, s. 9; 1994, c. 44, s. 53; 1997, c. 18, s. 64; 2002, c. 13, s. 28; 2008, c. 18, s. 22.
[*annotation(s) added*]

– CCC

Provincial Court Judge or Superior Court Justices with Indictable Matters Without Jury

A provincial court judge dealing with an indictable matter or superior court justice without jury is governed by s. 571:

Adjournment of non-jury trial

571 A judge or provincial court judge acting under this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] may from time to time adjourn a trial until it is finally terminated.

R.S.C. 1985, c. 27 (1st Supp.), s. 203

[*annotation(s) added*]

– CCC

The term "judge" for the purpose of s. 571 — found in Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*]—is defined in s. 552 as a *superior court judge*.[1]

Superior Court Justices with Indictable Offences Triable by Jury

Adjournments of trials on indictable matters under Part XX [*Pt. XX – Procedure in Jury Trials and General Provisions (s. 574 to 672)*]:

606
[*omitted (1), (1.1), (1.2) and (2)*]

Allowing time

(3) An accused is not entitled as of right to have his trial postponed but the court may, if it considers that the accused should be allowed further time to plead, move to quash or prepare for his defence or for any other reason, adjourn the trial to a later time in the session or sittings of the court, or to the next of any subsequent session or sittings of the court, on such terms as the court considers proper.

[*omitted (4), (4.1), (4.2), (4.3), (4.4) and (5)*]
R.S., 1985, c. C-46, s. 606; R.S., 1985, c. 27 (1st Supp.), s. 125; 2002, c. 13, s. 49; 2015, c. 13, s. 21.

– CCC

Any judge dealing with an indictable matter with a jury:

Trial continuous

645 (1) The trial of an accused shall proceed continuously subject to adjournment by the court.

Adjournment

(2) The judge may adjourn the trial from time to time in the same sittings.

Formal adjournment unnecessary

(3) For the purpose of subsection (2) [*authority to adjourn trial*], no formal adjournment of trial or entry thereof is required.

[*omitted (4) and (5)*]
R.S., 1985, c. C-46, s. 645; R.S., 1985, c. 27 (1st Supp.), s. 133; 1997, c. 18, s. 76; 2001, c. 32, s. 43.
[*annotation(s) added*]

– CCC

Clerk Authorized to Adjourn Jury Matter

Adjournment when no jury summoned

474 (1) Where the competent authority has determined that a panel of jurors is not to be summoned for a term or sittings of the court for the trial of criminal cases in any territorial division, the clerk of the court may, on the day of the opening of the term or sittings, if a judge is not present to preside over the court, adjourn the court and the business of the court to a subsequent day.
[*omitted (2)*]
R.S., 1985, c. C-46, s. 474; 1994, c. 44, s. 31.

– CCC

Codified Reasons to Adjourn

Non-Appearance of Prosecutor

Provincial court judge under Part XXII [*Pt. XXII – Procuring Attendance (s. 697 to 715.2)*] may adjourn a matter due to non-appearance of the prosecutor:

Non-appearance of prosecutor

799 Where, in proceedings to which this Part [*Pt. XXII – Procuring Attendance (s. 697 to 715.2)*] applies, the defendant appears for the trial and the prosecutor, having had due notice, does not appear, the summary conviction court may dismiss the information or may adjourn the trial to some other time on such terms as it considers proper.
R.S., c. C-34, s. 734.
[*annotation(s) added*]

– CCC

Problems with Charging Document

Where the accused has been misled or prejudiced by any issues found in the indictment or information, the accused may adjourn a matter. (see s. 485, 547, and 601)

Failure to Give Expert Notice

Where a party wishes to call an expert witness and did not give notice, the available remedy is an adjournment under s. 657.3 (5).

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1. see Definition of Judicial Officers and Offices

Discretion of the Judge

It is a discretionary decision on whether to grant or refuse a request for an adjournment.[1] The discretion should be exercised judicially, giving proper reasons.[2]

Appellate Standard Review

The decision is reviewable on the circumstances of the particular case, including the ability and quality of the accused.[3] The question for the reviewing judge is whether sufficient weight was given to "all relevant considerations".[4]

This exercise of discretion is afforded considerable deference.[5]

The judge does not need to mention every factor considered.[6]

The trial judge is not in error for failure to give full reasons so long as the record shows evidence that permits the necessary inferences to justify the decision.[7]

Where the appeal concerns a refusal to adjourn for the accused to obtain counsel, the appellant must show that the refusal deprived the accused of full answer and defence which resulted in a miscarriage of justice.[8]

Factors to Consider

A judge is typically not inclined to adjourn trial matters. The cost of resources to bring a matter to trial and the desire to bring a matter to a conclusion speaks to the judge's interest in having a matter proceed. This is balanced against the accused's right to a fair trial and right to be tried within a reasonable time.

Where the judge has grounds to believe that the request for an adjournment is a sham, the judge may refuse the adjournment.[9]

The trial judge should consider all circumstances, including:[10]

- the gravity of the charges
- the number of previous postponements
- the consequences to the Crown and accused by a postponement
- the accused criminal record as a reflection on his experience in the system[11]
- the public interest in the orderly and expeditious administration of justice[12]

1. *R v White*, 2010 ABCA 66 (CanLII), 252 CCC (3d) 248, *per curiam* (3:0) , at para 14
   Manhas v The Queen, 1980 CanLII 172 (SCC), [1980] 1 SCR 59, *per* Martland J
2. *R v Barrette*, 1976 CanLII 180 (SCC), [1977] 2 SCR 121, *per* Pigeon J (6:3) at 124-125
   R v Anderson, 2013 ABCA 160 (CanLII), 553 AR 72, *per curiam* (3:0)
   R v JCG, 2004 CanLII 66281 (QC CA), 189 CCC (3d) 1, *per* Dalphond JA, at para 8
3. *White*, *supra*
4. *R v Gerlitz*, 2014 ABQB 243 (CanLII), *per* Gates J, at para 21 ("The test for appellate review is whether the trial judge has given sufficient weight to all relevant considerations")
   JCG, *supra*, at para 9
   White, *supra*, at para 15
5. *R v Toor*, 2001 ABCA 88 (CanLII), 155 CCC (3d) 345, *per* Paperny JA (alone), at para 15 ("[t]he granting of adjournments and the exercise of judicial discretion are generally afforded a considerable degree of deference, and the law is well established in the area.")
   R v Travis, 2012 ABQB 629 (CanLII), *per* Yamauchi J, at paras 61 to 63
6. *R v Beals*(1993), 126 NSR (2d) 130(*no CanLII links) , at paras 16 and 29
   R v Tortora, 2010 BCCA 547 (CanLII), 297 BCAC 128, *per* Bennett JA (3:0), at para 23
7. *EWB*, *supra* ("On an appeal from a refusal it would appear that a court of appeal will not find the learned trial judge erred notwithstanding his reasons may not be fully articulated if the record discloses evidence from which it can be inferred that the absence of counsel was brought about by the accused for the purpose of delaying the proceedings.")
8. *Gerlitz*, *supra*, at para 24
9. *R v Amos*, 2012 ONCA 334 (CanLII), 292 OAC 298, *per* Watt JA (3:0)
10. *JCG*, *supra*, at paras 12 to 13 ("...“the gravity of the charge, the number of previous postponements and the consequences of a postponement for the Crown and for the accused")
    White, *supra*, at para 16
    R v MacLean, 2013 ABQB 166 (CanLII), *per* Ouellette J, at para 14
    R v EWB, 1993 CanLII 5636 (NS CA), 352 APR 130, *per* Hallett JA (3:0)
11. *EWB*, *ibid.*
12. *R v JEB*, 1989 CanLII 1495 (NS CA), 52 CCC (3d) 224, *per* MacDonald JA
    R v EWB, 1993 CanLII 5636 (NS CA), 352 APR 130, *per* Hallett JA, at para 18

Adjournment to Obtain Counsel

When faced with a request to adjourn to obtain counsel, the trial judge should consider whether a fair trial requires counsel given the seriousness or complexity of the charges.[1]

The judge may also consider the "personality and skills" of the accused.[2]

The right to retain counsel requires that the accused to act honestly and diligently.[3]

Generally, a request should not be refused where the failure to have counsel for trial was not his fault, but rather the fault of defence counsel.[4]

The judge has discretion to adjourn a trial on request of the accused for reason that they are not represented by counsel. The judge must consider the accused constitutional right to a fair trial. The accused nevertheless has the right to represent himself. The right to be represented by counsel must be exercised "diligently and honestly", thus they may be refused if they have not acted honestly and diligently. The accused cannot be refused where the absence of counsel is not their fault.[5]

Exercise of Discretion

The discretion to allow an adjournment must be based on reasons well-founded in the law.[6]

Choice to Self-Rep Not Ground of Appeal

However, an accused who chooses not to have counsel cannot appeal a conviction on the grounds of not having effective representation.[7]

Principles

When considering whether to allow an adjournment by a self-represented accused to seek counsel, the judge should consider principles including:[8]

- the right to counsel is not absolute;[9]
- each application for an adjournment must be decided on its own facts;
- generally, an accused should not be refused an adjournment if the fact that he is without counsel is not his fault, but that of his counsel;
- the right of an accused to retain counsel must be exercised honestly and diligently so as not to delay a scheduled trial; and
- the scope of review by an appeal court of the exercise of the discretionary power to adjourn a scheduled trial is relatively wide as the consequences of a refusal may be to deprive an accused of his right to be represented by counsel.

Self-Represented Accused Request to Adjourn to Obtain Counsel

When faced with a request to adjourn to obtain counsel, the trial judge should consider whether a fair trial requires counsel given the seriousness or complexity of the charges.[10]

The judge may also consider the "personality and skills" of the accused.[11]

The right to retain counsel requires that the accused to act honestly and diligently.[12]

Generally, a request should not be refused where the failure to have counsel for trial was not his fault, but rather the fault of defence counsel.[13]

See a review of principles at *White*, *supra*, at para 17

Constitutional Protections

Consideration should be on whether the accused was deprived of the right to a fair trial, their right to make full answer and defence, or whether there would be a miscarriage of justice.[14]

There is no constitutional right to state-funded trial counsel.[15]

Factors

From these principles, the factors courts should consider include the following:[16]

- whether the accused has failed to exercise the right to counsel honestly and diligently;
- whether granting an adjournment would inordinately delay the trial;
- opportunity to obtain with counsel;
- efforts to cooperate with counsel[17]
- the ability of the accused to understand the documentary evidence

The Court should consider relevant the facts such as:[18]

- whether or not there have been prior adjournments due to the unavailability of counsel and the accused was warned well in advance of trial that the trial would be proceeding on the scheduled date with or without counsel...;
- the accused's criminal record which reflects on the accused's degree of familiarity with the criminal justice system and legal aid programmes...;
- whether the charge against the accused is simple or complex which fact impacts on the critical question whether or not the accused can get a fair trial without counsel...;
- the public interest in the orderly and expeditious administration of justice...;
- if the accused has been refused legal aid and when the refusal was communicated to the accused.

By one authority, the consideration of all the circumstances should focus on the following questions:[19]

- Has the accused failed to exercise the right to counsel honestly and diligently?
  - Has the accused had an adequate opportunity to obtain counsel?
  - Has the accused been warned that he or she will have to proceed with trial without counsel? Has the accused been made aware of the potential consequences of that?
  - Has Legal Aid or private counsel withdrawn or refused to represent the accused? If so, when was the accused advised of this? Keeping in mind the principles in *Cunningham*[20], does the record disclose why counsel withdrew?
  - Has the accused acted or failed to act so as to thwart the appointment of counsel? Has the accused acted in any other way to delay the proceedings?
  - Is there evidence that the absence of counsel at trial is part of an orchestrated attempt by the accused to delay the proceedings?
- Would granting an adjournment inordinately delay the trial?
  - How long has it been since the charges were laid? Is this the first scheduled date for trial? If not, how many times has the matter been postponed or adjourned since the charges were laid? Who was responsible for prior adjournments? Were any of the prior postponements due to unavailability of defence counsel?
  - Is the accused in custody? If not, what are the terms of interim release?
  - How serious is the offence with which the accused has been charged?
  - How long of an adjournment is the accused requesting? Is it reasonable in the circumstances? Would a shorter adjournment suffice?
  - When is the next available trial date? Would the accused and the Crown consent to a change in venue if that would facilitate an earlier trial date?
  - Does the accused agree that the delay brought about by the requested adjournment will not count against the s. 11(b) of the Charter right to be tried within a reasonable time?
- Would granting an adjournment potentially affect trial fairness from the Crown's perspective?

- Are there co-accused? Are they being tried separately? If so, when are their trials scheduled? If not, what is the co-accuseds' position on an adjournment?
- What is the expected duration of the trial?
- How many witnesses is the Crown expected to call? What are their characteristics? Are any of them children? Elderly? Infirm? Experts? Will any of them require a translator?
- Was the Crown put to subpoenaing its witnesses? Is there a real risk a witness may fail or be unable, for any reason, to testify at an adjourned trial? Is there evidence that the accused may be seeking a tactical adjournment to see if that risk materialises?
- Where are the witnesses located? Will it be inordinately difficult for the Crown to arrange for witness attendance at a later trial date?
- Is there a real risk that physical evidence may be lost or destroyed before trial if the matter were adjourned?
- What, if anything, can be done to address or mitigate the consequences of an adjournment?

- Is the accused reasonably capable of making full answer and defence to the charges without the assistance of legal counsel?
  - What is the accused's level of education and intellectual sophistication? Is the accused in good physical and mental health? What is the accused's employment background? What level of family or other support is available to the accused?
  - Is the accused's criminal record such that it indicates the accused would be familiar with the criminal justice system and the criminal trial process?
  - Was there a preliminary hearing? If so, what does the transcript indicate about the issues that will arise?
  - Was the matter case managed such that the legal issues have been narrowed before trial? Is there an agreed statement of facts?
  - Will the trial be lengthy, complex or legally complicated? Is the matter likely to give rise to complex or unusual points of law or of evidence or complicated defence strategies?
  - Is the accused facing multiple charges or charges with multiple lesser-included offences?
  - Is the accused in jeopardy of serving a significant incarceral term if convicted?

Diligence

The accused has an obligation to acts "diligently and honestly" in attempting to obtain counsel.[21] Generally, an adjournment should not be denied where the circumstances were not his fault .[22] Similarly, where it is exclusively the fault of counsel, the adjournment should be granted.[23]

Standard of Review

The proper standard of review on appeal of this decision is one of whether the discretion was "exercised judicially", which requires asking "whether the trial judge has given sufficient weight to all relevant considerations".[24] An appeal should not be granted for refusing an adjournment unless it can be shown that the right to full answer and defence was impacted such that there was an error in principle and amounted to a miscarriage of justice.[25]

1. *Gerlitz*, *supra*, at para 24
2. *Gerlitz*, *supra*, at para 24
   White, *supra*, at para 16
   R v Hodgson, 2004 ABCA 183 (CanLII), 348 AR 383, *per curiam* (3:0), at para 4
3. *Gerlitz*, *supra*, at para 24
   White, *supra*, at para 17
   R v EWB, 1993 CanLII 5636 (NS CA), 352 APR 130, *per* Hallett JA (3:0) ("As a general rule an accused should be refused an adjournment if he has not acted diligently and honestly in attempting to obtain counsel and it can be inferred from the circumstances that he failed to avail himself of the opportunity to do so for the purpose of delaying the proceedings")
4. *EWB*, *ibid.* ("As a general rule an accused should not be refused an adjournment if the fact that he is without counsel on the scheduled trial dates is not his fault but that of his counsel and he had no complicity in the matter.")
5. *R v Halnuck*, 1996 CanLII 5275 (NS CA), 107 CCC (3d) 401, *per* Clarke CJ
   R v Beals, 1993 CanLII 5636 (NS CA), (1993) 126 NSR (2d) 130 (CA), *per* Hallett JA
   R v Marzocchi, 2006 CanLII 13096 (ON CA), 69 WCB (2d) 410, *per curiam*
   R v Bitternose, 2009 SKCA 54 (CanLII), 244 CCC (3d) 218, *per* Wilkinson JA
   R v Bissonette, 2003 ABCA 93 (CanLII), *per* Conrad JA
6. *Beals*, *supra*
   R v Barrette, 1976 CanLII 180 (SCC), [1977] 2 SCR 121, *per* Pigeon J
7. *R v Harris*, 2009 SKCA 96 (CanLII), 331 Sask R 283, *per* Richards JA, at para 27
8. *R v Le (TD)*, 2011 MBCA 83 (CanLII), 275 CCC (3d) 427, *per* Scott CJ, at para 36
   R v White, 2010 ABCA 66 (CanLII), 252 CCC (3d) 248, *per curiam*, at para 17
   Beals, *supra*
9. see also *R v McCallen*, 1999 CanLII 3685 (ON CA), 131 CCC (3d) 518, *per* O'Connor JA, at para 40
   Beals, *supra* ("The right to counsel at trial is not absolute")
10. *Gerlitz*, *supra*, at para 24
11. *Gerlitz*, *supra*, at para 24
    White, *supra*, at para 16
    R v Hodgson, 2004 ABCA 183 (CanLII), 348 AR 383, *per curiam* (3:0), at para 4
12. *Gerlitz*, *supra*, at para 24
    White, *supra*, at para 17
    R v EWB, 1993 CanLII 5636 (NS CA), 352 APR 130, *per* Hallett JA (3:0) ("As a general rule an accused should be refused an adjournment if he has not acted diligently and honestly in attempting to obtain counsel and it can be inferred from the circumstances that he failed to avail himself of the opportunity to do so for the purpose of delaying the proceedings")
13. *EWB*, *ibid.* ("As a general rule an accused should not be refused an adjournment if the fact that he is without counsel on the scheduled trial dates is not his fault but that of his counsel and he had no complicity in the matter.")
14. *Rak*, *infra*, at para 7 (in upholding refusal the SKCA said "We are all of the view the appellants were not deprived of their right to a fair trial or their right to make full answer in defence and there was no miscarriage of justice.")
15. *R v Prosper*, 1992 CanLII 2476 (NS CA), 113 NSR (2d) 156 (NSCA), *per* Chipman JA
    Beals, *supra*
16. *R v Hayter*, 2018 SKCA 65 (CanLII), 365 CCC (3d) 413, *per* Caldwell JA
    R v Rak, 1999 CanLII 12229 (SK CA), 172 Sask R 301 (CA), *per* Lane JA, at para 7 ("The appellants had ample opportunity to obtain counsel and their refusal to cooperate with counsel led to a refusal of Legal Aid. The failure to have counsel did not result in an unfair trial. Gregory Rak handled the defence rather adroitly on his own and his father's behalf and was effective in his cross-examination. He demonstrated a clear ability to understand the documentary evidence. As well the trial judge was extremely helpful to the appellants throughout the course of the trial.")
17. *Rak*, *supra*

18. *Beals*, *supra*
R v White, 2010 ABCA 66 (CanLII), 252 CCC (3d) 248, *per curiam*
R v Tortora, 2010 BCCA 547 (CanLII), 265 CCC (3d) 264, *per* Bennett JA
R v Le (T.D.), 2011 MBCA 83 (CanLII), 275 CCC (3d) 427, *per* Scott CJ
R v Bitternose, 2009 SKCA 54 (CanLII), 244 CCC (3d) 218, *per* Wilkinson JA
19. *Hayter*, *supra*, at para 30
20. 2010 SCC 10, [2010] 1 SCR 331
21. *R v Richard and Sassano* (1992), 55 OAC 43(*no CanLII links)
22. *Beals*, *supra* ("As a general rule an accused should be refused an adjournment if he has not acted diligently and honestly in attempting to obtain counsel and it can be inferred from the circumstances that he failed to avail himself of the opportunity to do so for the purpose of delaying the proceedings")
R v Manhas, 1980 CanLII 172 (SCC), 17 CR (3d) 331, *per* Martland J
23. *Beals*, *supra* ("As a general rule an accused should not be refused an adjournment if the fact that he is without counsel on the scheduled trial dates is not his fault but that of his counsel and he had no complicity in the matter") *Barrette*, *supra*
24. *Le(TD)*, *ibid.*, at para 37
White, *ibid.*, at para 15
Rak, *supra*, at para 2 ("The standard of review of the exercise of a trial judge's discretion in refusing an adjournment may be reviewed by an appellate court "if it is based upon reasons that are not well-founded in law and results in a deprivation of the accused's right to make full answer in defence" ... the right to make full answer in defence "must be weighed conscientiously and delicately along with the public interest in the orderly administration of justice".")
25. *Beals*, *supra* ("The scope of review by an appeal court of a refusal, notwithstanding it involves the review of the exercise of a discretionary power, is wide as the consequences of a refusal are to deprive an accused of his right to be represented by counsel. On appeal the appellant must show that in refusing the adjournment the trial judge deprived the appellant of his right to make full answer and defence and thus made an error in principle which constituted a miscarriage of justice (Barrette v R. and Manhas v R., supra).")

Other Reasons for Adjournment

Lack of Preparation

It is often expected that an adjournment will be granted where there is late arriving evidence.[1]

Where a lawyer fails to properly prepare, an adjournment is not required as there is a breach of their duty to the court and client.[2]

1. *R v Johnston*, 1991 CanLII 7056 (ON CA), (1991), 47 OAC 66, 5 C.R. (4th) 185, 64 CCC (3d) 233, *per* Finlayson JA
2. *R v ERS*, 1994 ABCA 176 (CanLII), 149 AR 285, *per curiam*

Missing witnesses

In order to adjourn a trial matter on the grounds of missing witnesses, the applicant must establish:[1]

1. that the absent witnesses are material in the case;
2. that the party applying has not been guilty of laches or neglect in arranging for the attendance of the witnesses; and
3. that there is a reasonable expectation that the witnesses will attend court on the date sought by the party applying for the adjournment.

The judge may also consider other relevant circumstances.[2]

1. *R v LeBlanc*, 2005 NSCA 37 (CanLII), 729 APR 235, *per* MacDonald CJ -- no adjournment for crown in failing to subpoena witnesses
R v Rose (D.A.), 1995 CanLII 4458, 140 NSR (2d) 151 (SC), *per* Glube CJ
R v AT, 1991 CanLII 6104 (AB QB), 69 CCC (3d) 107, *per* Mcdonald J - factors to consider
R v Shergill, 2009 BCCA 55 (CanLII), 269 BCAC 1, *per* Hall JA -- judge should have granted the crown adjournment for missing witness
R v MacDonald, 1998 CanLII 18016 (NL CA), 132 CCC (3d) 205, *per* Cameron JA -- short adjournment for crown for missing witness
Darville v the Queen, 1956 CanLII 463 (SCC), 116 CCC 113 (SCC), *per* Taschereau J, at paras 13 to 14
2. *R v Dang*, 2005 ABCA 441 (CanLII), 380 AR 367, *per* Costigan JA -- consequences of delay by adjournment

Late Disclosure

A failure for the judge to grant a request for adjournment due to late disclosure can amount to an abuse of process requiring a new trial.[1] Before ordering a new trial for refusing to adjourn on account of late disclosure, the court should consider:[2]

1. the Crown's assurance that disclosure was complete,
2. the timing and volume of disclosure,
3. the seriousness of the charges,
4. the requirements of a proper review procedure, and
5. the co-operative approach of defence counsel

1. *R v Chu*, 2016 SKCA 156 (CanLII), 344 CCC (3d) 51, *per* Jackson JA, at para 82
2. *Chu*, *ibid.*, at para 82

Case Digests

- Adjournments (Cases)

See Also

- Precedent - Procedural - Adjournment

Public and Media Restrictions

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Topics

- Open Court Principle
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- Excluding People From Court

Change of Venue

< Procedure and Practice < Pre-Trial and Trial Matters

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General Principles

Crown Discretion to Select Venue

While once the norm, the place of trial is no longer in the sole discretion of the Crown to choose.[1] Instead, they retain discretion on choosing where a trial will take place but can be subject to an application under s. 599 to change the venue.[2]

Motion to Change Venue

The venue of trial may be changed on application under s. 599. That provision states:

> **Change of Venue**
> **Reasons for change of venue**
>
> 599 (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if
>
> (a) it appears expedient to the ends of justice, including
>
> (i) to promote a fair and efficient trial, and
> (ii) to ensure the safety and security of a victim or witness or to protect their interests and those of society; or
>
> (b) a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held.
>
> (2) [Repealed, R.S., 1985, c. 1 (4th Supp.), s. 16]
> [*omitted (3), (4) and (5)*]
> R.S., 1985, c. C-46, s. 599; R.S., 1985, c. 1 (4th Supp.), s. 16; 2019, c. 25, s. 267.
>
> – CCC

Burden

There is a long-standing common law presumption and tradition that a trial should take place in the district where the offence ocurred.[3]

The onus is on the applicant to establish that such an order “appears expedient to the ends of justice”.[4] Traditionally, a change of venue is rare and not without very good reason with strong evidence.[5]

Requirements

The test is whether "a fair and reasonable probability of partiality or prejudice in the jurisdiction" of origin.[6] The "fundamental consideration is whether a change of venue is necessary in order to ensure that an accused has a fair trial with an impartial jury."[7]

Authorized Justice

The selection of venue of trial is "an administrative matter" of the courts and lies with the Chief Justice or their designate to decide.[8]

Transfer Outside of Province

A superior court judge cannot transfer a matter to a different province where the offence was committed entirely within the originating province or territory.[9]

Change in Circumstances

Where the grounds of issuing a transfer are no longer present, the matter can be returned to the original jurisdiction.[10]

1. *R v Davis*, 2018 ONSC 4630 (CanLII), *per* Di Luca J, at para 21
2. *Davis*, *ibid.*, at paras 24 to 25
3. *R v Kellar*(1973), 24 CRNS 71(*no CanLII links) , at p. 77 (There is a "prima facie rule that an accused should be tried at the place which the offence is alleged to have been committed")
   R v Singh, 2018 ONSC 1532 (CanLII), *per* Durno J, at para 150 ("There remains a presumption that a trial will be held in the place where the offence occurred. Reasons of convenience, court efficiency, and the need for members of the community in which the crime is alleged to have occurred to see justice done all continue to support holding the trial where the indictment was filed. However, in Canada there is no right to have a trial in a particular city, village or town where the offence occurred…")
   Jeffries, *supra*, *per* Gauthier J, at para 33 ("There is no doubt that the common law rule, that the trial of a matter should take place in the district, county, or place in which the offence is alleged to have occurred, is of ancient pedigree.") see also *R v Suzack*, 2000 CanLII 5630 (ON CA), 141 CCC (3d) 449, *per* Doherty JA ("It is a well-established principle that criminal trials should be held in the venue in which the alleged crime took place. This principle serves both the interests of the community and those of the accused")
4. *Suzack*, *ibid.*
5. *R v Conroy*, [1995] OJ No 1667(*no CanLII links) , at para 9
   Salhany, Canadian Criminal Procedure 6th ed., 2-470 ("As a general rule, the court is reluctant to change the place of trial since the county or district where the offence is alleged to have been committed has prima facie jurisdiction.")
   R v Alward, 1976 CanLII 1214 (NB CA), 32 CCC (2d) 416, *per* Limerick JA ("The mere fact that Mr. Wil-let died as a result of a robbery in Fredericton and that there was considerable publicity disseminated by the news media would not necessarily preclude the accused from a fair and impartial trial. There must be very strong evidence of a general prejudicial attitude in the community as a whole to justify a change of venue:...")
   R v Beaudry, 1965 CanLII 690 (BC SC), 3 CCC 51, *per* Aikins J
6. *Beaudry*, *supra*, *per* Aikins J, at p. 54
7. *R v Collins*, 1989 CanLII 264 (ON CA), 48 CCC (3d) 343, *per* Goodman JA
   R v Charest, 1990 CanLII 3425 (QC CA), 57 CCC (3d) 312, *per curiam*
8. *R v Jeffries*, 2010 ONSC 772 (CanLII), 86 WCB (2d) 859, *per* Gauthier J, at para 53 ("It may well be said that, in the context of this case, Timmins' connection to the charge is that it is closer, and Sudbury's connection to the charge is that it is within the same district as the place in which the offence was allegedly committed. Following the argument to its conclusion would indicate that the Crown does hold the discretion to select the venue of trial, since both venues do have some connection to the charge. The answer to this argument brings us to the third point, which is that the selection of a venue of trial is an administrative matter, for which the authority lies with the Chief Justice of the Superior Court or her statutory designate, the Regional Senior Justice.")
9. *R v Threinen*, 1976 CanLII 1452 (SK QB), 30 CCC (2d) 42, *per* Hughes J, at pp. 44-5
10. *Kellar*, *supra*

Procedure

599.
[*omitted (1) and (2)*]

Conditions respecting expense

(3) The court or judge may, in an order made on an application by the prosecutor under subsection (1) [*reasons for change of venue*], prescribe conditions that he thinks proper with respect to the payment of additional expenses caused to the accused as a result of the change of venue.

Transmission of record

(4) Where an order is made under subsection (1) [*reasons for change of venue*], the officer who has custody of the indictment, if any, and the writings and exhibits relating to the prosecution, shall transmit them forthwith to the clerk of the court before which the trial is ordered to be held, and all proceedings in the case shall be held or, if previously commenced, shall be continued in that court.

Idem

(5) Where the writings and exhibits referred to in subsection (4) [*change of venue – transmission of record*] have not been returned to the court in which the trial was to be held at the time an order is made to change the place of trial, the person who obtains the order shall serve a true copy thereof on the person in whose custody they are and that person shall thereupon transmit them to the clerk of the court before which the trial is to be held.
R.S., 1985, c. C-46, s. 599; R.S., 1985, c. 1 (4th Supp.), s. 16; 2019, c. 25, s. 267.
[*annotation(s) added*]

– CCC

Order is authority to remove prisoner

> 600 An order that is made under section 599 [*change of venue*] is sufficient warrant, justification and authority to all sheriffs, keepers of prisons and peace officers for the removal, disposal and reception of an accused in accordance with the terms of the order, and the sheriff may appoint and authorize any peace officer to convey the accused to a prison in the territorial division in which the trial is ordered to be held.
> R.S., c. C-34, s. 528.
> [*annotation(s) added*]
>
> – CCC

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- Jurisdiction of the Courts

Peace Bonds

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Introduction

A Peace Bond is a form of recognizance (a pledge to judge or justice to abide by conditions) that can be required at the request of either Crown or Defence, or on the Court's own motion. The Peace Bond lasts for up to 12 months and may include conditions such as requiring the accused to "keep the peace", to refrain from contact or communication with a named party, or not to possess any weapons or ammunition.

Timing

The Peace Bond can be ordered at any point before or during a trial.

Right to a Hearing

Where a trial judge is considering imposing common law peace bond, he must allow parties to make submissions on it, as a matter of fairness, before deciding.[1]

1. e.g. see *R v Riad*, 2014 ONSC 3407 (CanLII), *per* Campbell J, at paras 9 to 10

Common Law

The peace bond traces back to the English common law as a form of "preventative justice". It "empowers justices to place a person under bond where it appears the person may be a threat to peace, regardless of the fact the person has committed no offence." [1]

The common law peace bond still exists. It is not a criminal punishment that is extinguished by s. 9 of the Criminal Code and is affirmed by section 8(2)[2]

1. *Stevenson v Saskatchewan (Minister of Justice)*, 1987 CanLII 4983 (SKQB), , 61 Sask.R.91 (Q.B.), *per* Halvorson J
   R v Siemens, 2012 ABPC 116 (CanLII), 541 AR 62, *per* Rosborough J
   see also *Mackenzie v Martin*, 1954 CanLII 10 (SCC), [1954] SCR 361, *per* Kerwin J, at p. 370
2. 8.(2) The criminal law of England that was in force in a province immediately before April 1, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

Statute

The peace bond provisions between s.810 and 810.2 are all invoked on the same standard, whether the judge is "satisfied by the evidence adduced that the informant has reasonable grounds for the fear" that he will commit one of the enumerated offences.[1] Where satisfied, the accused will be required to enter into a recognizance to "keep the peace and be of good behaviour".

Proceedings under s. 810 to 810.2 are more civil than criminal nature. It is not designed to punish for past bad acts, but rather is preventative in nature. It only carries the potential for criminal charges upon violation.[2]

The court must assess the "present risk" of the person in committing an enumerated offence in the future. The court must consider "all relevant factors in a person's life" and "factors that are not immutable but will change over time".[3] Then the court must balance the interests in protecting the victims of the enumerated crime and the interest of the person's liberty.[4]

The purpose of s. 810.1 is not to punish but to prevent crime from happening.[5]

Section 810.1 does not violate s. 7 and is constitutional.[6]

Orders under s. 810.1 is "designed to protect children from victimization." [7]

Procedure

There is a dispute over whether the procedures of Part XVI of the Code have an application to proceedings in relation to peace bonds.[8]

Peace Bond Against a Young Person

Under s. 20 of the YCJA, a justice may make a s. 810 order against a young person:

> 20
> [*omitted (1)*]
>
> **Orders under section 810 of Criminal Code**
>
> (2) A justice has jurisdiction to make an order under section 810 (recognizance — fear of injury or damage) of the Criminal Code in respect of a young person. If the young person fails or refuses to enter into a recognizance referred to in that section, the justice shall refer the matter to a youth justice court.
> 2002, c. 1, s. 20; 2019, c. 13, s. 160.
>
> – YCJA

1. See comment *R v Nawakayas*, 2013 SKPC 35 (CanLII), *per* Morgan J, at para 1
2. *R v Bilida*, 1999 ABQB 1016 (CanLII), 256 AR 336, *per* Martin J ("... is not a criminal charge, nor does it address past misconduct")
   cf. *R v Fontaine*, 2010 SKPC 16 (CanLII), 356 Sask R 229, *per* Nightingale J rejects view of it as a "quasi-criminal" proceeding
   Nawakayas, *supra*, at paras 7, 8
   R v Budreo, 2000 CanLII 5628 (ON CA), 142 CCC (3d) 225, *per* Laskin JA (s. 810.1 "is a preventative provision not a punitive provision.")
3. *Budreo*, *supra*, at paras 25, 33
4. *Budreo*, *ibid.*, at para 39
5. *Budreo*, *ibid.*, at para 30
   Nawakayas, *supra*, at paras 7 to 13
6. *Budreo*, *supra*
   R v Sem Paul Obed, 2000 CanLII 28287 (NS PC), *per* C Williams J
7. *R v Loysen*, 2006 SKQB 290 (CanLII), 213 CCC (3d) 281, *per* Wilkinson J, at para 1
   Budreo, *supra*, at para 25 ("It aims not to punish past wrongdoing but to prevent future harm to young children, to prevent them from being victimized by sexual abusers.....It is about assessing the present risk of a person committing a sexual offence against young children...")
8. *R v Penunsi*, 2018 NLCA 4 (CanLII), 357 CCC (3d) 539, *per* Hoegg JA
   MacAusland v Pyke, 1995 CanLII 4541 (NS SC), 96 CCC (3d) 373, *per* Kelly J

Laying on Information

The "laying of an information" does not require the applicant swear and information before a provincial court judge.[1]

1. *R v RK*, 2011 ONCJ 129 (CanLII), *per* J.P. Wright J

"Reasonable Grounds for the Fear"

All four types of peace bonds require that the provincial court judge be satisfied that there is "reasonable grounds for the fear" that the respondent will commit one of the enumerated offences.

The requirement of "reasonable grounds" for a "fear" suggests "a reasonably based sense of apprehension about a future event" or "a belief, objectively established, that the individual will commit an offence".[1]

The judge is to look at the risk of "future harm" not "future conduct".[2]

Conditions based on proven likelihood of harm should be "relatively slight".[3]

1. *R v Budreo*, 2000 CanLII 5628 (ON CA), 142 CCC (3d) 225, *per* Laskin JA
2. *R v Letavine*, 2011 ONCJ 444 (CanLII), *per* Dechert J
3. *R v Budero*, 1996 CanLII 11800 (ON SC), 104 CCC (3d) 245, *per* Then J appealed to 2000 CanLII 5628 (ON CA), 142 CCC (3d) 225, *per* Laskin JA

Procedure

There is divided authority that suggests that where an information has been laid under s. 810, the court may rely on the provisions of Part XVI [Compelling Appearance of Accused Before a Justice and Interim Release] to authorize arrest warrants and governs bail.[1]

1. *R v Budreo*, 2000 CanLII 5628 (ON CA), 142 CCC (3d) 225, *per* Laskin JA
   R v Cachine, 2001 BCCA 295 (CanLII), 154 CCC (3d) 376, *per* Rowles JA *contra R v Penunsi*, 2018 NLCA 4 (CanLII), 357 CCC (3d) 539, *per* Hoegg JA

Evidence

The onus is on the Crown to satisfy the court on a balance of probabilities that there are sufficient grounds to make the order.[1]

The court must consider all relevant evidence.[2]

The standards of evidence are relaxed and may include hearsay.[3]

Hearsay evidence is admissible but may be given limited weight.[4] However, second-hand information will mostly be considered non-hearsay since it is tendered for the purpose of establishing belief and not the underlying fact.[5]

1. *R v Nawakayas*, 2013 SKPC 35 (CanLII), *per* Morgan J, at para 13
   see *R v Soungie*, 2003 ABPC 121 (CanLII), 341 AR 350, *per* Allen J
   R v Boone, 2003 MBQB 292 (CanLII), 179 Man R (2d) 227, *per* Darichuk J, at para 8
2. *Nawakayas*, *supra*, at para 13
   see *R v Loysen*, 2006 SKQB 290 (CanLII), 213 CCC (3d) 281, *per* Wilkinson J, at para 17
3. *Nawakayas*, *supra*, at para 18
4. *Nawakayas*, *supra*, at para 15
5. *Nawakayas*, *supra*, at para 18

Types of Peace Bonds

Risk of Injury Peace Bond (810)

- Peace Bond (Injury)

Organized Crime Peace Bond (810.01)

- Peace Bond (Organized Crime)

Terrorism Peace Bond (83.3 and 810.011)

- Peace Bond (Terrorism)

Forced Marriage (810.02)

- Peace Bond (Force Marriage)

Sexual Offence Peace Bond (810.1)

- Peace Bond (Sexual Offences)

Serious Personal Injury Peace Bond (810.2)

- Peace Bond (Serious Personal Injury)

Protection of Vulnerable Witness Peace Bond (810.5)

> **Orders under sections 486 to 486.5 and 486.7**
>
> 810.5 (1) Sections 486 to 486.5 [*provisions protecting victims and witnesses*] and 486.7 [*witness security order – application and factors*] apply, with any necessary modifications, to proceedings under any of sections 83.3 [*terrorism recognizance*] and 810 to 810.2 [*peace bonds*].
>
> **Offence — order restricting publication**
>
> (2) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) [*order restricting publication – sexual offences*] or subsection 486.5(1) [*order restricting publication – victims and witnesses*] or (2) [*order restricting publication – justice system participants*] in proceedings referred to in subsection (1) [*provisions relating to witness protection apply to peace bond hearings*] is guilty of an offence under section 486.6 [*breach of s. 486.4 and 486.5 publication ban*].
>
> 2019, c. 13, s. 154.
> [*annotation(s) added*]
>
> – CCC

Breaches of a Peace Bond

Breach of recognizance

811 A person bound by a recognizance under any of sections 83.3 [*terrorism recognizance*] and 810 to 810.2 [*peace bonds*] who commits a breach of the recognizance is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than four years; or
(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 811; 1993, c. 45, s. 11; 1994, c. 44, s. 82; 1997, c. 17, s. 10, c. 23, ss. 20, 27; 2001, c. 41, s. 23; 2015, c. 20, s. 27, c. 23, s. 19, c. 29, s. 12; 2019, c. 25, s. 322.
[*annotation(s) added*]

– CCC

An offence of a "breach of recognizance" under s. 811 is an absolute jurisdiction offence under s. 553(c)(ix) and so there is no defence election. It must be tried by a provincial court judge.

A breach of a peace bond order cannot amount to a breach of an undertaking under s. 145(3).[1]

Terms of a peace bond apply to conduct that occurs in other provinces.[2]

1. *R v Simancek*, [1993] OJ No 1342 (O.C.A.)(*no CanLII links)
2. see e.g. *R v Pheiffer*, 1999 BCCA 558 (BC CA), 139 CCC (3d) 552, *per* Ryan JA

Ranges

- *R v Depew*, 2012 ABPC 303 (CanLII), *per* Semenuk J - 12 months

History

On July 17, 2015, the Tougher Penalties for Child Predators Act (Bill C-26) came into force resulting in an increase of the maximum penalties for convictions s. 811. On summary conviction, the maximum penalties increased from 6 months and to 18 months. On indictable election, the maximum penalties increased from 2 years to 4 years.

Appearance by Video Link

Audioconference or videoconference

810.21 (1) If a defendant is required to appear under any of sections 83.3 [*terrorism recognizance*] and 810 to 810.2 [*peace bonds*], a provincial court judge may, on application of the prosecutor, order that the defendant appear by audioconference or videoconference.

Application

(2) Despite section 769 [*application of judicial interim release provisions*], sections 714.1 to 714.8 [*video and audio evidence*] and Part XXII.01 [*Pt. XXII.01 – Remote Attendance by Certain Persons (s. 715.21 to 715.26)*] apply, with any necessary modifications, to proceedings under this section.

2015, c. 20, s. 26; 2019, c. 25, s. 321.
[*annotation(s) added*]

– CCC

Transfer of Bond Between Provinces

Transfer of order

810.22 (1) If a person who is bound by an order under any of sections 83.3 [*terrorism recognizance*] and 810 to 810.2 [*peace bonds*] becomes a resident of — or is charged with, convicted of or discharged under section 730 [*order of discharge*] of an offence, including an offence under section 811 [*breach of recognizance*], in — a territorial division other than the territorial division in which the order was made, on application of a peace officer or the Attorney General, a provincial court judge may, subject to subsection (2) [*transfer peace bond between provinces – AG consent*], transfer the order to a provincial court judge in that other territorial division and the order may then be dealt with and enforced by the provincial court judge to whom it is transferred in all respects as if that provincial court judge had made the order.

Attorney General's consent

(2) The transfer may be granted only with

(a) the consent of the Attorney General of the province in which the order was made, if the two territorial divisions are not in the same province; or
(b) the consent of the Attorney General of Canada, if the information that led to the issuance of the order was laid with the consent of the Attorney General of Canada.

If judge unable to act

(3) If the judge who made the order or a judge to whom an order has been transferred is for any reason unable to act, the powers of that judge in relation to the order may be exercised by any other judge of the same court.
2015, c. 20, s. 26.

– CCC

Collection and Use of Bodily Samples Under Peace Bond

Samples — designations and specifications

810.3 (1) For the purposes of sections 810 [*peace bond – injury or damage*], 810.01 [*peace bond – organized crime*], 810.011 [*terror peace bond*], 810.1 [*sex offence peace bond*] and 810.2 [*serious personal injury peace bond*] and subject to the regulations, the Attorney General of a province or the minister of justice of a territory shall, with respect to the province or territory,

(a) designate the persons or classes of persons that may take samples of bodily substances;
(b) designate the places or classes of places at which the samples are to be taken;
(c) specify the manner in which the samples are to be taken;
(d) specify the manner in which the samples are to be analyzed;
(e) specify the manner in which the samples are to be stored, handled and destroyed;
(f) specify the manner in which the records of the results of the analysis of the samples are to be protected and destroyed;
(g) designate the persons or classes of persons that may destroy the samples; and
(h) designate the persons or classes of persons that may destroy the records of the results of the analysis of the samples.

Further designations

(2) Subject to the regulations, the Attorney General of a province or the minister of justice of a territory may, with respect to the province or territory, designate the persons or classes of persons

(a) to make a demand for a sample of a bodily substance for the purposes of paragraphs 810(3.02)(b) [*conditions in recognizance &ndash bodily sample on demand (abstention breach)*], 810.01(4.1)(f) [*peace bond &ndash conditions – bodily sample on demand (abstention breach)*], 810.011(6)(e) [*terror peace bond – conditions – bodily sample on demand (abstention breach)*], 810.1(3.02)(h) [*sex offence peace bond – conditions – bodily sample on demand (abstention breach)*] and 810.2(4.1)(f) [*serious personal injury peace bond – conditions – bodily sample on demand (abstention breach)*]; and
(b) to specify the regular intervals at which a defendant must provide a sample of a bodily substance for the purposes of paragraphs 810(3.02)(c) [*conditions in recognizance – bodily sample reg interval (abstention breach)*], 810.01(4.1)(g) [*peace bond &ndash conditions – bodily sample reg interval (abstention breach)*], 810.011(6)(f) [*terror peace bond – conditions – bodily sample reg interval (abstention breach)*], 810.1(3.02)(i) [*sex offence peace bond – conditions – bodily sample reg interval (abstention breach)*] and 810.2(4.1)(g) [*serious personal injury peace bond – conditions – bodily sample reg interval (abstention breach)*].

Restriction

(3) Samples of bodily substances referred to in sections 810 [*peace bond – injury or damage*], 810.01 [*peace bond – organized crime*], 810.011 [*terror peace bond*], 810.1 [*sex offence peace bond*] and 810.2 [*serious personal injury peace bond*] may not be taken, analyzed, stored, handled or destroyed, and the records of the results of the analysis of the samples may not be protected or destroyed, except in accordance with the designations and specifications made under subsection (1) [*peace bond samples – designations and specifications*].

Destruction of samples

(4) The Attorney General of a province or the minister of justice of a territory, or a person authorized by the Attorney General or minister, shall cause all samples of bodily substances provided under a recognizance under section 810 [*peace bond – injury or damage*], 810.01 [*peace bond – organized crime*], 810.011 [*terror peace bond*], 810.1 [*sex offence peace bond*] or 810.2 [*serious*

personal injury peace bond] to be destroyed within the period prescribed by regulation unless the samples are reasonably expected to be used as evidence in a proceeding for an offence under section 811 [*breach of recognizance*].

Regulations

(5) The Governor in Council may make regulations

(a) prescribing bodily substances for the purposes of sections 810 [*peace bond – injury or damage*], 810.01 [*peace bond – organized crime*], 810.011 [*terror peace bond*], 810.1 [*sex offence peace bond*] and 810.2 [*serious personal injury peace bond*];
(b) respecting the designations and specifications referred to in subsections (1) [*peace bond samples – designations and specifications*] and (2) [*peace bond samples – further designations*];
(c) prescribing the periods within which samples of bodily substances are to be destroyed under subsection (4) [*peace bond samples – destruction of sample*]; and
(d) respecting any other matters relating to the samples of bodily substances.

Notice — samples at regular intervals

(6) The notice referred to in paragraph 810(3.02)(c) [*conditions in recognizance – bodily sample reg interval (abstention breach)*], 810.01(4.1)(g) [*peace bond &ndash conditions – bodily sample reg interval (abstention breach)*], 810.011(6)(f) [*terror peace bond – conditions – bodily sample reg interval (abstention breach)*], 810.1(3.02)(i) [*sex offence peace bond – conditions – bodily sample reg interval (abstention breach)*] or 810.2(4.1)(g) [*serious personal injury peace bond – conditions – bodily sample reg interval (abstention breach)*] must specify the places and times at which and the days on which the defendant must provide samples of a bodily substance under a condition described in that paragraph. The first sample may not be taken earlier than 24 hours after the defendant is served with the notice, and subsequent samples must be taken at regular intervals of at least seven days.
2011, c. 7, s. 11; 2015, c. 20, s. 34.
[*annotation(s) added*]

– CCC

Prohibition on use of bodily substance

810.4 (1) No person shall use a bodily substance provided under a recognizance under section 810 [*peace bond – injury or damage*], 810.01 [*peace bond – organized crime*], 810.011 [*terror peace bond*], 810.1 [*sex offence peace bond*] or 810.2 [*serious personal injury peace bond*] except for the purpose of determining whether a defendant is complying with a condition in the recognizance that they abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Prohibition on use or disclosure of result

(2) Subject to subsection (3) [*prohibition on use or disclosure of result – exception*], no person shall use, disclose or allow the disclosure of the results of the analysis of a bodily substance provided under a recognizance under section 810 [*peace bond – injury or damage*], 810.01 [*peace bond – organized crime*], 810.011 [*terror peace bond*], 810.1 [*sex offence peace bond*] or 810.2 [*serious personal injury peace bond*].

Exception

(3) The results of the analysis of a bodily substance provided under a recognizance under section 810 [*peace bond – injury or damage*], 810.01 [*peace bond – organized crime*], 810.011 [*terror peace bond*], 810.1 [*sex offence peace bond*] or 810.2 [*serious personal injury peace bond*] may be disclosed to the defendant to whom they relate, and may also be used or disclosed in the course of an investigation of, or in a proceeding for, an offence under section 811 or, if the results are made anonymous, for statistical or other research purposes.

Offence

(4) Every person who contravenes subsection (1) [*prohibition on use of bodily substance*] or (2) [*prohibition on use or disclosure of result*] is guilty of an offence punishable on summary conviction.
2011, c. 7, s. 11; 2015, c. 20, s. 34.
[*annotation(s) added*]

– CCC

Proof of certificate of analyst — bodily substance

811.1 (1) In a prosecution for breach of a condition in a recognizance under section 810 [*peace bond – injury or damage*], 810.01 [*peace bond – organized crime*], 810.011 [*terror peace bond*], 810.1 [*sex offence peace bond*] or 810.2 [*serious personal injury peace bond*] that a defendant not consume drugs, alcohol or any other intoxicating substance, a certificate purporting to be signed by an

analyst that states that the analyst has analyzed a sample of a bodily substance and that states the result of the analysis is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person who appears to have signed the certificate.

Definition of analyst

(2) In this section, analyst has the same meaning as in section 320.11 [*offences relating to conveyances – definitions*].

Notice of intention to produce certificate

(3) No certificate shall be admitted in evidence unless the party intending to produce it has, before the trial, given reasonable notice and a copy of the certificate to the party against whom it is to be produced.

Requiring attendance of analyst

(4) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for cross-examination.
2011, c. 7, s. 12; 2015, c. 20, s. 34; 2018, c. 21, s. 27.
[*annotation(s) added*]

– CCC

See Also

- *R v Siemens*, 2012 ABPC 116 (CanLII), 541 AR 62, *per* Rosborough J gives a detailed summary of the history of the peacebond
- Weapons Prohibition Orders

Application Digests

- *Janzen (Re)*, 2010 SKPC 35 (CanLII), 354 Sask R 94, *per* Agnew J - denied
- *R v Kitchener*, 2008 SKPC 139 (CanLII), 322 Sask R 285, *per* Morgan J - granted
- *R v DAD*, 2007 BCPC 16 (CanLII), BCJ No 159, *per* Brecknell J - granted
- *R v GRW*, 2006 BCPC 557 (CanLII), *per* Pothecary J - denied
- *R v Olson*, 2002 CanLII 46254 (MB PC), 54 WCB (2d) 31, *per* Stewart J - denied

Rule Against Collateral Attacks on Court Orders

< Sentencing < Available Sentences < Probation

General Principles

All orders made by courts with lawful jurisdiction must be obeyed unless they are set aside by proper application.[1] Challenge to that order outside of a hearing to set aside the order is known as a "collateral attack" upon the order. It generally prohibited.[2] The purpose of the rule is to "ensur[e] court orders are considered final and conclusive" and must be obeyed unless set aside by "an established judicial procedure".[3]

The rule does *not* apply to the findings of fact underlying the order.[4]

The rule against collateral attack has been recognized as arising from the doctrine of abuse of process whereby violations of the rule are a form of abuse.[5]

Even where an order allegedly violates a constitutional right, the rule against collateral attack can still apply.[6]

The rule applies to many types of orders including:

- peace bonds[7]
- provincial administrative orders[8]
- undertakings[9]
- probation orders[10]
- search warrants[11]

It however has been found not to apply in circumstances such as:

- a pre-trial severance order[12]

Probation Orders

An established procedure to attack a probation order would include making application under s. 732.2(3) to amend the order.[13]

1. *R v Curragh Inc*, 1997 CanLII 381 (SCC), [1997] 1 SCR 537, 144 DLR (4th) 614, *per* Forest and Cory JJ, at para 8 (“[E]very order of a trial court is enforceable and must be obeyed until it is declared void by an appellate court.”)
2. *R v Wilson*, 1983 CanLII 35 (SCC), [1983] 2 SCR 594, *per* McIntyre J at 599 ("It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.")
Danyluk v Ainsworth Technologies Inc, 2001 SCC 44 (CanLII), [2001] 2 SCR 460, *per* Binnie J, at para 20 ("a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it")
Garland v Consumers' Gas Co., 2004 SCC 25 (CanLII), [2004] 1 SCR 629, *per* Iacobucci J, at para 71 ("The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal. Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review)")
Canada (Attorney General) v TeleZone Inc, 2010 SCC 62 (CanLII), [2010] 3 SCR 585, *per* Binnie J, at para 60
R v Love, 2011 ONCJ 134 (CanLII), *per* Wright J, at para 10
R v Consolidated Maybrun Mines Ltd, 1998 CanLII 820 (SCC), [1998] 1 SCR 706, *per* L'Heureux-Dubé J - re collateral attacks on administrative orders
See *R v Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 SCR 333, *per* Iacobucci J
R v S(J), 2007 CanLII 44356 (ONSC), [2007] OJ No 4049 (ONSC), *per* Hill J
R v Domm, 1996 CanLII 1331 (ON CA), 111 CCC (3d) 449, *per* Doherty JA
R v Wilson, 1983 CanLII 35 (SCC), [1983] 2 SCR 594 at 604, *per* McIntyre J
R v Pastro, 1988 CanLII 214 (SK CA), 42 CCC (3d) 485, *per* Bayda CJ, at pp. 498-9
3. *Love*, *supra*, at para 10
4. *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 (CanLII), [2003] 3 SCR 77, *per* Arbour J, at para 34
5. *Toronto (City)*, *ibid.*, at paras 22 and 34
6. *Domm*, *supra*
7. *R v Pheiffer*, 1999 BCCA 558 (CanLII), 139 CCC (3d) 552, *per* Ryan JA
8. *Consolidated Maybrun*, *supra*
9. *SJ*, *supra*
10. *Love*, *supra*
11. *Pastro*, *supra*
12. *Litchfield*, *supra*
13. *Love*, *supra*, at para 14

See Also

- Presumption of Regularity

Judicial Neutrality and Bias

This page was last substantively updated or reviewed *January 2021*. (Rev. # 79564)

< Procedure and Practice < Trials
< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

Obligation of Neutrality

The judge must be neutral. This requires that the judge should "confine himself as much as possible to his own responsibilities and leave to counsel and members of the jury their respective functions."[1]

Appearance of Impartiality

It is not sufficient that the courts simply be impartial, but rather they must appear to be impartial as well.[2]

The appearance of neutrality is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[3]

Judge's Degree of Participation

Judge's are not expected to be "silent observers" in a trial.[4]

I judge can "enter the arena" for "the purpose of insisting the counsel move the case forward".[5]

A judge can participate in legal debate, challenge counsel's position and state preliminary views without creating a perception of bias.[6]

Conduct that involves the "[u]njustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality".[7]

Purpose of Neutrality

The justice system only works if it has "the respect and confidence of its society". That requires "trials that are fair" and that appear to be fair to the "informed and reasonable observer". [8]

Disqualification of Judges

The mere fact that a judge previously ruled against a litigant does not automatically disqualify them from future cases.[9] Such a history does not support an apprehension of bias.[10] Judges are presumed capable of disabusing themselves of the accused's history in their future judgement.[11]

The assessment of bias is highly fact specific.[12]

1. *R v Torbiak and Campbell*, 1974 CanLII 1623 (ON CA), , 18 CCC (2d) 229, *per* Kelly JA, at pp. 230-231
2. *Wewaykum Indian Band v Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259, *per curiam*, at para 66 ("the manifestation of a broader preoccupation about the image of justice [because] there is an overriding public interest that there should be confidence in the integrity of the administration of justice")
3. *R v Sussex Justices, Ex parte McCarthy* , [1924] 1 K.B. 256 (UK), at p. 259
4. *R v Potter; R v Colpitts*, 2020 NSCA 9 (CanLII), *per curiam*, at para 743
5. *R v Clarke*, 2014 NSSC 431 (CanLII), *per* Coady J, at para 34
6. *R v Baccari*, 2011 ABCA 205 (CanLII), 527 WAC 301, *per curiam*
7. *Clarke*, *supra*, at para 20 citing Canadian Judicial Council, "Ethical Principles for Judges", at p. 33
8. *R v RDS*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, *per* Cory J
9. *Broda v Broda*, 2001 ABCA 151 (CanLII), 286 AR 120, *per curiam*, at para 16
   R v Collins, 2011 FCA 171 (CanLII), 202 ACWS (3d) 820 *per* Mainville JA , at para 11 ("[t]he simple fact that judges render a judgment which is unfavourable to a party cannot in itself result in a conclusion of bias. Were it otherwise, no judgment could ever be issued. A reasonable apprehension of bias must be shown to exist either in the judgment itself, in the comportment of the judge or by some other means.")
   R v JNS, 2019 ABQB 557 (CanLII), *per* Mandziuk J
   R v Heisinger, 2007 NWTTC 11 (CanLII) *per* Schmaltz J, at para 6 ("The case law is clear: an accused having appeared previously before a judge will not require that the judge cannot preside on subsequent matters involving that accused. This applies whether or not an accused appeared as an accused, a party, or a witness, and whether or not credibility findings were made.")
10. *Alberta Health Services v Wang*, 2018 ABCA 104 (CanLII), *per* Slatter JA, at para 9 ("... Making decisions is the essence of the judicial function, and a reasonable person, properly informed, would not conclude that a judge would have a bias towards any one party just because that party was unsuccessful on one particular application.")
11. *R v Bolt*, 1995 ABCA 22 (CanLII), 26 WCB (2d) 18, *per* Russell JA, at para 2 ("… It is inevitable that there will be occasions when an experienced trial judge will have had some prior judicial contact with an accused. We are confident that trial judges are capable of disabusing their minds of that fact in considering the guilt or innocence of the accused in relation to the specific charge before them…")
12. *R v Potter; R v Colpitts*, 2020 NSCA 9 (CanLII), at para 742
    Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General), 2015 SCC 25 (CanLII), [2015] 2 SCR 282, *per* Abella J

Reasonable Apprehension of Bias

- Reasonable Apprehension of Bias

See Also

- Appeals
- Role of the Trial Judge
- Judicial Immunity

Crown or Judge-Ordered Termination of Proceedings

Withdraw and Dismissal of Charges

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< Procedure and Practice < Pre-Trial and Trial Matters

Withdraw of Charges

The Crown can withdraw a charge at any time prior to plea. After a plea has been entered, it may only be withdrawn with leave of the court and may require consent of the defence.

Source of Power to Withdraw

It is a Crown's prerogative power, derived from s. 8(2) and common law, to withdraw a charge prior to plea.[1]

The power to withdraw charges is possessed by the Crown alone. The judge has limited control or review of that authority.[2]

Procedure

A withdraw can be accomplished by taking the information out of possession of the court or simply refusing to put the information before the court.[3]

In practice, a charge can be withdrawn by simply writing a letter to the clerk of the court directing them not to place the information before the court.[4]

Timing of Withdraw

The Crown's authority to withdraw prior to plea is unfettered.[5]

The authority to withdraw an information requires the "commencement of a prosecution", which coincides with the decision of the justice to issue process.[6]

After the plea, the Crown may only withdraw with leave of the court.[7]

When an election to Superior Court court has been made, the charge can be withdrawn up until a preliminary inquiry is complete.

Effect of Withdraw

Once an information is withdrawn, all associated arrest warrants, recognizances, or detention orders are vacated.[8]

A detention order is associated with a particular information. A replacement information cannot carry to old detention order.[9]

A withdraw of an information, that is subsequently replaced by a different charge, may in some circumstances give rise to a plea of "autrefois acquit".[10]

1. *R v Beauchamp*, 2014 ABPC 113 (CanLII), *per* Rosborough J, at paras 9 to 10
   R v McHale, 2010 ONCA 361 (CanLII), 256 CCC (3d) 26, *per* Watt JA, at para 32 ("Despite the absence of express or necessarily implied authority in the Criminal Code, it is well-established that the Attorney General has the authority to withdraw an information prior to plea")
   R v Dick, 1968 CanLII 231 (ON SC), , [1968] 2 OR 351 (H.C.J.), *per* Lieff J, at p. 359
   R v Osborne, 1975 CanLII 1357 (NB CA), (1975), 11 NBR (2d) 48 (S.C. (A.D.)), *per* Limerick JA, at paras 17 and 30
   R v Blasko, 1975 CanLII 1405 (ON SC), , [1975] O.J. No. 1239 (H.C.J.), *per* Parker J, at paras 5 and 6
   Re Forrester and The Queen, 1976 CanLII 1433 (AB QB), 33 CCC (2d) 221 (Alta. S.C.(T.D.)), *per* Quigley J, at pp. 223-5
2. See *R v Garcia and Silva*, 1969 CanLII 450 (ON CA), , [1970] 3 CCC 124, *per* Gale CJ
   Osborne, *supra*, at pp. 411-12
3. *Beauchamp*, *supra*, at para 14
   Re Forrester and the Queen, *supra*
4. *Beauchamp*, *supra*, at paras 15 to 18
5. *Forrester*, *supra*, at para 8 ("In the present case the Crown appeared to apply for a withdrawal but in effect it need not have had to frame its intentions by way of a request, and in any event the Provincial Judge clearly stated the effect of what transpired when he said "... the charge is withdrawn by the Crown"")
6. *McHale*, *supra*, at para 77
7. *Beauchamp*, *supra*, at para 13
   Re Blasko and the Queen, *supra*
8. *Beauchamp*, *supra*, at paras 19 to 25
9. *Beauchamp*, *supra*, at paras 20 to 21
   Ex Parte Stewart, 1978 CanLII 2443 (ON SC), 42 CCC (2d) 62 (Ont.H.C.), *per* Linden J, at para 5 ("I hold that a detention order springs from the information, not from the offence itself. Once an information is withdrawn or declared void, then I believe that any detention order based upon that information must also fall.")
10. e.g. see *R v C(SS)*, 2001 ABQB 959 (CanLII), 301 AR 25, *per* Lee J

Dismissal for Want of Prosecution

A judge may make an order dismissing charges for "want of prosecution" resulting in the cessation of the proceedings.

The order can be made at any point up until the commencement of trial.

An applicant can make a motion seeking the dismissal of the charges. Typically, this will arise where a matter cannot proceed any further such as where:

1. the judge has refused to adjourn a matter
2. the Crown elects to "offer no evidence"
3. the crown has failed to attend or is otherwise incapable of moving a prosecution forward

The authority to dismiss charges is discretionary.[1]

A judge cannot make an order to dismiss for want of prosecution where the prosecutor is late in attending court.[2] And particularly where a guilty plea has already been entered.[3]

1. *R v Fletcher and Smith*, 1990 CanLII 2507 (NSCA), 99 NSR (2d) 258, *per* MacDonald JA, at p. 260 or, at para 7
2. *R v Moreland*, 1994 CanLII 1016 (BC SC), *per* Hutchison J
3. *R v Siciliano*, 2012 ONCA 168 (CanLII), *per curiam*

Dismissal Due to Non-Appearance of Relevant Party

> **Non-appearance of prosecutor**
>
> 799 Where, in proceedings to which this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] applies, the defendant appears for the trial and the prosecutor, having had due notice, does not appear, the summary conviction court may dismiss the information or may adjourn the trial to some other time on such terms as it considers proper.

R.S., c. C-34, s. 734.

– CCC

Simply dismissing matters on the docket for non-attendance of the Crown without any inquiry into the reasons for delay is not a judicial exercise of discretion.[1] The same rule would apply for failure of Crown witnesses to attend.[2]

1. *R v Fletcher*, 1990 CanLII 2507 (NSCA), 270 APR 258, *per* MacDonald JA - judge dismisses the docket because crown is not present 4 minutes after court opens
2. *R v Carvery*, 1992 CanLII 2603 (NSCA), 299 APR 350, *per* Hallett JA

Recommence Dismissed Charges

A charge that is dismissed for want of prosecution may be recommenced with the laying of a new information or direct indictment only with written consent of the Attorney General or Deputy Attorney General:

Recommencement where dismissal for want of prosecution

485.1 Where an indictment in respect of a transaction is dismissed or deemed by any provision of this Act to be dismissed for want of prosecution, a new information shall not be laid and a new indictment shall not be preferred before any court in respect of the same transaction without

(a) the personal consent in writing of the Attorney General or Deputy Attorney General, in any prosecution conducted by the Attorney General or in which the Attorney General intervenes; or
(b) the written order of a judge of that court, in any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene.

R.S., 1985, c. 27 (1st Supp.), s. 67.

– CCC

Dismissal After Trial

Under s.804, a summary conviction court may dismiss an information at the conclusion of trial.

Upon dismissing the charge, the summary conviction court must make an order of dismissal. Section 808 states:

Order of dismissal

808 (1) Where the summary conviction court dismisses an information, it may, if requested by the defendant, draw up an order of dismissal and shall give to the defendant a certified copy of the order of dismissal.

Effect of certificate

(2) A copy of an order of dismissal, certified in accordance with subsection (1) [*summary conviction court may issue order of dismissal on request*] is, without further proof, a bar to any subsequent proceedings against the defendant in respect of the same cause.
R.S., c. C-34, s. 743.

– CCC

See Also

- Trial Verdicts
- Directed Verdicts

Constitutional Challenges to Legislation

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Introduction

Section 52 of the Constitution Act, 1982 establishes the supremacy of the Constitution over all other laws in Canada:

> **Primacy of Constitution of Canada**
>
> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> – CONST, 1982

Any laws that are found in violation of any part of the Constitution, including the Charter, will be of no force or effect.

Purpose of Judicial Review of Law

The purpose of the Charter is to be "anti-majoritarian". It is to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[1]

Anti-Majoritarian

It has been observed that the purpose of the Charter is not to conform to the will of the majority but instead to protect individuals from it.[2] That being said, there are various aspects of analysis that conform to public attitudes and norms:

- the "living tree" purposive approach to analysis of text,
- the normative analysis of s. 8,
- the consideration of "society's interests" in s. 24(2) analysis and
- the "standards of decency"/toleration of Canadian society test for s. 12.

Standing

Any person with legal standing may make an application to the court declare any provincial or federal law unconstitutional and of no force or effect.

The rights of the specific claimant do not need to be impugned by the legislation in order to challenge it.[3] As long as the claimant otherwise has standing, they may seek a "declaration of invalidity" if the law affects their case or one of a third party.[4] The reason is that the "issue" is the "nature of the law" and not the status of the accused.[5] Further, the dependency on "precise facts" may risk allowing "bad law" to remain valid indefinitely, violating the rule of law that says no one should be subject to invalid laws.[6]

Powers of Provincial Court

A provincial court judge has no power to make a "declaration of invalidity" against any provision of law. They may, however, decide to "decline to apply the law" on the basis of a provision's unconstitutionality. Only a court of "inherent jurisdiction" (i.e. a superior court) may make such a declaration.[7]

Notice

Any challenge to federal legislation requires that notice be given to the Attorney General of Canada.

Discretion of Crown Not a Defence

An unreasonable law that otherwise violates the Charter cannot be protected on the basis that the "prosecution will behave honourably".[8]

1. *Hislop v Canada (Attorney General)*, 2003 CanLII 37481 (ON SC), 234 DLR (4th) 465, *per* Ellen Macdonald J, at para 17 citing West Virginia Bd v Barnette, 319 U.S. 624 (1943), Hisop appealed on other grounds at 2009 ONCA 354 (CanLII)
2. *R v Drumonde*, 2019 ONSC 1005 (CanLII), *per* Schreck J, at para 39
   R v Collins, 1987 CanLII 84 (SCC), [1987] 1 SCR 265, *per* Lamer J, at p. 282 ("[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority")
   See also *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 84
   Template:CanLIIRCP, at para 21
3. *R v Nur*, 2015 SCC 15 (CanLII), [2015] 1 SCR 773, *per* McLachlin CJ, at para 51 ("This Court has consistently held that a challenge to a law under s. 52 of the Constitution Act, 1982 does not require that the impugned provision contravene the rights of the claimant")
   R v Big M Drug Mart Ltd, 1985 CanLII 69 (SCC), [1985] 1 SCR 295, *per* Dickson J at p. 314
   R v Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30
   R v Wholesale Travel Group Inc, 1991 CanLII 39 (SCC), [1991] 3 SCR 154, *per* Lamer CJ
   R v Heywood, 1994 CanLII 34 (SCC), [1994] 3 SCR 761, *per* Cory J
   R v Mills, 1999 CanLII 637 (SCC), [1999] 3 SCR 668, *per* McLachlin and Iacobucci JJ
   R v Ferguson, 2008 SCC 6 (CanLII), [2008] 1 SCR 96, *per* McLachlin CJ, at paras 58 to 66
4. *Nur*, *supra*, at para 51
   Ferguson, *supra*, at para 59
5. *Big M*, *supra* at p. 314
   Nur, *supra*, at para 51

6. *Nur*, *supra*, at para 51
7. *R v Lloyd*, 2016 SCC 13 (CanLII), [2016] 1 SCR 130, *per* McLachlin CJ, at para 19
8. *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61 (CanLII), [2002] 3 SCR 209, *per* Arbour J

Procedure

Arguments challenging the constitutionality of a statute should be heard only at the end of all the evidence.[1]

It has been suggested that Courts should not entertain constitutional issues if it is not necessary to resolve the case.[2]

Jurisdiction

A challenge to legislation will generally be treated, for the purpose of jurisdiction, as a civil matter. Consequently, there is greater jurisdiction to address breaches and s. 1 arguments.[3]

Presumption

There is a presumption of constitutionality for all legislation.[4] When there are "two plausible characterization agrees of a law, we should normally choose that which supports the law's constitutional validity".[5]

Evidence in Challenging Legislation

It is accepted that to challenge legislation there should be both "adjudicative facts" and "legislative facts".[6]

1. *R v Iverson*, 2009 ABPC 254 (CanLII), *per* Sully J, at para 8 - Defence must call "evidence to the contrary" before making charter argument cf. *R v Tidlund*, 2010 ABPC 29 (CanLII), 486 AR 370, *per* Fradsham J
2. *R v Kinnear*, 2005 CanLII 21092 (ON CA), 198 CCC (3d) 232, *per* Doherty JA, at para 59
3. *R v Boutilier*, 2016 BCCA 24 (CanLII), 332 CCC (3d) 315, *per* Neilsen JA, at para 56 ("Because jurisdiction over criminal law and procedure is within the exclusive jurisdiction of the federal Parliament under s. 91(27) of the Constitution Act, 1867, a provincial statute like the Court of Appeal Act is not applicable in ordinary criminal proceedings. An application for a declaration that a provision of the Criminal Code is unconstitutional, however, is not an ordinary criminal proceeding.")
   R v Ndhlovu, 2018 ABCA 260 (CanLII), *per curiam*, at para 7
   R v White, 2008 ABCA 294 (CanLII), 236 CCC (3d) 204, *per* Slatter JA, at para 22 ("The nature of the proceedings (and therefore the available appeal rights) is not governed by the subject matter of the target statute, but rather by the substantive nature of the proceedings and the order granted. If the proceedings are essentially related to the guilt or innocence of the accused, or some issue collateral to that (such as bail, or a publication ban in a particular case), then the proceedings are governed by the appeal and other procedures in the Criminal Code. But if the proceedings are directed at the constitutionality of the statute, they are civil, even if the challenge arises in a criminal context.")
4. *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 (CanLII), [2003] 1 SCR 6, *per* Major J, at para 33
5. *Siemens*, *ibid.*, at para 33
6. MacKay early 90s
   Danson v Ontario (Attorney General), 1990 CanLII 93 (SCC), [1990] 2 SCR 1086, *per* Sopinka J
   Mackay v Manitoba, 1989 CanLII 26 (SCC), [1989] 2 SCR 357, *per* Cory J - discusses evidential requirements and states "Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel".

Notice

Where the defence challenges the constitutionality of a provision in the Criminal Code, notice must be given to the Attorney General of Canada. Where the provision is within provincial legislation, Attorney General of the province must be given notice.[1]

The provincial Judicature Act and/or the civil procedure rules may set out he te requirements of notice for a constitutional question.[2]

Generally, notice must be given to both the Attorney General of Canada and the Attorney General of the province before the issue can be heard.[3]

1. e.g. *Nova Scotia Civil Procedure Rule 31.19 and Constitutional Questions Act*, RSNS 1989, c.89
2. *R v Turnbull*, 2016 NLCA 25 (CanLII), *per* Rowe JA
3. *Turnbull*, *ibid.*, at para 12
   NF: see Judicature Act RSNL 1990, c. J-4 at s. 57(1)

Division of Powers

Legislation concerning criminal law must have three prerequisites:[1]

- a valid criminal purpose,
- prohibition, and
- penalty

1. *R v Van Kessel Estate*, 2013 BCCA 221 (CanLII), *per* Donald JA, at para 24

Overlap and Incidental Effect

Legislation that overlaps with concerns of other levels of government is acceptable.[1]

1. *General Motors of Canada Ltd. v City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 SCR 641, *per* Dickson CJ, at p. 669 ("overlap of legislation is to be expected and accommodated in a federal state")

Reference re Firearms Act, 2000 SCC 31 (CanLII), [2000] 1 SCR 783, *per* McLachlin CJ

Section 7: Life, Liberty and Security of Person

Section 7 of the Charter protects an individual's autonomy and personal legal rights from actions of the government in Canada.

Under the heading of "Legal Rights", the section states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> – CCRF

Section 7 applies to all matters concerning the "state's conduct in the course of enforcing and securing compliance with the law".[1] It can even apply to laws and state actions that are "entirely unrelated to adjudicative or administrative proceedings".[2]

It is an open question whether s. 7 imposes positive obligations upon the state.[3]

Three Types

There are three distinct types of protection within the section:[4]

- the right to life,
- the right to liberty, and
- the right to security of the person.

An applicant must establish that at least one of the three rights have been infringed upon as a result of the proceedings against him.[5]

Denial of these rights only result in a breach if they breach "fundamental justice". A remedy can only be achieved if the breach cannot be saved under s. 1 of the Charter.(see Section 1, section below)

Section 1 of the Charter

Section 1 permits the state to justify infringement of the Charter where "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

This section has been said to have limited use when considering violations of s. 7 of the Charter. The most likely appropriate circumstances will be in cases of "natural disasters, the outbreak of war, epidemics and the like".[6]

Causation

There must be "sufficient causal connection" between the law or state actions and the limitation on life, liberty or security of the person.[7] The law need not be the only or "dominant" cause of the deprivation, however, it must be "real" and not "speculative".[8]

1. *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 SCR 429, *per* McLachlin CJ, at paras 77 to 78
   New Brunswick (Minister of Health and Community Services) v G(J), 1999 CanLII 653 (SCC), [1999] 3 SCR 46, *per* Lamer CJ, at para 65
2. *Chaoulli v Quebec (A.G.)*, 2005 SCC 35 (CanLII), [2005] 1 SCR 791{, *per* Deschamps J, at paras 124, 194 to 199
3. *Gosselin v Quebec (AG)*, 2002 SCC 84 (CanLII), [2002] 4 SCR 429, *per* McLachlin CJ, at paras 82 to 83
4. *R v Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 SCR 30, at p. 52
5. *R v Beare*, 1988 CanLII 126 (SCC), [1988] 2 SCR 387, [1987] SCJ No 92, *per* La Forest J, at para 28
   Reference re Motor Vehicle Act (British Columbia) s 94(2), 1985 CanLII 81 (SCC), [1985] 2 SCR 486, [1985] SCJ No 73, *per* Lamer J, at para 30
6. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 SCR 3, *per curiam*, at para 78
7. *Bedford v Canada (A.G.)*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101, *per* McLachlin CJ, at para 76
8. *Bedford*, *ibid.*

"Everyone"

In the section, "everyone" refers to all people within Canada, including non-citizens.[1] However, it does not apply to corporate entities.[2]

1. *Singh v Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 SCR 177
   Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1 (CanLII), [2002] 1 SCR 3, *per curiam*
2. *Irwin toy ltd. v Quebec (Attorney general)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927, *per* Dickson CJ, Lamer and Wilson JJ

Life Interests

The prohibition on possession of marijuana does not engage the "life interest" where consumption could prevent people from being ill.[1]

The right to life is implicated anytime the state increases the risk of death.[2]

1. *Hitzig v Canada*, 2003 CanLII 30796 (ON CA), 177 CCC (3d) 449, *per curiam*
2. *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331, *per curiam*, at para 62
   Chaoulli, *supra*, at paras 112 to 124 and 200

Liberty Interests

The right to liberty protects an individual's freedom to act without physical restraint (i.e., imprisonment would be inconsistent with liberty unless it is consistent with fundamental justice). The court described it as "[touching] the core of what it means to be an autonomous human being blessed with dignity and independence in matters that can be characterized as fundamentally or inherently personal."[1]

Any offence that creates a "real possibility of imprisonment" will be sufficient to engage the liberty interest.[2]

1. *R v Clay*, 2003 SCC 75 (CanLII), [2003] 3 SCR 735, *per* Gonthier and Binnie JJ
2. *R v Zwicker*, 2003 NSCA 140 (CanLII), 49 MVR (4th) 69, *per* Hamilton JA, leave denied [2004] SCCA No 54

Security Interests

The right to security of the person consists of rights to privacy of the body and its health[1] and of the right protecting the "psychological integrity" of an individual. That is, the right protects against significant government-inflicted harm (stress) to the mental state of the individual.[2]

Not every interference will amount to an "adverse impact on security of the person" under s. 7. There must be "serious" "psychological or physical" impact. [3]

1. Hogg, Constitutional Law of Canada. 2003 Student Ed. Scarborough, Ontario: Thomson Canada Limited, 2003, 981.
2. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307, *per* Bastarache J
3. *Chaoulli v Quebec*, 2005 SCC 35 (CanLII), [2005] 1 SCR 791, *per* Deschamps J, at para 123

Section 7: Principles of Fundamental Justice

- Principles of Fundamental Justice

Section 12: Cruel and Unusual Punishment

Section 1: Justifiable Limitation of Rights

- Justifiable Limitations on Rights

Remedy for Unconstitutional Provisions

The remedy must be guided by the "principles of respect for the purposes and values of the Charter, and respect for the role of the legislature".[1]

The remedy must be "the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieve that objective".[2]

Powers of Provincial Court Regarding Unconstitutional Legislation

A statutory court such as a provincial court only has a power of a finding of "statutory invalidity" and not a power to make a "declaration of statute invalidity" under s. 52 of the Constitution Act, 1982. As a result the finding has no authority over other cases.[3]

Effect of a Declaration of Invalidity

Once an inherent jurisdiction court makes a declaration of invalidity, the law contravenes the constitution and so the provision "ceases to exist and is of no force and effect".[4]

A ruling of invalidity is binding on the Crown and only altered by appeal.[5]

1. *Nociar v Her Majesty the Queen*, 2008 CMAC 7 (CanLII), *per* Dawson J, at para 34
   Corbière v Canada (Minister of Indian and Northern Affairs), 1999 CanLII 687 (SCC), [1999] 2 SCR 203, *per* McLachlin and Bastarache JJ, at para 110
2. *Nociar*, *supra*, at para 34
   Corbière v Canada (Minister of Indian and Northern Affairs), *supra*, at para 110
3. *R v Lloyd*, 2016 SCC 13 (CanLII), [2016] 1 SCR 130, *per* McLachlin CJ, at paras 14 to 20
4. *R v Sarmales*, 2017 ONSC 1869 (CanLII), 139 WCB (2d) 164, *per* R. Smith J, at para 20 ("...once a declaration is made by a judge with inherent jurisdiction, that the law contravenes the Constitution, the offending section ceases to exist and is of no force and effect.")

5. *Sarmales*, *ibid.* at para 20

See Also

- Principles of Interpretation
- Offences Found to be Unconstitutional
- Maximum and Minimum Sentences
- Exclusion of Evidence Under Section 24(2) of the Charter

Mistrials

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General Principles

A mistrial is a remedy where it "is necessary to prevent a miscarriage of justice".[1] A miscarriage can arise where "a trial is unfair, or when the trial has the appearance of unfairness, viewed by a well-informed, reasonable person considering the whole of the circumstances".[2]

A finding of a mistrial is a discretionary power of the trial judge.[3] The Judge must "assess whether there is a real danger that trial fairness has been compromised."[4]

A mistrial will also arise where there is an apprehension of bias.[5]

Pre-Condition to a Mistrial

A declaration of a mistrial "should only be granted as a last resort, in the clearest of cases and where no remedy short of that relief will adequately redress the actual harm occasioned."[6] In a jury trial, a mistrial can only be ordered if the prejudice cannot be remedied by a jury instruction.[7] The decision to grant an application for a mistrial is discretionary.[8]

An appellate court should only intervene where the decision "is so clearly wrong as to amount to an injustice". [9]

For an application for a mistrial the test is "whether the appellant's ability to make full answer and defence has been impaired." [10]

Other remedies, such as mid-trial instructions, should be considered before a mistrial is granted.[11]

Impairment of Full Answer and Defence

The impairment of full answer and defence is not limited to the accused's ability to respond to the merits of the case but also the ability to make "process-oriented" challenge to the proceedings.[12]

Mistrial After Judge's Verdict

A trial judge who convicts an accused but has not yet sentenced him is not *functus* in respect of the charge any may still vacate the finding before sentencing.[13]

Mistrial After Jury Verdict

The authority of a judge to order a mistrial after a jury renders a verdict is "extremely limited".[14]

Interference with a jury verdict is permitted where:[15]

1. the jury does not render the verdict it intended; or
2. where the accused wants to raise the defence of entrapment.

Where an exception does not apply, the judge is *functus*.[16]

Ineffective legal assistance is not a valid ground for a mistrial after verdict.[17]

Timing of Application

Courts have jurisdiction to grant a mistrial even after a conviction but before sentencing.[18]

Scheduling of a Re-Trial

A retrial should be scheduled "without further delay". Only a "short period" of delay will be expected. Anything longer may open the possibility of a s. 11(b) Charter delay.[19]

Mistrial as Abuse of Process

There is some suggestion that the Crown seeking a mistrial to provide an opportunity to strengthen the case against the accused and cover for negligent preparations may be considered abusive and warrant a stay under s. 7 of the Charter.[20]

1. *R v Burke*, 2002 SCC 55 (CanLII), [2002] 2 SCR 857, *per* Major J, at para 75

see also *R v Chiasson*, 2009 ONCA 789 (CanLII), 258 OAC 50, *per curiam*
R v Toutissani, 2007 ONCA 773 (CanLII), [2007] OJ No 4364, *per* MacPherson JA

2. *R v Khan*, 2001 SCC 86 (CanLII), [2001] 3 SCR 823, *per* Arbour J, at para 27
R v Vader, 2016 ABQB 625 (CanLII), *per* DRG Thomas J, at para 10
3. *R v GC*, 2018 ONCA 392 (CanLII), 146 WCB (2d) 332, *per curiam*, at para 3
Khan, *supra*, at para 79
4. *GC*, *supra*, at para 3
Khan, *supra*, at para 79
5. *R v Burke*, 2002 SCC 55 (CanLII), 164 CCC (3d) 385, *per* Major J, at para 74
see also Reasonable Apprehension of Bias
6. *Toutissani*, *ibid.*, at para 9
R v Karim, 2010 ABCA 401 (CanLII), 493 AR 312, *per curiam*, at para 27 - a mistrial should be allowed only in "the clearest of cases where there is no other way to save the trial"
R v GC, 2018 ONCA 392 (CanLII), 146 WCB (2d) 332, *per curiam*, at para 4 ("A mistrial is a remedy of last resort...")
7. *R v Truscott*, 1960 CanLII 474 (ON CA), 126 CCC 136, *per* Porter CJ
R v Burnett, 2014 MBQB 23 (CanLII), *per* Menzies J, at para 19
8. *R v Grant (I.M.)*, 2009 MBCA 9 (CanLII), 240 CCC (3d) 462, *per* Chartier JA, at para 69
GC, *supra*, at para 4
9. *Grant*, *ibid.*, at para 69
10. *R v T(LA)*, 1993 CanLII 3382 (ON CA), [1993] OJ No 1605, 84 CCC (3d) 90, *per* Lacourciere JA, at para 8
11. *Toutissani*, *supra*
12. *R v Sandeson*, 2020 NSCA 47 (CanLII), *per* Farrar JA
13. *R v Henderson*, 2004 CanLII 33343 (ON CA), 189 CCC (3d) 447, *per* Feldman JA (3:0), at para {{{2}}} ("...where a trial judge convicts an accused but has not yet sentenced him or her, the trial judge is not functus in respect of that charge, and can, in exceptional circumstances, vacate the adjudication of guilt before sentencing...")
R v Lessard, 1976 CanLII 1417 (ON CA), 30 CCC (2d) 70, *per* Martin JA, at pp. 73 to 75
14. *Henderson*, *ibid.* ("A judge's jurisdiction to alter a jury's verdict, order a stay or declare a mistrial after a jury verdict is extremely limited.")
15. *R v Miguel Orlando Zavala-Martinez*, 2019 ONSC 1087 (CanLII), *per* Allen J, at para 8
16. *Zavala-Martinez*, *ibid.*
17. *Zavala-Martinez*, *ibid.*, at para 12
18. *R v Andersen*, 2018 BCSC 587 (CanLII), *per* Weatherill J
19. *R v Brace*, 2010 ONCA 689 (CanLII), 261 CCC (3d) 455, *per* Juriansz JA, at para 15
see also Right to a Trial Within a Reasonable Time
20. *R v D(TC)*, 1987 CanLII 6777 (ON CA), 38 CCC (3d) 434, *per* Martin JA, at p. 447 (CCC) (" In my view, however, s. 7 of the Charter constitutionalizing the requirement of "fundamental justice" might, in some circumstances, bar a second trial where the first trial has been improperly terminated. By way of example only, I consider that if, upon a breakdown of the Crown's case, a judge were to declare a mistrial in order to give the prosecution an opportunity to strengthen its case against the accused by endeavouring to find additional witnesses thereby depriving the accused of an acquittal where the Crown's initial preparation had been negligent, a second trial in those circumstances would contravene the principles of fundamental justice. ")
see also *R v Pan*, 1999 CanLII 3720 (ON CA), 134 CCC (3d) 1, *per* McMurtry CJ, Osborne, Labrosse and Charron JJA aff'd *R v Pan; Sawyer*, 2001 SCC 42 (CanLII), [2001] 2 SCR 344

Consequence of Mistrial on Future Matters

Where a mistrial is declared, the rulings on pre-trial motions will generally still apply if the prosecution is re-initiated.[1]

Section 653.1 states:

> **Mistrial — rulings binding at new trial**
>
> 653.1 In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the *Canadian Charter of Rights and Freedoms* that were made during the trial are binding on the parties in any new trial if the rulings are made — or could have been made — before the stage at which the evidence on the merits is presented.
> 2011, c. 16, s. 14.
>
> – CCC

This section is considered a "departure from previous authority from the Supreme Court of Canada to the effect that a trial judge is not bound by interlocutory rulings made at an earlier trial".[2] Its purpose is to ensure that the consequences of a mistrial are minimized and that cretian issues do not have to be re-litigated on retrial.[3]

Section 653.1 applies to rulings that relate to (1) disclosure; (2) admissibility of evidence; or (3) the Charter.[4]

Presumptions Relating to Prior Rulings

This presumption to maintaining prior ruling can be rebutted on a balance of probabilities where it is in the "interests of justice".[5]

Interests of Justice

"Interests of justice" are not limited to the interest of the parties but also the "broad-based societal concerns".[6]

Rebuttal of the presumption can include considerations such as:[7]

1. whether any new evidence will be tendered on the proposed rehearing;
2. whether any new arguments will be advanced on the proposed rehearing and the apparent merit, if any, of those arguments;
3. the interests of the parties, including any articulable prejudice fostered or perpetuated by the inability to relitigate any issue previously decided;
4. the public interest in the timely and efficient conduct of criminal trial proceedings and avoidance of unnecessary and duplicative proceedings;
5. any changes in the legal principles governing the ruling on which relitigation is proposed;

6. the nature of the evidentiary record on the basis of which the prior ruling was made, as for example, viva voce testimony; agreed statement of facts; transcripts of testimony given elsewhere and any differences in the record proposed for relitigation;
7. the nature of the issue(s) involved in the prior ruling and proposed relitigation;
8. the possibility of inconsistent rulings; and
9. any other circumstances relating to the balance of the subsequent trial proceedings that may have an impact on the continued applicability of the prior rulings.

1. *R v Lee*, 2002 CanLII 8304 (ON CA), 170 CCC (3d) 225, *per* MacPherson JA
2. *R v Davis*, 2012 ONSC 5526 (CanLII), *per* Baltman J, at para 14
3. *R v Victoria*, 2018 ONCA 69 (CanLII), 359 CCC (3d) 179, *per curiam* (3:0)
4. *Victoria*, *ibid.*, at para 51
5. *Victoria*, *ibid.*, at para 52
6. *Victoria*, *ibid.*, at para 53
7. *Victoria*, *ibid.*, at para 55

Circumstances for a Mistrial

A mistrial may be ordered where:

- an opening address and cross-examination refers to a confession that is later determined inadmissible.[1]

A mistrial will not be ordered where the accused fires trial counsel mid-trial and the new counsel wishes to have re-done the trial in a different manner. There is no right to start over again with new counsel.[2]

1. *R v Lizotte*, 1980 CanLII 2957 (QC CA), [1980] 61 CCC (2d) 423, *per* Kaufman JA
2. *R v Ramos*, 2020 MBCA 111 (CanLII), *per* Mainella JA, at paras 139 to 141

Directed Verdicts

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< Procedure and Practice < Trials < Verdicts

General Principles

A directed verdict (or "non-suit" motion) is a defence motion made at the closing of the crown's case but before the defence is to call any evidence, requesting the dismissal of the case on the basis that the essential elements of the offence are not made out. This is right of defence from the common law and not statute.[1] Historically, a successful directed verdict motion judge would literally direct a jury to enter a verdict of not guilty.[2] This has since been changed, and now does not involve the jury. It is simply a consider a motion for non-suit.[3]

Standard of Review

The standard of review of a directed verdict is one of correctness based on it being a question of law.[4]

1. *R v Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 SCR 333, *per* Iacobucci J, at paras 49 to 50, 52, 56 and 57
   R v Timminco Ltd, 2001 CanLII 3494 (ON CA), 153 CCC (3d) 521, *per* Osborne JA, at paras 18 to 20
   R v Rowbotham; Roblin, 1994 CanLII 93 (SCC), [1994] 2 SCR 463, *per* Lamer CJ, at p. 467 (" A directed verdict is not a creature of statute but rather of the common law. ")
2. *R v Declercq*, 2012 ABPC 147 (CanLII), *per* Redman J, at para 4
3. *Declercq*, *supra*
   Rowbotham, *supra*
4. See *R v Henderson (WE)*, 2012 MBCA 93 (CanLII), 284 Man R (2d) 164, *per* Chartier JA, at para 125
   R v O'Kane (PJ) et al, 2012 MBCA 82 (CanLII), 292 CCC (3d) 222, *per* Hamilton JA, at para 42
   R v Barros, 2011 SCC 51 (CanLII), 273 CCC (3d) 129, *per* Binnie J, at para 48 ("Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge")
   R v Tomlinson, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA, at para 155
   R v Richard (D.R.) et al, 2013 MBCA 105 (CanLII), 299 Man R (2d) 1, *per* Cameron JA, at para 71

Directed Verdict Test

The test to be applied for a directed verdict is whether or not there is any evidence, direct or indirect, upon which a jury, properly instructed, could reasonably convict.[1]

A directed verdict will not be granted if there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.[2] The motion for directed verdict should not be granted if there has been adduced admissible evidence which could, if believed, result in conviction. The Crown, in order to meet the test set out in Sheppard, must adduce some evidence of culpability for every essential element of the crime for which the Crown has the evidential burden.[3]

The judge must be satisfied there is some evidence that establishes each constituent element of the offence.[4]

This test is the same test that is applied at the conclusion of preliminary inquiry under s. 548(1).[5]

Weighing Evidence

The judge should not "weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made" nor should the judge draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury."[6]

Thus, the test requires that the judge not 1) weigh evidence, 2) test the quality or reliability of admissible evidence 3) draw inferences of fact. However, courts are allowed to do "limited weighing" of the evidence to assess "whether it is capable of supporting the inferences the Crown asks the jury to draw."[7]

1. *R v Arcuri*, 2001 SCC 54 (CanLII), [2001] 2 SCR 828, *per* McLachlin CJ, at para 21
   R v Monteleone, 1987 CanLII 16 (SCC), 35 CCC (3d) 193, *per* McIntyre J, at p. 161 ("whether direct or circumstantial [evidence], which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal.")
   The United States of America v Shephard, 1976 CanLII 8, , [1977] 2 SCR 1067, (1976) 30 CCC (2d) 424, *per* Ritchie J
   R v Charemski, 1998 CanLII 819 (SCC), 123 CCC (3d) 225, *per* Bastarache J, at para 2
   R v O'Kane (PJ) et al, 2012 MBCA 82 (CanLII), 292 CCC (3d) 222, *per* Hamilton JA, at paras 40 to 41
   R v Al-Enzi, 2021 ONCA 81 (CanLII), *per* Tulloch JA, at para 148
   R v Hayes, 2020 ONCA 284 (CanLII), 391 CCC (3d) 453, *per* Tulloch JA, at para 65
   R v Tomlinson, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA, at para 151
2. United States of America v Shephard
3. *Charemski*, *supra*, at para 3
4. *Arcuri*, *supra*, at para 21
5. see *R v Beals*, 2011 NSCA 42 (CanLII), 277 CCC (3d) 323, *per* Saunders JA, at para 20
   The Preliminary Hearing uses the test from United States of America v Shephard at 1080 (cited to SCR) ("Whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.")
   Arcuri, *supra*, at para 21
   see Preliminary Inquiry Evidence
6. *Moteleone*, *supra*, at p. 161
7. *Arcuri*, *supra*, at paras 1, 51xv23
   R v Beals, 2011 NSCA 42 (CanLII), 277 CCC (3d) 323, *per* Saunders JA

Circumstantial Evidence

Where the case rests on circumstantial evidence as opposed to direct evidence the judge may embark on "limited weighing" of the evidence to bridge the gap in the evidence required to establish an essential element.[1]

"Limited weighing" in circumstantial cases does not include "factual inferences" to assess credibility or reliability.[2]

The judge must determine whether the circumstantial evidence is "reasonably capable of supporting the inferences" sought *and* whether the evidence, if believed, "supports an inference of guilt".[3]

1. *R v Tomlinson*, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA, at para 153
   R v Arcuri, 2001 SCC 54 (CanLII), [2001] 2 SCR 828, *per* McLachlin CJ, at paras 23, 30
2. *Tomlinson*, *supra*, at para 153
   Arcuri, *supra*, at paras 23 and 30
3. *Tomlinson*, *supra*, at para 154
   Arcuri, *supra*, at para 23

Included Offences

Where the offence contains included offences the accused may seek a directed verdict on the primary offence as well as some but not all the included offences.[1]

1. *R v Tomlinson*, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA, at para 155
   R v Titus, 1983 CanLII 49 (SCC), [1983] 1 SCR 259, *per* Ritchie J, at p. 264

See Also

- Trial Verdicts
- Preliminary Inquiry Evidence
- Circumstantial Evidence

Stay of Proceedings

< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

There are two different types of stays. A stay can be entered by the Crown under s. 579. This type of stay is discretionary and can be reversed at the discretion of the Crown. The second type of stay is one that is ordered by the judge either on application of the accused or in limited circumstances at the judge's own initiative.

Stay of Proceedings by Crown

- Stay of Proceedings by Crown

Stay of Proceedings by Crown

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General Principles

A stay of proceedings initiated by the Crown is separate and apart from a judicial stay of proceedings.

The power to stay prosecutions applies equally to Crown prosecutions and private prosecutions.[1] Pre-enquete, where the interests of the party advancing a private prosecution conflict with that of the Crown, the role of the Crown is paramount.[2]

The Crown may direct that a proceedings be stayed under s. 579:

> **Attorney General may direct stay**
>
> 579 (1) The Attorney General or counsel instructed by the Attorney General for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by the Attorney General's or counsel's direction, as the case may be, and the entry shall then be made, at which time the proceedings shall be stayed accordingly and any undertaking or release order relating to the proceedings is vacated.
> [*omitted (2)*]
> R.S., 1985, c. C-46, s. 579; R.S., 1985, c. 27 (1st Supp.), s. 117; 2019, c. 25, s. 264.
>
> – CCC

This provision came into force on December 18, 2019.

This section is a codification of the old common law power of the Crown, *nolle prosequi* that permits a stay proceedings.[3]

Discretion of Stay

This is a right of the crown on the basis that all criminal proceedings are on behalf of the Queen.[4]

The decision to enter a stay is unilateral. The judge has no ability to control or direct the actions of the Crown in staying a proceeding.[5] The entering of a stay is to be directed to the clerk of the court and not the judge him or herself.[6]

A Crown stay of proceedings is part of the "core" of prosecutorial discretion.[7]

Timing of Stay

The language of s. 579(1) has been interpreted as permitting application anytime after an information has been laid.[8] It is not necessary that the Crown await for determination by the judge or justice to issue process.[9]

Reason for Stay

It is not necessarily an abuse of process to stay a proceedings to protect informer identity and then recommence the proceedings at a later time.[10] The onus is upon the applicant to show that there was an abuse of process in staying the proceedings.[11]

Effects of a Stay

Once a Crown stay has been entered, all custody or bail orders are released.[12]

However, not all matters relating to the prosecution die upon entering a stay. Breaches of conditions and failures to attend court while the charges were in force will continue.[13]

The accused's election of mode of trial remains in place for the duration of the stay up until the point that the stay becomes permanent.[14]

Constitutionality

The power of the Crown to stay a proceeding is not unconstitutional.[15]

Private Prosecution

The Crown may stay a private prosecution under s. 579. That stay is reviewable as an extraordinary remedy under the Code.

A person declared an vexatious litigant for the purposes of civil litigations is not prohibited from challenging such a stay.[16]

Judicial Review

While there is "considerable deference" to the Crown exercising the power to stay a proceeding, the decision is reviewable *only* for abuse of process.[17]

The burden of proof is on the claimant to prove the elements of abuse on a balance of probabilities.[18]

1. *Glegg*, *infra*, at para 39
2. *Glegg*, *infra*, at para 39
   Re Bradley et al and The Queen, 1975 CanLII 766 (ON CA), 24 CCC (2d) 482, *per* Arnup JA, at p. 490(*complete citation pending*)
3. *Whitehead v Ferris, P.C.J., and Saskatchewan (Attorney General)*, 1989 CanLII 4656 (SK QB), 76 Sask R 78, *per* Wimmer J, at para 4
4. *R v Cooke, Dingman and Whitton*, 1948 CanLII 357 (AB QB), 91 CCC 310, *per* McBride J
   R v McKay, 1979 CanLII 2185 (SK CA), [1979] 4 WWR 90, 9 CR (3d) 378, *per* Culliton CJ
5. *R v Cunsolo*, 2008 CanLII 48640 (ONSC), , [2008] OJ No 3754; 180 CRR (2d) 174 (Ont. Sup. Ct.), *per* Hill J, at para 27
   R v Larosa, 2002 CanLII 45027 (ON CA), 166 CCC (3d) 449, *per* Doherty JA (3:0), at para 41
   R v Smith, 1992 CanLII 325 (BC CA), 79 CCC (3d) 70, *per* Hollinrake JA (3:0), at para 25
6. *McKay*, *supra*, at para 12
7. *R v Glegg*, 2021 ONCA 100 (CanLII), *per* Watt JA, at para 39
8. *Glegg*, *supra* at para 45
   R v McHale, 2010 ONCA 361 (CanLII), 256 CCC (3d) 26, *per* Watt JA, at paras 85 to 87, 89
   R v Vasarhelyi, 2011 ONCA 397 (CanLII), 272 CCC (3d) 193, *per* Watt JA, at para 49
   R v Pardo, 1990 CanLII 10957 (QC CA), 62 CCC (3d) 371, *per* Gendreau JA, at pp. 373-74
   R v Klippenstein, 2019 MBCA 13 (CanLII), 152 WCB (2d) 551, at para 7
   R v Linamar Holdings Inc, 2007 ONCA 873 (CanLII), 76 WCB (2d) 120, at paras 9 to 10
9. *Glegg*, *supra* at para 45
10. *R v Scott*, 1990 CanLII 27 (SCC), [1990] 3 SCR 979, *per* Cory J (5:4)
11. *R v N(D)*, 2004 NLCA 44 (CanLII), 188 CCC (3d) 89, *per* Wells CJ
12. *Cunsolo*, *supra*, at para 27
13. *R v CW*, 2011 ABPC 205 (CanLII), 512 AR 310, *per* Lefever DCJ, at paras 36 to 37
14. *R v Mann*, 2012 BCSC 1248 (CanLII), *per* Bernard J
15. *Cunsolo*, *supra*, at para 27
    R v Fortin, [1989] OJ No 123 (CA)(*no CanLII links) , at para 1
16. *Holland v British Columbia (Attorney General)*, 2020 BCCA 304 (CanLII), 394 CCC (3d) 552, *per* Harris JA, at para 31
17. *Glegg*, *supra* at para 40
    R v Anderson, 2014 SCC 41 (CanLII), [2014] 2 SCR 167, *per* Moldaver JA, at para 48
    Krieger v Law Society of Alberta, 2002 SCC 65 (CanLII), [2002] 3 SCR 372, *per* Iacobucci AND Major JJ, at para 32
    R v Nixon, 2011 SCC 34 (CanLII), [2011] 2 SCR 566, *per* Charron J, at para 31
18. *Glegg*, *supra* at para 41

Re-Initiating a Stayed Proceeding

To recommence the proceedings the Crown must give notice to the clerk of the court. A new information is not required.[1]

The Crown must provide personal service to the accused and may use a summons to compel the accused to return to court.[2]

The decision to stay a proceeding under s. 579 is part of the core prosecutorial function and attracts a high degree of deference.[3]

> 579
> [*omitted (1)*]
>
> **Recommencement of proceedings**
>
> (2) Proceedings stayed in accordance with subsection (1) [*crown directed stay of proceedings*] may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced. R.S., 1985, c. C-46, s. 579; R.S., 1985, c. 27 (1st Supp.), s. 117.
>
> – CCC

Abusive Reinstatement

There is some suggestion that the use of a Crown stay of proceedings for the purpose of avoiding an adjournment request is abusive.[4]

1. *R v Velvick*, 1976 CanLII 1300 (AB QB), 33 CCC (2d) 447, *per* McFadyen J
2. *R v Dube* (1986), 17 WCB 213 (Ont. Dist. Ct.)(*no CanLII links)
3. *R v Cunsolo*, 2008 CanLII 48640 (ONSC), [2008] OJ No 3754, *per* Hill J, at para 27
4. *R v Cole*, 1998 CanLII 2425 (NS SC), 126 CCC (3d) 159, *per* Hood J
   Cf. *R v Cole*, 2000 NSCA 42 (CanLII), 143 CCC (3d) 417, *per* Bateman JA, at para 49 (The Court had “grave doubts as to the propriety of the [application judge’s] ruling” and considered the decision a "novel" interpretation of of Crown discretion)
   see also *R v Parkin*, 1986 CanLII 4640 (ON CA), 28 CCC (3d) 252, 16

WCB 167, *per* Thorson J - re-lay to avoid limitation period
see also *R v Quinn*, 1989 CanLII 959 (QC CA), 48 CRR 314, 54 CCC

(3d) 157, *per curiam* - re-lay to avoid limitation period

Preclearance Act Proceedings

Instruction to stay

579.001 (1) The Attorney General or counsel instructed by him or her for that purpose shall, at any time after proceedings in relation to an act or omission of a preclearance officer, as defined in section 5 of the Preclearance Act, 2016, are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by direction of the Attorney General if the Government of the United States has provided notice of the exercise of primary criminal jurisdiction under paragraph 14 of Article X of the Agreement.

Stay

(2) The clerk or other officer of the court shall make the entry immediately after being so directed, and on the entry being made the proceedings are stayed and any recognizance relating to the proceedings is vacated.

Recommencement

(3) The proceedings may be recommenced without laying a new information or preferring a new indictment, if the Attorney General or counsel instructed by him or her gives notice to the clerk or other officer of the court that

(a) the Government of the United States has provided notice of waiver under paragraph 15 of Article X of the Agreement; or
(b) the Government of the United States has declined, or is unable, to prosecute the accused and the accused has returned to Canada.

Proceedings deemed never commenced

(4) However, if the Attorney General or counsel does not give notice under subsection (3) [*re-commencing stayed charges against preclearance offier*] on or before the first anniversary of the day on which the stay of proceedings was entered, the proceedings are deemed never to have been commenced.

Definition of Agreement

(5) In this section, Agreement means the Agreement on Land, Rail, Marine, and Air Transport Preclearance between the Government of Canada and the Government of the United States of America, done at Washington on March 16, 2015.

2017, c. 27, s. 62.
[*annotation(s) added*]

– CCC

See Also

- Private Prosecutions

Judicial Stay of Proceedings

This page was last substantively updated or reviewed *January 2015.* (Rev. # 79564)

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General Principles

Certain courts have jurisdiction to stay criminal proceedings under s. 24(1) where putting a person on trial would amount to an "abuse of process" and violate the "principles of fundamental justice" under s. 7.[1] The principle of abuse of process arises from the common law.[2] It is now superseded by the Charter.[3]

A Stay of Proceedings is the most drastic of remedies available to a court. "Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in-Court; society will never have the matter resolved by a trier of fact. For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: "the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the 'clearest of cases'".[4]

A stay of proceedings is considered the “ultimate remedy” that is absolutely final, preventing the court from ever adjudicating the matter.[5]

Consequently, there is a high threshold on a stay of proceedings. It is only permissible in the “clearest of cases”.[6]

A clearest of case is one in which the integrity of the justice system is implicated.[7]

If the Crown enters a stay of proceedings on their own is part of the Crown's royal prerogative which is not reviewable by the court.

A stay should not be used "to discipline the police or to attempt to redress a past wrong".[8]

A judge does not have the power to stay proceedings on an electable charge where the defence has yet to enter his election.[9]

Breaches of s. 11(b) are treated differently from other Charter breaches.[10]

Stay is Mostly a Prospective Remedy

In most cases, a stay is intended to be a prospective remedy to prevent future harm. It is only in rare cases of "egregious" misconduct that going forward would be "offensive" that a stay is warranted for past wrongs.[11]

Standard of Appellate Review

A decision to stay a proceeding under s. 24(1) of the Charter is accorded deference on review.[12]

1. *R v Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 SCR 128, *per* Dickson CJ (7:0)
   R v Kalanj, 1989 CanLII 63 (SCC), [1989] 1 SCR 1594, *per* McIntyre J (3:2)
   R v Power, 1994 CanLII 126 (SCC), [1994] 1 SCR 601, *per* L'Heureux-Dubé J (4:3)
2. *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, *per* L'Heureux-Dubé J
3. e.g. *R v Regan*, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J (5:4)
4. *O'Connor*, *supra*
   see *R v Carosella*, 1997 CanLII 402 (SCC), [1997] 1 SCR 80, *per* Sopinka J
   R v La, 1997 CanLII 309 (SCC), [1997] 2 SCR 680, *per* Sopinka J
   Regan, *supra*
   Taillefer; R v Duguay, 2003 SCC 70 (CanLII), [2003] 3 SCR 307, *per* LeBel J
5. *Canada (Minister of Citizenship & Immigration) v Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 SCR 391, 118 CCC (3d) 443, *per curiam*, at para 86
6. *Regan*, *supra*, at para 53
7. *R v Antinello*, 1995 ABCA 117 (CanLII), 165 AR 122, 97 CCC (3d) 126, *per* Kerans JA (3:0)
   R v Curragh, 1997 CanLII 381 (SCC), [1997] 1 SCR 537, 113 CCC (3d) 481, *per* La Forest and Cory J (7:2)
   R v Spence, 2011 ONSC 2406 (CanLII), 85 CR (6th) 72, *per* Howden J
   R v Bjelland, 2009 SCC 38 (CanLII), [2009] 2 SCR 651, *per* Rothstein J (4:3)
   R v RPS, 2010 ABQB 418 (CanLII), 503 AR 233, *per* Thomas J
   R v Robinson, 1999 ABCA 367 (CanLII), 250 AR 201, *per* McFadyen JA
   R v Latimer, 1997 CanLII 405 (SCC), [1997] 1 SCR 217, 112 CCC (3d) 193, *per* Lamer CJ
   R v Gangl, 2011 ABCA 357 (CanLII), 532 WAC 337, *per curiam*
8. *R v Samuels*, 2008 ONCJ 85 (CanLII), 76 WCB (2d) 588, *per* Nakatsuru J, at paras 62, 83
9. *R v Waugh*, 2009 NBCA 23 (CanLII), 246 CCC (3d) 116, *per* Drapeau CJ
10. *R v Thomson*, 2009 ONCA 771 (CanLII), 248 CCC (3d) 477, *per curiam* (3:0)
11. *Canada (Minister of Citizenship and Immigration) v Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 SCR 391, *per curiam*
12. *R v Bellusci*, 2012 SCC 44 (CanLII), [2012] 2 SCR 509, *per* Fish J (7:0), at para 17

Grounds for Stays of Proceeding

- Abuse of Process (s. 7 of Charter)
  - Police Misconduct (violence, trickery, etc)
  - Crown misconduct
  - Lost evidence
- Cruel and Unusual Punishment (s. 12 of Charter)
- Right to a Trial Within a Reasonable Time (s. 11(b) of the Charter)
- Representation at Trial#State-funded Counsel ("Rowbotham" applications) - Stays for Lack of Counsel

Case Digests

- Stay of Proceedings (Cases)

Abuse of Process

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General Principles

The abuse of process doctrine provides courts with the authority to order that a proceeding be stayed on the basis that they are unfair or otherwise sufficiently undermine the integrity of the judicial system.[1]

Charter vs Common Law

The doctrine of abuse of process exists both at common law and under s. 7 of the Charter. However, for most practical purposes the doctrine is entirely encompassed by the Charter.[2]

Categories of Abuse Doctrine

The doctrine arises out of two protections within s. 7 of the Charter. It protects against two categories of abuses consisting of:[3]

1. conduct affecting the "fair trial" rights under s. 7, or
2. conduct that falls into the "residual" protection of s. 7 of the "integrity of the judicial system".

Where the alleged conduct is not sufficient to justify a stay when considered in the context of either of the two categories, the judge must still consider the existence of a breach by balancing the interests in favour of a stay (e.g. denunciation of conduct or preserving the integrity of the system) against the "interest that society has in having a final decision on the merits".[4]

History

Early case law stated that abuse of process would be engaged where the process "would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious".[5]

Purpose

The purpose of the doctrine is "to preserve the integrity of the process through which justice is administered in the community, not to provide a remedy for the breach of individual rights".[6]

The doctrine intends to "protect the integrity of the courts' process and the administration of justice from disrepute".[7] It is also "intended to guard against state conduct that society find unacceptable, and which threatens the integrity of the justice system".[8]

Remedy

Where an abuse is found the judge has "wide discretion to issue a remedy – including the exclusion of evidence or a stay of proceedings – we're doing so is necessary to preserve the integrity of the justice system for the fairness of trial".[9]

The Crown conduct warranting a stay must be "egregious and seriously compromis[e] trial fairness and/or the integrity of the justice system".[10]

1. *R v Regan*, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J
2. *R v Schacher*, 2003 ABCA 313 (CanLII), 179 CCC (3d) 561, *per* Ritter JA, at para 10
   R v O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, at paras 70 to 71
3. *R v Nixon*, 2011 SCC 34 (CanLII), [2011] 2 SCR 566, *per* Charron J, at paras 36 and 42
   R v Zarinchang, 2010 ONCA 286 (CanLII), 254 CCC (3d) 133, *per curiam*
   Regan, *supra*
   R v Babos, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, *per* Moldaver J, at para 31
   R v Howley, 2021 ONCA 386 (CanLII), *per curiam*, at para 51
4. *Howley*, *ibid.*, at para 51
   Babos, *supra* at para 32
5. *R v Keyowski*, 1988 CanLII 74 (SCC), [1988] 1 SCR 657, *per* Wilson J, at para 2
   R v Young, 1984 CanLII 2145 (ON CA), 13 CCC (3d) 1, *per* Dubin JA
6. *R v Light*, 1993 CanLII 1023 (BC CA), 78 CCC (3d) 221, *per* Wood J
7. *R v Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, *per* Binnie J
8. *Babos*, *supra*, at para 35
9. *Babos*, *supra*, at para 32
10. *R v Anderson*, 2014 SCC 41 (CanLII), [2014] 2 SCR 167, *per* Moldaver J, at para 50

Requirements of Stay

Burden of Proof

The burden is upon the accused to establish on a balance of probabilities that a stay is warranted.[1]

Criteria (*Babos* test)

For an application under either category, the applicant must establish:[2]

1. There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
2. There must be no alternative remedy capable of redressing the prejudice; and
3. Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits"(, *ibid.*, at para 57).

Uncertain Cases

Proceedings should be stayed for abuse of process in only the "clearest of cases".[3]

There the circumstances are "close to the line," and the judge is "uncertain" about whether a stay is warranted, the judge may rely upon the "the balancing of the interests in granting a stay against society's interest in having a trial on the merits".[4]

1. *R v ED*, 1990 CanLII 6911 (ON CA), 57 CCC (3d) 151, *per* Arbour JA
2. *Regan*, *supra*, at para 57
   Zarinchang, *supra*, at para 56
   R v Babos, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, *per* Moldaver J, at para 32
3. *Keyowski*, *supra*, at para 2
   Young, *supra Babos*, *supra*
4. *Regan*, *supra*, at para 57
   Zarinchang, *supra*, at para 56

Babos Elements – Prejudice to Accused or Integrity of System

Number of Trials

There can be prejudice arising from the number of trials, however, that is balanced against the "societal interest" of the case.[1]

Embarrassment of Charges

The humiliation that flows from the proper laying of charges is not an abuse of process and not in-itself prejudicial.[2]

1. *R v Pan*, 1999 CanLII 3720 (ON CA), 134 CCC (3d) 1, *per* McMurtry CJ
2. *R v Regan*, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* Lebel J, at para 107 ("[T]he embarrassment to the appellant of the premature police announcement was overtaken by the charges which would have been laid in any event. Therefore there was no continuing prejudice from this misconduct. One must also remember that the humiliation flowing from properly laid charges, while unpleasant, is not an abuse of process. (para107) ")

Babos Elements – No Reasonable Alternative

Babos Elements – Balancing Factors

The third element requiring a balancing of factors should only apply if the first two steps do not determine the issues conclusively.[1]

1. *R v Babos*, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, *per* Moldaver J, at para 31

Residual Category

This second residual category "addresses the panoply of diverse circumstances in which a prosecution is so tainted that it attains a threshold of unfairness or vexatiousness that commands judicial intervention because the conduct so contravenes fundamental notions of justice that it undermines the integrity of the judicial process".[1]

Where the alleged abuse "poses no threat to trial fairness, but risks undermining the integrity of the judicial process" then the abuse must be categorized under the "residual" branch of the doctrine.[2]

The stay under the residual category should only be granted in the "rare" cases where "the abuse is likely to continue or be carried forward".[3]

Only in the rare or exceptional cases will it be that the past misconduct alone could justify a stay such that the "mere fact of going forward in light of it will be offensive".[4]

Where it is uncertain whether the abuse is sufficient for a stay under the residual category, the court may consider factors including:[5]

1. the particulars of the case,
2. the circumstances of the accused,
3. the nature of the charges he or she faces,
4. the interest of the victim and
5. the broader interest of the community in having the particular charges disposed of on the merits.

1. *R v Schacher*, 2003 ABCA 313 (CanLII), 179 CCC (3d) 561, *per* Ritter JA, at para 10
   Zarinchang, *supra*, at para 49
2. *R v Paryniuk*, 2017 ONCA 87 (CanLII), 134 OR (3d) 321, *per* Watt JA, at para 64
   R v Babos, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, *per* Moldaver J, at para 31
   R v Regan, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J
   O'Connor, *supra*, at para 73
3. *Regan*, *supra*, at para 55
4. *Regan*, *ibid.*, at para 55
5. *Zarinchang*, *supra*, at para 56

Procedure

Generally, a judge should hear all the trial evidence before making a ruling in order to understand the extent of the prejudice.[1]

If the abusive state conduct occurs during trial, the application must be brought to the judge before the jury renders a verdict.[2]

Appropriate Judge

A judge hearing an extradition may stay proceedings for abuse of process.[3]

1. *R v Bero*, 2000 CanLII 16956 (ON CA), 151 CCC (3d) 545, *per* Doherty JA, at para 18
2. *R v Henderson*, 2004 CanLII 33343 (ON CA), 189 CCC (3d) 447, *per* Feldman JA, at paras 29 to 41
3. *United States of America v Khadr*, 2011 ONCA 358 (CanLII), 273 CCC (3d) 55, *per* Sharpe JA

Entities Engaged in Abuse of Process

- Abuse of Process by Law Enforcement

- Abuse of Process by Crown Counsel

Remedy

- Abuse of Process Remedies,

Abuse of Process by Crown Counsel

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General Principles

Abuse of process by Crown counsel will constitute one of two forms. It is either:[1]

1. in the exercise of prosecutorial discretion; and
2. tactics and conduct before the court.

All "Crown decision making" is reviewable in some manner or another for abuse of process.[2]

In absence of conduct amounting to abuse of process, tactics and conduct is controllable through the court's inherent jurisdiction to control its own process.[3]

There is a high bar to be met before there can be a review of prosecutorial discretion. The judicial branch of government should not interfere with the administrative or accusatorial function of the executive branch of government unless there is "flagrant impropriety".[4]

The discretionary decisions and motives of the Crown should not be "second-guessed" by the Courts unless there is "improper motives or bad faith".[5]

Any decisions made by the Crown that form part of the core prosecutorial discretion can only be reviewed for abuse of process.[6] This would require circumstances of "flagrant impropriety".[7]

Burden and Standard

There is a presumption that the prosecuting Crown ios acting in good faith.[8]

The burden of proof is on the applicant to prove abuse of process on a balance of probabilities.[9]

Conducting a prosecution in "a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system" will be a basis for a stay.[10]

It is not necessary to make findings of misconduct or improper motives for a stay of proceedings to be entered.[11]

In certain circumstance, such as a repudiated plea agreement, the burden may shift to the Crown once the applicant establishes a "proper evidentiary foundation".[12]

1. *R v Anderson*, 2014 SCC 41 (CanLII), [2014] 2 SCR 167, *per* Moldaver J, at para 35 ("There are two distinct avenues for judicial review of Crown decision making. The analysis will differ depending on which of the following is at issue: (1) exercises of prosecutorial discretion; or (2) tactics and conduct before the court.")
2. *Anderson*, *ibid.*, at para 36
3. *Anderson*, *ibid.*, at para 36
4. *Kostuch v Attorney General*, 1995 CanLII 6244 (AB CA), 43 CR (4th) 81, *per curiam*, at pp. 89 to 92
5. *R v Power*, 1994 CanLII 126 (SCC), [1994] 1 SCR 601, *per* L'Heureux-Dubé J
6. *R v Nixon*, 2011 SCC 34 (CanLII), [2011] 2 SCR 566, *per* Charron J, at para 31
   Anderson, *supra*, at para 51
7. *Krieger v Law Society (Alberta)*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372, *per* Iacobucci and Major JJ, at para 49
8. *R v Olumide*, 2014 ONCA 712 (CanLII), *per curiam*, at para 2
   see *Krieger*, *supra*
   Nixon, *supra*
9. *R v Anderson*, 2014 SCC 41 (CanLII), [2014] 2 SCR 167, *per* Moldaver J, at para 52
   R v Cook, 1997 CanLII 392 (SCC), [1997] 1 SCR 1113, *per* L'Heureux-Dubé J, at para 62
   R v O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, *per* L'Heureux-Dubé J, at para 69
   R v Jolivet, 2000 SCC 29 (CanLII), [2000] 1 SCR 751, *per* Binnie J, at para 19
   Olumide, *supra*, at para 2
10. *O'Connor*, *supra*, at para 63
11. *O'Connor*, *supra*, at para 79
    R v Keyowski, 1988 CanLII 74 (SCC), [1988] 1 SCR 657, *per* Wilson J
12. *Nixon*, *supra*, at paras 60 to 62
    Anderson, *supra*

Procedure

The Court should be presented with "overwhelming evidence that the proceedings under scrutiny are unfair".[1]

It is not always necessary that all cases require an evidential foundation of affidavits or viva voce testimony.[2]

1. *R v Power*, 1994 CanLII 126 (SCC), [1994] 1 SCR 601, *per* L'Heureux-Dubé J, at para 17
2. *R v Roach*, 2013 ABQB 472 (CanLII), *per* Graesser J, at para 36

Challenge to Prosecutorial Discretion

The exercise of the powers of the Crown have been challenged in the following circumstances:

- Choice of which charges to pursue[1]
- intervention in a private prosecution[2]
- Crown Election[3]
- Consent to Re-Elect[4]
- Use of Direct Indictments[5]
- Crown power to override of a judge and jury trial (s. 568) [6]
- Choice of witnesses to call in trial[7]
- Stay of proceedings[8]

1. *R v KSV*, 1994 CanLII 9747 (NL CA), 89 CCC (3d) 477, *per* Gushue JA
   R v Lafrance, 1973 CanLII 35 (SCC), [1975] 2 SCR 201, *per* Martland J
   R v Johnson, 1977 CanLII 229 (SCC), [1977] 2 SCR 646, *per* Dickson J
2. *R v Baker*, 1986 CanLII 1151 (BC SC), 26 CCC (3d) 123, *per* Toy J
   R v Faber, 1987 CanLII 6849 (QC CS), 38 CCC (3d) 49, *per* Boilard J
   R v Osiowy, 1989 CanLII 5146 (SK CA), 50 CCC (3d) 189, *per* Vancise JA, at p. 191
   Werring v BC (AG), 1997 CanLII 4080 (BC CA), 122 CCC (3d) 343, *per* Esson JA
3. *R v Century 21 Ramos Realty Inc and Ramos*, 1987 CanLII 171 (ON CA), 32 CCC (3d) 353, *per curiam*
   R v Kelly, 1998 CanLII 7145 (ON CA), 128 CCC (3d) 206, *per* Austin JA
4. *R v E(L)*, 1994 CanLII 1785 (ON CA), 94 CCC (3d) 228, *per* Finlayson JA
5. *R v Arviv*, 1985 CanLII 161 (ON CA), 19 CCC (3d) 295, *per* Martin JA
   R v Moore, 1986 CanLII 4765 (MB CA), 26 CCC (3d) 474
   R v Sterling, 1993 CanLII 9146 (SK CA), 84 CCC (3d) 65, *per* Bayda CJ and Cameron JA - stay overturned
   R v Charlie, 1998 CanLII 4145 (BC CA), 126 CCC (3d) 513, *per* Southin J at pp. 521 to 522
   R v Thomas, 2017 BCSC 841 (CanLII), *per* Baird J
6. *R v Hanneson*, 1987 CanLII 6829 (ON SC), 31 CCC (3d) 560, *per* O'Discoll J
7. *R v Cook*, 1997 CanLII 392 (SCC), [1997] 1 SCR 1113, *per* L'Heureux-Dubé J, at para 21
8. *R v Light*, 1993 CanLII 1023 (BC CA), 78 CCC (3d) 221, *per* Wood J
   R v Pasini, 1991 CanLII 3916 (QC CA), 63 CCC (3d) 436, *per* Kaufman J
   R v Scott, 1990 CanLII 27 (SCC), [1990] 3 SCR 979
   R v Cole, 1998 CanLII 2425 (NS SC), 126 CCC (3d) 159, *per* Hood J

Malicious Prosecution

To establish malicious prosecution the plaintiff must prove the following:[1]

1. Initiated by the defendant;
2. Terminated in favour of the plaintiff;
3. Undertaking without reasonable and probable cause; and
4. Motivated by malice or a primary purpose other than carrying the law into effect.

1. *Miazga v Kvello Estate*, 2009 SCC 51 (CanLII), [2009] 3 SCR 339, *per* Charron J
   see also: *Nelles v Ontario*, 1989 CanLII 77 (SCC), [1989] 2 SCR 170
   Proulx v The Attorney General of Quebec, 2001 SCC 66 (CanLII), [2001] 3 SCR 9, *per* Iacobucci and Binnie JJ

Other Types of Prosecutions

Capacity of the Accused

The accused's loss of memory due to amnesia should not provide the basis for a stay of proceedings for abuse of process.[1] So long as the accused capable of "understanding the charges, conducting his trial, and adequately communicating with his counsel" then the right to fair trial will not be impacted.[2]

Serious Health Concerns

A prosecution may be stayed for abuse of process where the accused is "suffering from such serious health concerns that the continuation of the prosecution against him or her would be" abusive.[3]

1. *R v Morrissey*, 2007 ONCA 770 (CanLII), 227 CCC (3d) 1, *per* Blair JA, at para 75
   R v Desbiens, 2010 QCCA 4 (CanLII), 264 CCC (3d) 98
2. *Desbiens*, *supra*, at para 41
3. *R v Hong*, 2015 ONSC 4840 (CanLII), *per* Boswell J, at para 24 refers to it as a Michalowsky application
   R v Hong, 2015 ONSC 5114 (CanLII), *per* Boswell J
   R v Magomadova, 2015 ABCA 26 (CanLII), 588 AR 331, *per* Bielby JA
   R v TGP, 1996 CanLII 8405 (BC CA), 112 CCC (3d) 171, *per* McEachern JA
   R v J-GR, 2006 CanLII 21072 (ON SC), *per* Wein J
   R v Michalowsky, [1991] OJ No 3611(*no CanLII links)

Repudiation of a Plea Deal

The Crown is generally expected to honour agreements made.[1]

When Courts Can Review

The act of negotiating a plea arrangement and revoking one is "is an act of prosecutorial discretion".[2] It is only reviewable by a court on the basis of abuse of process.[3]

Mere repudiation without prejudice or conduct that amounts to an abuse of process is not reviewable.[4]

Courts should be careful before they engage in any attempt to "second-guess" the Crown's motives behind their decision to repudiate an agreement.[5] There should be "conspicuous evidence" of some improper motive, bad faith, or acts so wrong that it "violates the conscience of the community" such that it would be "gravely unfair" to continue.[6] Such cases are "extremely rare".[7]

Effect of Repudiation

A repudiation of a plea agreement between Crown and defence may amount to a breach of s. 7 of the Charter or a breach of the common law abuse of process doctrine.[8]

Crown Cannot be Enforced to Honour Agreement

The Court has no power to force the Crown to honour a prior agreement that has since been revoked as if it were some contractual undertaking.[9]

Purpose of Protecting Plea Deals

Agreements between counsel, whether on plea or otherwise, ensure an efficient and effective administration of justice. [10]

Basis to Repudiate Agreement

The circumstances where repudiation should be considered acceptable must remain "very rare".[11]

It is suggested that the Crown may be able to repudiate a plea and sentence agreement where there Crown subsequently discovers additional charges pending against the accused.[12]

Where a summary election was contingent on a guilty plea that it ultimately reneged by defence, the Crown has the ability to re-elect to proceed by indictment.[13]

Abuse by Crown Refusing Defence Settlement Proposal

The Crown discretion to choose to accept (or reject) pleas for lesser offences is subject to abuse of process consideration.[14] It would only be in "exceptional circumstances that the exercise of discretion of this type would be abusive.[15]

Crown Response to Defence Repudiation of Plea Deal

Where there is an agreement to elect to proceed summarily in exchange for a guilty plea, the Crown has the right to have the election struck and replaced with an indictable election, should the defence repudiate the agreement.[16]

1. *R v Goodwin*, (1981), 21 CR (3d) 263(*no CanLII links)
   R v Betesh, 1975 CanLII 1451 (ON CJ), [1975] OJ No 36 (Ont. Ct. J.), *per* Graburn J
   R v Smith, 1974 CanLII 1653 (BC SC), [1974] BCJ No 776 (SC), *per* Berge J
2. *R v Nixon*, 2011 SCC 34 (CanLII), [2011] 2 SCR 566, *per* Charron J, at paras 29 to 31
3. *Nixon*, *ibid.*, at para 31 ("Thus, it follows that the Crown's ultimate decision to resile from the plea agreement and to continue the prosecution is subject to the principles set out in Krieger: it is only subject to judicial review for abuse of process.")
4. *Nixon*, *ibid.*, at para 45
5. *R v Power*, 1994 CanLII 126 (SCC), [1994] 1 SCR 601, *per* L'Heureux-Dubé J("courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision.")
6. *Power*, *ibid.*("conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed")
7. *Power*, *ibid.*
8. see *R v M(R)*, 2006 CanLII 32999 (ON SC), [2006] OJ No 3875, *per* Hill J
9. *Nixon*, *supra*, at para 45 ("A plea agreement cannot be summarily enforced by the court as any other lawyers' undertaking, as Ms. Nixon contends."), see also paras 44 to 49.
10. *R v Dewald*, 2001 CanLII 4721 (ON CA), 156 CCC (3d) 405, *per* Laskin JA (2:1)
11. *Nixon*, *supra*, at para 48 ("As a result, I reiterate that the situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare.")
12. e.g. *R v Wood*, 2007 NSPC 39 (CanLII), *per* Tufts J
13. *R v De La Cruz*, 2003 CanLII 45233 (ON CA), 178 CCC (3d) 128, *per curiam*
14. *R v Conway*, 1989 CanLII 66 (SCC), [1989] 1 SCR 1659, *per* L'Heureux-Dubé J
15. *Conway*, *ibid.*
16. *De La Cruz*, *supra*

Other Conduct

Breach of Solicitor-Client Privilege

A stay may be warranted where the Crown gains access to defence documents that are protected by solicitor-client privilege.[1] There mere possession of these documents creates a rebuttable presumption of prejudice.[2]

Interview of Witnesses

The pre-charge interview of complainants by the Crown may raise some difficulties but is not abusive *per se* and may serve as a reasonable practice to avoid harmful or arbitrary results.[3]

Judge Shopping

Any form of "judge shopping" by the Crown is "unacceptable" as it is unfair and "tarnishes the reputation of the justice system".[4]

Accidental Breach of Privilege

Where the Crown accidentally discloses privileged information that would tend to identify an informant is not sufficient grounds to warrant a stay.[5]

Promise Not to Prosecute

A promise to not prosecute an accused if they told the truth does not prohibit the Crown from prosecuting the accused where it was demonstrably shown that the accused lied in giving the statement.[6]

1. *R v Bruce Power Inc*, 2009 ONCA 573 (CanLII), 245 CCC (3d) 315, *per* Armstrong JA
   R v Rudolph, 2017 NSSC 333 (CanLII), *per* Boudreau J
2. *Bruce Power Inc*, *ibid.*
3. *R v Regan*, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J, at para 91
4. *Regan*, *ibid.*, at para 61
5. *R v Bains*, 2010 BCCA 178 (CanLII), 254 CCC (3d) 170, *per* D Smith JA
6. *R v MacDonald*, 1990 CanLII 11021 (ON CA), 54 CCC (3d) 97, *per* Zuber JA

Prosecutions After Termination of Charges

Re-Laying Charges

A re-laying of an information after withdrawing charges at trial or on preliminary inquiry can be found to be abusive.[1] However, a stay during a trial is not necessarily always going to be abusive.[2] In has been found to be permissible where there is no "oppression, prejudice, harassment, or manifest hardship upon the accused".[3]

An improperly laid hybrid charge withdrawn after the 6 month limitation period and then replaced with the proper charges and elected to proceed by indictment may be sufficient to stay a charge.[4]

Prosecution On Re-Trial

Repeated prosecutions against an accused for the same offence would fall under the residual category of the abuse doctrine and is an example "in which the integrity of the justice system is implicated in the absence of state misconduct".[5]

There is some suggestion that an attempt to prosecute an accused after two or three failed trials is inherently abusive and the charges should be stayed except in "very rare cases".[6]

Consideration on this issue should include whether the Crown had a full opportunity to put its case to the jury.[7]

1. *R v Sabourin*, 2007 MBQB 53 (CanLII), 154 CRR (2d) 250, *per* Suche J - Judge comments that there should have been a direct indictment instead
   R v Ferguson, [1978] AJ No 1001 (ABPC)(*no CanLII links) , *per* Porter PCJ - Crown withdrew charges on day or trial and re-laid it a few days later
   R v Weightman and Cunningham, 1977 CanLII 1947 (ON CJ), [1977] OJ No 2592, *per* Zabel PCJ - Crown pulls charges mid-trial and re-laid them, the judge found the conduct "vexatious and oppressive"
   R v Cole, 1998 CanLII 2425 (NS SC), [1998] NSJ No 245, *per* Hood J
2. *R v Beaudry*, 1966 CanLII 537 (BC CA), 1966 CarswellBC 114 (CA), *per* Bull JA
   R v Smith, 1992 CanLII 12818 (BC CA), 1992 CarswellBC 407 (CA), *per* Hollinrake JA
   R v Scott, 1990 CanLII 27 (SCC), [1990] 3 SCR 979, *per* Cory J
   R v Panarctic Oils Ltd, 1982 CanLII 2990 (NWT SC), 1982 CarswellNWT 37 (S.C.), *per* de Weerdt J
   R v Ball, 1978 CanLII 2268 (ON CA), 1978 CarswellOnt 1227 (CA), *per* Jessup JA
3. *Ball*, *ibid.*, at para 19
   Roach, *supra*, at para 45
4. *R v Boutilier*, 1995 CanLII 4169 (NS CA), 104 CCC (3d) 327, *per* Freeman JA
5. *R v Badgerow*, 2014 ONCA 272 (CanLII), 311 CCC (3d) 26, *per* Strathy JA, at para 199
   R v Babos, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, *per* Moldaver J, at para 37 ("Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state misconduct, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example")
6. *R v Keyowski*, 1988 CanLII 74 (SCC), [1988] 1 SCR 657, *per* Wilson J
   R v Jack, 1997 CanLII 356 (SCC), [1997] 2 SCR 334, aff'g (1996), 1996 CanLII 1889 (MB CA), 113 Man. R. (2d) 260 (CA)
   R v Hunter, 2001 CanLII 5637 (ON CA), 54 OR (3d) 695, *per* Goudge JA
   R v L(A), 2004 CanLII 32136 (ON CA), 183 CCC (3d) 193, *per curiam*
   R v Taillefer, 2003 SCC 70 (CanLII), [2003] 3 SCR 307, *per* LeBel J
   R v Beaulac, 1999 CanLII 684 (SCC), [1999] 1 SCR 768, *per* Bastarache J
   R v Ellard, 2009 SCC 27 (CanLII), [2009] 2 SCR 19, *per* Abella J
   R v Vanezis, 2006 CanLII 37954 (ON CA), 83 OR (3d) 241, *per* Moldaver JA
   cf. *Badgerow*, *supra*
7. *Badgerow*, *supra*, at para 196 ("I do not find it necessary to resolve this issue [relating to abuse through re-prosecution], because highly probative and admissible evidence was excluded at the previous trials. As a result, the Crown did not have a full opportunity to put its case before the jury at any of the previous trials. Moreover, the application judge's assumption that the evidence will be not be stronger at a fourth trial cannot stand.")

See Also

- Abuse of Process by Law Enforcement

Prosecutorial Discretion

General Principles

Prosecutorial discretion refers to the "discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences".[1] It encompasses all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it".[2] The prosecution is empowered with discretionary authority over many decisions that have limited ability to be reviewed.

The discretion has its origins from the "Royal Prerogative of Justice and its enforcement in maintaining the King's Peace".[3]

The doctrine of prosecutorial discretion is not reviewable by courts except only on proof of abuse of process".[4]

Discretion must be exercised "in relation to a specific case" and not simply a blanket choice of what laws to enforce.[5]

Courts should be reluctant to interfere with prosecutorial discretion as they must respect the division of powers.[6]

Discretion is essential to keep the system from becoming "unworkably complex and rigid."[7]

Courts should not be reviewing the rationale for each and every decision of the Crown, it would be virtually impossible to have judge made rules to regulate the considerations involved. It would also create a conflict with the judge effectively regulating a prosecution.[8]

The court cannot direct the Crown on what offences they must prosecute.[9]

While the Attorney-General may enact policies that limit discretion, they are often considered undesirable.[10]

Core matters of prosecutorial discretion cannot be reviewed except for abuse of process.

The conduct can be reviewed where the conduct of the Crown consituted a "marked and unacceptable departure from the reasonable standards expected of the prosecution"[11]

Matters that have been found to be part of the core function of the Crown and so subject to prosecutorial discretion include:[12]

- the decision to prosecute
- the stay of a charge
- the withdraw of a charge
- the acceptance of a lesser charge
- the Crown election
- taking control of a private prosecution
- the decision to appeal
- the decision to consent to an adjournment [13]
- consenting or refusal to consent to re-election[14]
- notice to seek increased penalty[15]

It is not constitutionally required that the Crown consider the aboriginal status of the accused before making decisions that will limit the judge's sentencing options.[16]

Constitutionality

The "existence of prosecutorial discretion does not offend the principles of fundamental justice".[17]

1. *R v Anderson*, 2014 SCC 41 (CanLII), [2014] 2 SCR 167, *per* Moldaver J, at para 44
2. *Anderson*, *ibid.*, at para 44
   Krieger v Law Society of Alberta, 2002 SCC 65 (CanLII), [2002] 3 SCR 372, *per* Iacobucci and Major JJ, at para 47
3. *R v Smythe*, 1971 CanLII 30 (ON CA), 3 CCC (2d) 97, *per* Wells CJHC, at pp. 105 and 109 aff'd at 1971 CanLII 831 (SCC), *per* Fauteux CJ
4. *R v Nixon*, 2011 SCC 34 (CanLII), [2011] 2 SCR 566, *per* Charron J, at paras 20, 63 to 64
5. *R v Catagas*, 1977 CanLII 1636 (MB CA), [1978] 38 CCC (2d) 296, *per* Freedman CJM, at p. 301
6. *R v Power*, 1994 CanLII 126 (SCC), [1994] 1 SCR 601, *per* L'Heureux-Dubé J ("courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case law. They have been so as a matter of principle based on the doctrine of separation of powers ...")
   see also *R v Cook*, 1997 CanLII 392 (SCC), [1997] 1 SCR 1113, *per* L'Heureux-Dubé J
7. *R v Beare*, 1988 CanLII 126 (SCC), [1988] 2 SCR 387, *per* La Forest J, at p. 410-411
8. *Power*, *supra*, at pp. 626-627
9. *Power*, *supra* ("A judge does not have the authority to tell prosecutors which crimes to prosecute...".)
10. e.g. *R v K(M)*, 1992 CanLII 2765 (MB CA), 74 CCC (3d) 108, *per* O'Sullivan JA, at p. 110 - commenting on "zero-tolerance" policy on prosecution
11. See *R v 974649 Ontario Inc*, 2001 SCC 81 (CanLII), [2001] 3 SCR 575, *per* McLachlin CJ
    R v LL, 2015 ABCA 222 (CanLII), 300 CCC (3d) 345, *per curiam*, at para 10
12. *R v DN*, 2004 NLCA 44 (CanLII), 188 CCC (3d) 89, *per* Wells JA, at para 17
    Krieger, *supra*
    Power, *supra*, at paras 41 to 43
    Beare, *supra*, at pp. 410-411
13. *DN*, *supra* and *Beare*, *supra*, at para 51
14. *R v Ng*, 2003 ABCA 1 (CanLII), 173 CCC (3d) 349, *per* Wittmann JA
15. *R v Gill*, 2012 ONCA 607 (CanLII), 96 CR (6th) 172, *per* Doherty JA
16. *Anderson*, *supra*, at paras 29 to 33
17. *Beare*, *supra*, at para 56
    R v Lyons, 1987 CanLII 25 (SCC), [1987] 2 SCR 309, *per* La Forest J, at p. 348
    R v Jones, 1986 CanLII 32 (SCC), [1986] 2 SCR 284, *per* La Forest J, at pp. 303-304

Calling Witnesses

The Crown does not need to call any witnesses it considers to be unnecessary.[1] Likewise, the crown does not need to call unidentified witnesses or untrustworthy witnesses.[2]

There is no obligation on the Crown to call any witnesses at all, short of it amounting to an abuse of process.[3]

The decision to call a witness on a related subject after the Crown had determined the witness is otherwise unreliable can be acceptable in some circumstances.[4]

1. *Lemay v The King*, 1951 CanLII 27 (SCC), [1952] 1 SCR 232(*complete citation pending*), at p. 241
   R v Jolivet, 2000 SCC 29 (CanLII), [2000] 1 SCR 751, *per* Binnie J, at para 14
   R v Ellis, 2013 ONCA 9 (CanLII), 293 CCC (3d) 541, *per* Watt JA, at para 44 ("As a matter of general principle, Crown counsel is under no obligation to call a witness whom the Crown considers is unnecessary to the Crown's case...")
2. *Jolivet*, *ibid.*, at para 29
3. *R v Rezaei*, 2017 BCSC 611 (CanLII), *per* Jenkins J
   R v Cook, 1997 CanLII 392 (SCC), [1997] SCJ No 2, *per* L'Heureux-Dube J, at para 56
4. *R v LL*, 2015 ABCA 222 (CanLII), 300 CCC (3d) 345, *per curiam*

Relationship with Police

The Crown and police are to consult with each other but the "maintenance of a distinct line between these two functions is essential to the proper administration of justice."[1]

The Crown can be liable for their part in giving advice to police during an investigation.[2]

While it is acceptable, the Crown should not try to be involved in interviews with parties prior to charges being laid.[3]

1. See Marshall Inquiry http://www.gov.ns.ca/just/marshall_inquiry/
2. see *Dix v Canada (Attorney General)*, 2002 ABQB 580 (CanLII), 96 CRR (2d) 1, *per* Ritter J
   Proulx v Quebec (Attorney General), 2001 SCC 66 (CanLII), [2001] 3 SCR 9, *per* Iacobucci and Binnie JJ
3. *R v Regan*, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J at 61-70

Evaluating Whether to Prosecute (Charge Screening)

Most prosecution offices are guided by Crown Policy manuals requirements that there be a "reasonable prospect of conviction"[1] and there is a "public interest" in the proceeding.[2]

One cannot evaluate the decisions of the Crown to proceed retroactively. The context of what was known at the time.[3]

Considerations on the exercise of discretion must take into account the interest of the individual and the public interest.[4]

Re-evaluation of proceedings can be based on aspects that come to light at trial:[5]

- witnesses may not testify in accordance with their earlier statements;
- weaknesses in the evidence may be revealed during cross-examination;
- scientific evidence may be proved faulty; or
- defence evidence may shed an entirely different light on the circumstances as they were known at the time process was initiated.

Province's Policy

- Nova Scotia
- Ontario
- Alberta
- British Columbia [2]
- Federal Crown

1. Some provinces use difference standards such as "realistic prospects of conviction" (NS) or "substantial likelihood" (BC)
2. *Miazga v Kvello Estate*, 2009 SCC 51 (CanLII), [2009] 3 SCR 339, *per* Charron J, at para 64
3. *Miazga v Kvello Estate*, *ibid.*, at para 76
4. *R v Harrigan and Graham* (1975), 33 CRNS 60(*no CanLII links) , *per* Henry J, stated, at p. 69 ("In exercising these powers, which vitally concern the right and liberty of the individual, he must take into account not only the interest of the individual but also what the public interest requires.")
   R v Kenny, 1991 CanLII 2738 (NL SC), 68 CCC (3d) 36, *per* Barry J
5. *Miazga v Kvello Estate*, *supra*, at para 76

Prospects of Conviction

"Reasonable Prospects of Conviction" (RPC) is an objective test.

RPC must be more than establishing a *prima facie* case against the accused.

RPC does not require that conviction is "likely".

The Crown is generally permitted consideration of the reliability of the complainant or witness. Determinations on the credibility of that person is often not appropriate and is done only exceptionally and on a limited basis.

Public Interest

The determination of public interest is primarily a function of the gravity of the offence and level of culpability of the offender.

While there are many elements that inform the gravity of the offence

The Crown considers the wishes of the alleged victim or complainant, including:

- the trauma caused by testifying and its effect on rehabilitation
- the social pressures upon the person from their involvement
- their willingness to cooperate and testify

There should also be careful consideration on whether it is possible to mitigate these issues through resources with the courts, victim services or police. For example, the use of testimonial aids may assist in the testimony. Real dangers to the person may be mitigated through police protections. Emotional trauma may be mitigated with victim services.

The Crown will usually not force a vulnerable victim to testify in a case where there is clear interest against doing so.

Crown Election

The decision to proceed either by summary conviction or by imdictment is an "essential component of the fair and efficient operation of the criminal justice system".[1]

1. *R v Nur*, 2013 ONCA 677 (CanLII), 303 CCC (3d) 474, *per* Doherty JA, at para 190, appealed to SCC on other issues at 2015 SCC 15 (CanLII), *per* McLachlin CJ

See Also

- Abuse of Process by Crown Counsel),

Abuse of Process by Law Enforcement

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General Principles

Police misconduct towards an accused in certain cases can lead to a stay of proceedings under s. 24(1) of the Charter on the basis that it violates the abuse of process doctrine.[1] This type of grounds to stay proceedings falls into the "residual category" of the abuse of process doctrine.[2]

Trickery

The police are entitled to use "lawful stratagems, even amounting to reasonable trickery, to gather evidence".[3]

Realistic Standard

It is recognized that a lot is expected of police officers and so must not "impose an unrealistic standard" as they often do not have the ability to decide through "quiet deliberation or hindsight".[4]

Factors to Consider

Abuse or illegality by police does not by itself give rise to an abuse of process, but rather is a factor in whether to grant a stay.[5]

Evaluating the lawfulness of police conduct should be considered in light of:[6]

1. the duty being performed;
2. the extent to which some interference with individual liberty is necessitated in order to perform that duty;
3. the importance of the performance of that duty to the public good;
4. the liberty interfered with; and
5. the nature and extent of the interference.

Courts will stay charges where police powers have been abused in light of factors including:[7]

1. the need to dispel any notion that the police are above the law in performing their duties;
2. the potential for a positive prospective effect on the police in applying provisions of the *Criminal Code* or otherwise performing police duties;
3. the obligation of the courts to preserve the integrity of the justice system by not allowing their processes to be used in the face of serious police misconduct;
4. the necessity to avoid giving tacit approval of the misconduct in issue; and
5. the absence of an alternative remedy and the importance of providing a remedy that will act as a deterrent against the abuse of police powers.

The court may consider the officer's involvement in a prior published case where there were negative findings made against the officer.[8]

1. *R v Ahmed*, 2011 ONSC 2551 (CanLII), *per* Garton J: obstruction charge stayed
   R v Maskell, 2011 ABPC 176 (CanLII), 512 AR 372, *per* Groves J: impaired charges stayed
2. *Ahmed*, *ibid.*, at para 51
3. *R v Grandinetti*, 2003 ABCA 307 (CanLII), 178 CCC (3d) 449, *per* McFadyen J, at paras 36 to 42
4. *R v Dunn*, [1992] OJ No 685(*no CanLII links)
5. *R v Campbell (Shirose)*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, *per* Binnie J
6. *R v Simpson*, 1993 CanLII 3379 (ON CA), [1993] OJ No 308, *per* Doherty J, at para 55
7. *R v Knight*, 2010 ONCJ 400 (CanLII), 79 CR (6th) 39, *per* Clark J, at para 26
   R v Cheddie, [2006] OJ No 1585 (SCJ)(*no CanLII links)
   R v O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411
8. *R v Harflett*, 2016 ONCA 248 (CanLII), 336 CCC (3d) 102, *per* Lauwers JA

Use of Force

Charges have been stayed on the basis of police using tasers or pepper spray where they were not warranted.[1] As well as where excessive force has been used while arresting the accused.[2]

Burden

The accused has the onus to show that he was subject of excessive force.[3]

1. See *R v Fryingpan*, 2005 ABPC 28 (CanLII), [2005] AJ No 102, *per* Easton J - tasered during arrest
   R v JW, 2006 ABPC 216 (CanLII), [2006] AJ No 1097, *per* Kvill J
   R v Merrick, 2007 CarswellOnt 3855 (O.C.J.)(*no CanLII links) - stayed for use of taser during arrest
   R v Wiscombe, 2003 BCPC 418 (CanLII), [2003] BCJ No 2858, *per* Walker J
   R v Spannier, 1996 CanLII 978 (BC SC), [1996] BCJ No 2525 (BCSC), *per* Edwards J - pepper spray while being put in detention cells
2. *R v Cheddie*, [2006] OJ No 1585(*no CanLII links) - officer struck and kicked accused during arrest and search
   R v Kemper, [1989] OJ No 3310(*no CanLII links)
   R v Gladue (1993), 23 WCB (2d) 342, [1993] AJ No 1045(*no CanLII links) - female accused face pushed against wall
   cf. *R v Anderson*, 2009 MBQB 121 (CanLII), 241 Man R (2d) 15, *per* Abra J - stay denied
3. *R v Davis*, 2013 ABCA 15 (CanLII), 295 CCC (3d) 508, *per curiam* (2:1)

Invasions of Privacy

It has been successfully argued that a video camera filming an accused in lockup using the toilet is a violation of s. 8 resulting in a stay of proceedings.[1]

1. *R v Mok*, 2012 ONCJ 291 (CanLII), 258 CRR (2d) 232, *per* West J

Dishonesty

It has applied where police had manufactured false evidence against the accused.[1]

Police cannot report that a confidential informant is anonymous when they know the identity of the person.[2] This type of lie can result in an abuse of process.[3]

1. *R v Spagnoli and Shore*, 2011 ONSC 4843 (CanLII), *per* Hambly J -- falsified anonymous source information
2. *Spagnoli*, *ibid.*
3. *Spagnoli*, *ibid.*

Arrest and Detention

See Arrest Procedure#Terms of Custody for details on detention procedure.

An accused who is held in custody beyond the 24 hours time limit after arrest without being brought to a justice is arbitrarily detained and charges may be stayed.[1]

For a stay of proceedings due to a breach of s. 9 during detention post-arrest, there must be some connection between the charges and the breach. [2]

1. e.g. *R v Simpson*, 1995 CanLII 120 (SCC), [1995] 1 SCR 449, *per* Lamer CJ affirming 1994 CanLII 4528 (NL CA), *per* Goodridge CJ
2. *R v Salisbury*, 2011 SKQB 153 (CanLII), 372 Sask R 242, *per* Gerein J, at para 11 (" It is accepted that there was a breach of s. 9 of the Charter. However, it occurred after the commission of the offences and

after the investigation had been completed. There was no connection between the breach and the charges. ")

"Gating"

"Gating" refers to the practice of police to delay the execution of a process of arrest until such a time as the person is scheduled for release, resulting in an extension of their detention.[1]

The basis for "gating" is the "perceived danger to prisoner or public if the prisoner were released".[2]

The Charter does not permit investigators to charge a person at "their convenience".[3]

A stay of proceeding may be ordered where the delay in charging where the delay was due to negligence or improper motivation.[4]

A case where delaying the investigation had the effect to "marginalize a mentally disabled prisoner in the context of the criminal proceedings" was sufficient for a stay.[5]

1. *R v AWH*, 2016 NSPC 65 (CanLII), *per* Derrick J, at paras 33 to 34
   R v Parisien, 1971 CanLII 1171 (BC CA), [1971] BCJ 649 (BCCA), *per* Branca JA - delayed execution of arrest warrant
   R v Duncan, [1999] OJ No 1977 (ONCJ)(*no CanLII links) , at para 27 - delay of investigation and charge because of release schedule
2. *R v Moore*, 1983 CanLII 1677 (ON CA), [1983] OJ 228 (HCJ), *per* Dubin JA, at para 2
   AWH, *supra*, at para 33
3. *R v Cardinal*, 1985 ABCA 157 (CanLII), [1985] AJ 1099, *per* Kerans JA, at para 8
4. *AWH*, *supra*, at para 35
   Duncan, *supra*
   R v Lima, 2016 ONCJ 167 (CanLII), OJ No 1580, *per* George J
5. *Duncan*, *supra*, at paras 27 to 30

Delayed Charging

Mere delay in charging and prosecuting an accused "cannot, without more, justify staying the proceedings as an abuse of process at common law". To do so would amount to "imposing a judicially created limitation period for a criminal offence.".[1]

When concerning the police decision to lay charges against the accused, it is not necessary that malice be proven to be abusive.[2]

Where police charge an accused with an offence arising from a matter for which he has already been tried and convicted may result in an abuse of process where the proceedings from the new charge would "offender the community's sense of fair play and decency."[3]

1. *R v WKL*, 1991 CanLII 54 (SCC), [1991] 1 SCR 1091, *per* Stevenson J at page 5
2. *R v Box*, 1994 CanLII 5026 (SK QB), [1994] S.J. No 17, 118 Sask R 241 (Q.B.), *per* Gerein J
   see also *R v Keyoski*, 1988 CanLII 74 (SCC), [1988] 1 SCR 657, *per* Wilson J
3. *Box*, *ibid.*

Entrapment

Improper Use of Charges

Charging to Collect Civil Remedy

Where a prosecution is used solely as a means of achieving a civil remedy (such as restitution for a debt) then it would amount to a private prosecution and an abuse of process.[1] In these circumstances it should only be "exercised very sparingly and only in exceptional circumstances".[2]

As long as there is a *prima facie* case for a crime, then there can be concurrent civil and criminal matters.[3]

Payment of Agent Conditional on Results

It is not improper to make full payment of a police agent conditional on collecting evidence sufficient to lay charges.[4] It is however improper where the condition is one of requiring conviction then it would be inappropriate as it may induce dishonesty.[5]

1. *R v Malenfant*, 1992 CanLII 7162 (NB QB), 328 APR 305, *per* Landry J
   R v Leroux, 1928 CanLII 455 (ON CA), 50 CCC 52, *per* Grant JA
   R v Bell, 1929 CanLII 280 (BC CA), 51 CCC 388, *per* Macdonald CJ
   R v Waugh, 1985 CanLII 3557 (NS CA), 21 CCC (3d) 80, *per* Macdonald JA
2. *Malenfant*, *ibid.*
   Waugh, *ibid.*
3. *Waugh*, *supra*
4. *R v Dikah*, 1994 CanLII 8722 (ON CA), 89 CCC (3d) 321, *per* Labrosse JA (2:1), at para 29
5. *R v Xenos*, 1991 CanLII 3455 (QC CA), 70 CCC (3d) 362

Lost or Destroyed Evidence

- Lost or Destroyed Evidence

Police Trickery

- Entrapment
- Mr. Big Operations

Remedies

- Abuse of Process Remedies

See Also

- Abuse of Process by Crown Counsel,

Abuse of Process Remedies

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General Principles

The available remedies to an applicant who is able to establish an abuse of process include a stay of proceedings and costs.

Stay of Proceedings

A court has a "residual discretion" to order a stay of proceedings where there is a finding of abuse of process.[1] This will apply in such circumstances where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a Court's process through oppressive or vexatious proceedings."[2]

Jurisdiction to Stay Proceedings

A provincial court judge has the jurisdiction to make an order remedying any abuse of process.[3]

Only superior courts have jurisdiction to stay proceedings on a non-Charter based abuse of process motion.[4]

A preliminary inquiry judge may not stay proceedings on grounds of abuse of process.[5]

A provincial court judge cannot stay a proceeding for an abuse of process before the defence election has been made.[6]

Burden

The onus is on the accused to prove the stay is appropriate. It is a high onus as the charges can never be prosecuted and so it should only be given in the "clearest of cases".[7]

Requirements Before a Stay Can be Ordered

Regardless of the basis for abuse of process, a stay can only be entered where:[8]

1. the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
2. no other remedy is reasonably capable of removing that prejudice.

It should be shown that the "conduct complained of violated those fundamental principles of justice which underlie the community's sense of fair play and decency".[9]

The use of a stay of proceedings is a prospective, not a retrospective remedy.[10]

The merit of a stay "depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial".[11]

Borderline Cases

Where there is uncertainty whether a stay is a warranted for a finding of a breach of the Charter, the court should consider (in addition to the two standard critera) whether "it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits".[12] Where the misconduct is "egregious" it should never be "overtaken by some passing public concern" that there is a compelling societal interest in a full hearing.[13]

Standard of Review

The decision to stay a proceeding is a discretionary decision that is afforded deference and should only intervene where there was misdirection on the law or if decision amounts to an "injustice".[14]

1. *R v Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 SCR 128, *per* Dickson CJ
   R v O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, at para 73
2. *Jewitt*, *supra*
   see also *R v Conway*, 1989 CanLII 66 (SCC), [1989] 1 SCR 1659, *per* L'Heureux-Dubé J ("where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.")

3. *Jewett*, *supra*
   R v Wood, 2007 NSPC 39 (CanLII), *per* Tufts J
4. *R v Maxner*, 1981 CanLII 3285 (NS CA), (1981), 22 CR (3d) 193, *per* Jones JA
   Re R. and Lizee, 1978 CanLII 2463 (BC SC), 42 CCC (2d) 173, (BCSC), *per* Rae J
   R v Lebrun, 1978 CanLII 2429 (BC CA), 45 CCC (2d) 300, 7 CR (3d) 93, [1979] 1 WWR 764 (BCCA), *per* Bull JA
5. *R v Stupp, Winthrope and Manus*, 1982 CanLII 1897 (ON SC), 2 CCC (3d) 111, *per* Craig J
6. *R v Zaluski*, 1983 CanLII 2384 (SK QB), 7 CCC (3d) 251, *per* Matheson
7. *O'Connor*, *supra*
   R v Regan, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J, at para 53
   R v Taillefer; R v Duguay, 2003 SCC 70 (CanLII), [2003] 3 SCR 307, *per* LeBel J, at para 117 (should be ordered "only in exceptional circumstances")
   R v Keyowski, 1988 CanLII 74 (SCC), [1988] 1 SCR 657, *per* Wilson J
8. *Regan*, *supra*
9. *R v Leduc*, 1993 CanLII 80 (SCC), [1993] 3 SCR 641, *per* Sopinka J, ("The power to stay proceedings on the ground of abuse of process must only be exercised in the clearest of cases and when it is shown that the conduct complained of violated those fundamental principles of justice which underlie the community's sense of fair play and decency.")
10. *Regan*, *supra*, at para 54
11. *R v La*, 1997 CanLII 309 (SCC), [1997] 2 SCR 680, *per* Sopinka J, at para 27 ("The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. ... Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application.")
12. *Regan*, *supra*, at para 57
13. *Regan*, *supra*, at para 57
14. *R v Cloutier*, 2011 ONCA 484 (CanLII), 272 CCC (3d) 291, *per* Weiler JA, at para 71 ("An appellate court will only be justified in interfering with the decision if the trial judge misdirected himself or herself on the law or if the decision is so clearly wrong as to amount to an injustice")

Procedure

The consideration of a stay of proceedings for abuse of process should "reserved" until after hearing "some or all the evidence" of the case (usually after trial) such that there is a evidentiary record of the circumstances of the abuse.[1]

It has been said that "except where the appropriateness of a stay is manifest at the outset of proceedings", the judge should reserve any stay motion until after the trial evidence has been heard so that the full degree of prejudice can be assessed.[2]

It is at the discretion of the court to rule on the stay remedy immediately, or upon hearing some or all of the evidence.[3]

Should an application for a stay be denied at an earlier stage in proceedings it may be renewed if there is a material change in circumstances.[4]

Jury Trial

The judge has no jurisdiction to entertain a stay application after the jury has rendered a verdict.[5]Any request for a stay must occur before the jury begins deliberation.[6] At a minimum, it must be brought before the jury returns with a verdict.[7]

1. *R v La*, 1997 CanLII 309 (SCC), [1997] 2 SCR 680, *per* Sopinka J, at para 27 ("...the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application.")
   R v Andrew (1992), 60 OAC 324(*no CanLII links) , at p. 325 ("is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial")
2. *R v Bero*, 2000 CanLII 16956 (ON CA), 151 CCC (3d) 545, *per* Doherty JA ("This Court has repeatedly indicated that except where the appropriateness of a stay is manifest at the outset of proceedings, a trial judge should reserve on motions such as the motion brought in this case until after the evidence has been heard. The trial judge can more effectively assess issues such as the degree of prejudice caused to an accused by the destruction of evidence at the end of the trial")
3. *La*, *supra*, at para 27 ("...the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence")
4. *La*, *supra*, at para 28 ("even if the trial judge rules on the motion at an early stage of the trial and the motion is unsuccessful at that stage, it may be renewed if there is a material change of circumstances")
5. *R v Grant (I.M.)*, 2009 MBCA 9 (CanLII), 240 CCC (3d) 462, *per* Chartier JA
6. *Grant*, *ibid.*, at para 21 ("But what is absolutely certain in terms of timing is that the stay request and the decision on its merits must be made before the jury starts its deliberations.")
7. *R v Henderson*, 2004 CanLII 33343 (ON CA), 189 CCC (3d) 447, *per* Feldman JA("the motion for a remedy must be brought before the jury's verdict is registered")

Costs

Costs does not automatically follow a finding of an abuse of process. It is only in the "rare and exceptional" cases.[1]

The conduct must go beyond "inadvertent or careless failure" and would cross into "recklessness, conscious indifference to duty, or whether conscious or otherwise, a marked and unacceptable departure from usual and reasonable standards of prosecution".[2] The consequences must amount to "an indisputable and clearly measurable infringement or denial of a right".[3]

The purpose for costs, being to ensure compliance or show disapproval of the serious prejudicial conduct, must be "founded in circumstances of clear and obvious compensatory need".[4]

1. *R v Cole*, 2000 NSCA 42 (CanLII), 143 CCC (3d) 417, *per* Bateman JA, at paras 18, 50 to 51
2. *Cole*, *ibid.*, at para 52
3. *Cole*, *ibid.*, at para 52
4. *Cole*, *ibid.*, at para 52

Right to a Trial Within a Reasonable Time

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General Principles

The right to a trial within a reasonable time is guaranteed by s. 7 and 11(b) of the Charter.

Charter Right to Reasonable Time to Trial

Section 11(b) of the Canadian Charter entitles any "person charged with an offence ... the right ... to be tried within a reasonable time". Where there is a breach of this right, the available remedy to a court is a stay of proceedings.

History

In 2016, the Supreme Court of Canada re-framed the analysis for s. 11(b) by setting presumptive ceilings of 18 and 30 months depending on defence election. The new "Jordan" analysis removed from consideration the prejudice to the accused and the seriousness of the offence.[1]

1. see *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ

Purpose

The objectives of both s. 7 and 11(b) of the Charter include ensuring "the fair and timely operation of the criminal justice system".[1] Timeliness is "one of the of the hallmarks of a free and democratic society".[2]

The right protects both individual rights and societal rights.[3]

Section 11(b) protects three individual rights:[4]

- the accused's right to security of person by minimizing the anxiety and stigma of criminal proceedings;
- the accused's right to liberty by minimizing the effect of pre-trial custody or restrictive bail conditions; and
- the accused's right to a fair trial by ensuring that the proceedings occur while evidence is fresh and available.

It also protects societal rights:[5]

- the public's interest in having our laws enforced by having those who break the law tried quickly;
- the public's interest in having those accused of crime dealt with fairly; and

Timely trials also affect societal interests by benefiting victims and witnesses, and instills public confidence in the administration of justice.[6]

Jordan Framework

The new framework is designed in part to "do away with prejudice as an express factor in assessing delay." It was considered "confusing, hard to prove, and highly subjective".[7] It does not, however, ignore the existence of prejudice, it simply creates a legal presumption of prejudice once the ceiling has been breached.[8]

The reason also for the change was to address the "culture of complacency" among Crown, defence and courts that have developed in modern years.[9] This culture is exhibited in delay causing conduct, including: *Jordan*, *supra*, at para 40

- unnecessary procedures;
- unnecessary adjournments;
- inefficient practices by all parties; and
- inadequate institutional resources.

The message from Jordan is that “all participants in the system are to take proactive measures at all stages of the trial process to move cases forward and bring accused persons to trial in a timely fashion.”[10]

Judges are charged with curtailing delay and changing courtroom culture.[11] Practices causing delay that were tolerated are no longer permitted. This can include denying defence adjournments where it could result in unacceptably long delay despite it being time attributable to defence. [12]

1. *R v Dias*, 2014 ABCA 402 (CanLII), 317 CCC (3d) 527, *per curiam*
   R v Sapara, 2001 ABCA 59 (CanLII), 41 CR (5th) 356, *per* Russell JA
2. *Jordan*, *infra*, at para 1
   R v KGK, 2020 SCC 7 (CanLII), 61 CR (7th) 233, *per* Moldaver J, at para 25 ("Section 11(b) of the Charter provides that any person charged with an offence has the right . . . to be tried within a reasonable time. This provision reflects and reinforces the notion that timely justice is one of the hallmarks of a free and democratic society" [*quotation marks removed*])
3. *KGK*, *ibid.*, at para 25
   R v KJM, 2019 SCC 55 (CanLII), 381 CCC (3d) 293, *per* Moldaver J, at para 38 ("This right serves both individual and societal interests...")

4. *R v Qureshi*, 2004 CanLII 40657 (ON CA), 190 CCC (3d) 453, *per* Laskin JA, at paras 8 to 10
   KGK, *ibid.*, at para 25 and 27
   KJM, *supra*, at para 38 ("At the individual level, it protects the accused's "liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence"")
   R v MacDougall, 1998 CanLII 763 (SCC), [1998] 3 SCR 45, *per* McLachlin J, at para 19 ("The next question is whether the phrase "tried within a reasonable time" in s. 11(b) is capable of extending to sentencing. A purposive reading suggests that "s. 11(b) protects against an overlong subjection to a pending criminal case and aims to relieve against the stress and anxiety which continue until the outcome of the case is final": R v Rahey, [citation removed], at p. 610 (emphasis added), per Lamer J., Dickson C.J. concurring. In the same case La Forest J., with whom McIntyre J. concurred, stated that "tried" means not "brought to trial", but "adjudicated" (p. 632). Since the "outcome" of a criminal case is not known until the conclusion of sentencing, and since sentencing involves adjudication, it seems reasonable to conclude that "tried" as used in s. 11(b) extends to sentencing.")
5. *Qureshi*, *ibid.*, at paras 8 to 10
6. *KGK*, *supra*, at para 25
   KJM, *supra*, at para 38 ("At the societal level, "[t]imely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the 'worry and frustration [they experience] until they have given their testimony'", and permit them to move on with their lives (see Jordan, at paras. 23-24, citing Askov, at p. 1220). Society also has an interest in seeing that citizens accused of crimes are treated humanely and fairly (see Morin, at p. 786), and timely trials help maintain the public's confidence in the administration of justice, which is "essential to the survival of the system itself" (Jordan, at paras. 25-26). "In short, timely trials further the interests of justice" (ibid., at para. 28).")
7. *R v KN*, 2018 BCCA 246 (CanLII), 362 CCC (3d) 288, *per* Fenlon JA, at para 35
   R v Jordan, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ
8. *KN*, *ibid.*, at para 35
   Jordan, *supra*, at para 54
9. *Jordan*, *supra*, at paras 4, 40, and 135
   R v KGK, 2020 SCC 7 (CanLII), 61 CR (7th) 233, *per* Moldaver J, at para 1 (the framework was "designed to overcome a culture of complacency that had grown in the criminal justice system and was causing excessive delays in bringing accused persons to trial. ")
10. *R v Thanabalasingham*, 2020 SCC 18 (CanLII), 447 DLR (4th) 310, *per curiam*, at para 9
11. *Thanabalasingham*, *ibid.*, at para 9
12. *Thanabalasingham*, *ibid.*, at para 9

Presumptive Ceiling

Presumptive Breach

There will be a presumptive breach of s. 11(b) of the Charter where the delay between the date of laying of charges and the conclusion of the trial is greater than the presumptive ceiling.[1]

Standard Duration

The duration of the presumptive ceiling will depend on the level of court in which the matter will be heard. The "Jordan" framework sets a presumptive acceptable period of delay between charge and conclusion of trial is **18 months** for provincial court trials and **30 months** for superior court trial.[2]

The period is calculated from the time of charging until the actual or anticipated end of trial, minus defence delays.[3] Where the ceiling is exceeded there is a presumption of unreasonablness which will amount to a breach of s. 11(b) of the Charter.[4]

Ceiling for Youth Accused

Prior to Jordan it was well understood that there are no special rights to speedy trial different from those granted to adult accused.[5] However, it has been made clear that there is an expectation that youth court matters will reach conclusion more quickly than adult ones and the analysis should be different.[6] Some pre-Jordan courts have recommended guidelines within 5 or 6 months of charge or up to 15 months from charge.[7]

The shorter time to trial is necessary so that:[8]

1. the young person can better appreciate the connection between behaviour and consequences;
2. the distorted perception of time by a young person compared to adults;
3. the need to deal with dispositions speedily while youth is still in their formative years.

There is some suggestion that for youth charged under the Youth Criminal Justice Act, the presumptive ceiling should be set at 12 months[9] , 15 months[10] , and 16 months.[11]

Others have suggested that there should be no change to the presumptive ceiling, rather can be dealt with an a non-presumptive breach.[12]

Ceiling Where there is a Direct Indictment

The 30 month ceiling is not affected by the Crown decision to circumvent a preliminary inquiry through the use of a direct indictment under s. 577 of the Code.[13]

This fixed time is not necessarily "free time" for the Crown as it will still be a factor to consider in a non-presumptive challenge.[14]

It has been suggested that Crown should seriously consider preferring a direct indictment in order to engage in the longer ceiling duration.[15]

Ceiling Where Crown Consents to Re-Election

It is unsettled what duration applies where the Crown consents to a re-election. One approach says that on re-election shortly after the matter commences in Supreme Court will mean an 18 month ceiling.[16] A second approach says that the 30 month ceiling will continue despite a re-election.[17]

Ceiling Where the Matter is Sent for Re-trial

There is a division in cases as to whether the normal ceilings apply. There is of course support for the ceiling "clock" resetting after the matter is sent back for trial.[18]

Another approach says the 18/30 month presumptive ceiling does not apply when a matter is returned for re-trial after a successful appeal as all re-trial matters should be prioritized over regular matters.[19] Few courts have set a number. With only some suggestion of between 5 to 12 months.[20]

There is only a little support for the view that the ceilings should apply only once regardless of the number of re-trials.[21]

Ceiling Where the Accused is in Custody

The dominant view is that the ceiling applies whether or not the accused is in custody.[22]

Rebutting the Presumptive Ceiling

The presumption can be rebutted where the Crown can show exceptional circumstances.[23]

1. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ
2. *Jordan*, *supra* (Judgement was rendered on July 8, 2016)
3. *Jordan*, *ibid.*, at paras 47 and 48
4. *Jordan*, *ibid.*, at para 68
5. *R v GCM*, 1991 CanLII 7057 (ON CA), [1991] OJ No 885 (CA), *per* Osborne JA, at para 45
   R v TR, 2005 CanLII 18709 (ON CA), [2005] OJ No 2150 (CA), *per* MacPherson JA
6. *GCM*, *supra*, at para 23 ("youth court proceedings should proceed to a conclusion more quickly than those in the adult criminal justice system. Delay, which may be reasonable in the adult criminal justice system, may not be unreasonable in the youth court")
7. *GCM*, *supra*, at para 45
   TR, *supra*
8. *GCM*, *supra*, at para 115
   TR, *supra*
   R v DS, 1991 CanLII 7055 (ON CA), [1991] OJ No 1220 (CA), *per* Galligan JA, rev'd on other grounds at 1992 CanLII 58 (SCC), *per* Sopinka J
9. *R v DA*, 2018 ONCJ 143 (CanLII), *per* O'Marra J
10. *R v ZN*, 2018 ONCJ 501 (CanLII), *per* Webber J, at paras 124, 132 to 133 *R v JM*, 2017 ONCJ 4 (CanLII), 344 CCC (3d) 217, *per* Paciocco J, at to 138 paras 136 to 138{{{3}}} - recommends 15 month ceiling
11. *R v SM*, 2016 ONCJ 793 (CanLII), *per* Gattrell J
12. *R v DMB*, 2018 ONCJ 15 (CanLII), *per* Christie J
    R v RV, 2017 ONCJ 305 (CanLII), *per* Wadden J
    R v KM, 2018 ONCJ 8 (CanLII), *per* Vaillancourt J
13. *R v Carter*, 2018 ABQB 657 (CanLII), 418 CRR (2d) 133, *per* Poelman J
    R v Jones, 2018 ABQB 691 (CanLII), *per* Nielsen J
    R v Wilson, 2017 ABQB 68 (CanLII), *per* Mahoney J, at paras 71 to 78
    R v Nyznik, 2017 ONSC 69 (CanLII), *per* Nordheimer J
    R v Nasery, 2017 ABQB 564 (CanLII), *per* Gates J
    R v Schenkels, 2017 MBCA 62 (CanLII), 140 WCB (2d) 593, *per* Hamilton JA
    R v Wilson, 2017 ABQB 68 (CanLII), *per* Mahoney J
    R v Cabrera, 2016 ABQB 707 (CanLII), 372 CRR (2d) 62, *per* Poelman J
14. *Nyznik*, *supra*, at para 31
15. *R v Manasseri*, 2016 ONCA 703 (CanLII), 344 CCC (3d) 281, *per* Watt JA ("the Crown should give very serious consideration to preferring direct indictments to fulfill its mandate under s. 11(b) and to ensure, to the extent reasonably possible, that criminal trial proceedings do not exceed the presumptive ceilings set by Jordan.")
16. *R v Teeti*, 2018 ABPC 207 (CanLII), *per* MacDonald J
17. *R v Kaulback*, 2018 NLCA 8 (CanLII), *per* Welsh JA
    R v DMS, 2016 NBCA 71 (CanLII), 353 CCC (3d) 396, *per* Quigg JA
18. *R v Ricard*, 2017 MBQB 11 (CanLII), MJ No 46
    R v Gakmakge, 2018 QCCS 3279 (CanLII)
    R v Bowers, 2017 NSPC 21 (CanLII), *per* Tax J
19. *R v MacIsaac*, 2018 ONCA 650 (CanLII), 365 CCC (3d) 361, *per* Hushcroft JA, at para 27
    R v Creglia, 2018 ONCJ 262 (CanLII), *per* Pringle J, at para 45
    R v Crant, 2018 ONSC 1479 (CanLII), *per* Nakatsuru J
    R v Bruno, 2018 ONCJ 627 (CanLII), *per* Pringle J
    Crowchild, *supra*
    R v Ferstl, 2017 ABPC 266 (CanLII), *per* Fradsham J
20. *Crowchild*, *supra*
    Creglia, *supra*
21. {{CanLIIRx|Windibank|gxf29|2017 ONSC 855 (CanLII)}, *per* Howard J
    R v Wu, 2017 BCSC 2373 (CanLII), *per* Watchuk J
    cf. *R v Crowchild*, 2018 ABQB 368 (CanLII), *per* Hall J, at para 21
22. *R v Carman*, 2017 ONCJ 11 (CanLII), *per* Duncan J, at para 17
23. *Jordan*, *ibid.*, at paras 47, 48, 69 to 81
    see Exceptions below

Obligations on the Crown, Defence, and Judges

All parties, including the courts, have a "responsibility to ensure that criminal proceedings are carried out in a manner ... consistent with" the right under s. 11(d).[1]

1. *R v Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 1

Crown Role

The Crown has an obligation to bring an accused to trial[1] and is also obligated to ensure that "the trial proceedings, once engaged, are not unduly delayed."[2]

It is also observed that "each charge that should not have been laid or pursued, deprives other worthy litigants of timely access to the courts".[3]

The Crown duties include:

- "making reasonable and responsible decisions regarding who to prosecute"[4]
- "making reasonable and responsible decisions" regarding choices of offences to prosecute[5]

- "delivering on their disclosure obligations promptly with the cooperation of police,"[6]
- "creating plans for complex prosecutions";[7]
- use court time efficiently;[8]
- use discretion to resolve cases;[9]
- making "reasonable admissions";[10]
- "streamlining the evidence";[11]
- "anticipating issues that need to be resolved in advance".[12]

Where there is a re-trial the Crown has an obligation to expedite the matter to trial.[13] Expediting the matter can include agreeing to non-consecutive trial dates even where it is "suboptimal".[14]

1. *R v Heaslip*, 1983 CanLII 3519 (ON CA), 9 CCC (3d) 480, *per* Martin JA, at p. 321
   R v Adam et al, 2006 BCSC 350 (CanLII), 70 WCB (2d) 1008, *per* Romilly J The crown has an obligation to"bring the accused to trial within a reasonable time"
   R v Godin, 2009 SCC 26 (CanLII), [2009] 2 SCR 3, *per* Cromwell J, at para 11
2. see *R v MacDougall*, 1998 CanLII 763 (SCC), [1998] 3 SCR 45, *per* McLachlin J, at para 49
3. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 43
4. *Jordan*, *supra*, at para 138 ("For Crown counsel, this means making reasonable and responsible decisions regarding who to prosecute and for what,...")
5. *Jordan*, *supra*, at para 138 ("For Crown counsel, this means making reasonable and responsible decisions regarding who to prosecute and for what,...")
6. *Jordan*, *supra*, at para 138 ("For Crown counsel, this means making reasonable and responsible decisions ... delivering on their disclosure obligations promptly with the cooperation of police, creating plans for complex prosecutions, and using court time efficiently. It may also require enhanced Crown discretion for resolving individual cases.")
7. *Jordan*, *supra*, at para 138
8. *Jordan*, *supra*, at para 138
9. *Jordan*, *supra*, at para 138
10. *Jordan*, *supra*, at para 138
11. *Jordan*, *supra*, at para 138
12. *Jordan*, *supra*, at para 138
13. *R v Creglia*, 2018 ONCJ 262 (CanLII), *per* Pringle J, at para 45
    R v MacIsaac, 2018 ONCA 650 (CanLII), 365 CCC (3d) 361, *per* Huscroft JA, at paras 27, 59 to 65
    R v GVE, 2016 ONCJ 14 (CanLII), *per* Schwarzl J, at para 76
14. *MacIsaac*, *supra*

Defence Counsel Role

The defence counsel's duties include:

- "actively advancing their clients' right to a trial within a reasonable time"[1]
- "collaborating with Crown counsel when appropriate"[2]
- "using court time efficiently"[3]
- making "reasonable admissions" [4]
- "streamlining the evidence"[5]
- "anticipating issues that need to be resolved in advance".[6]

1. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 138 ("For defence counsel, this means actively advancing their clients' right to a trial within a reasonable time, collaborating with Crown counsel when appropriate and, like Crown counsel, using court time efficiently. Both parties should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.")
2. *Jordan*, *supra*, at para 138
3. *Jordan*, *supra*, at para 138
4. *Jordan*, *supra*, at para 138
5. *Jordan*, *supra*, at para 138
6. *Jordan*, *supra*, at para 138

Judge Role

Judges role include "changing courtroom culture".[1] This would include denying adjournments even where it may be defence-attributed delay.[2]

Judges should be active to encourage parties to improve efficiencies by means including recommending proceeding "on a documentary record alone".[3]

Screening Applications

Judges should screen application by requiring counsel to prove the merit of an application by written summary of the evidence to show that it has a "reasonable prospect of success". Otherwise the application should be dismissed.[4]

1. *R v Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 37
   R v Jordan, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 114
2. *Cody*, *supra*, at para 37
3. *Cody*, *supra*, at para 39
4. *Cody*, *supra*, at para 38

Start and End of Jordan Ceiling

Jordan Delay Not Same as Total Delay

The Jordan rule does not represent a departure from the principle that "period of delay to be considered ... is not assumed equivalent to total delay".[1]

While there is a fixed "presumptive ceiling", there may still be compelling "case-specific factors" are still relevant considerations to reasonableness of the delay.[2]

Different Start Times

There are several views on when the "clock" starts for the calculation of delay. The dominant line of cases suggests that the calculation starts at the time of the laying of charges.[3] Many cases rely on the pre-Jordan approach which took the time to start at the laying of charges.[4] The second line of cases suggests that the time begins at the arrest and becoming aware of charges.[5] The rationale in the second line of cases relies on the notion that the police should not be able to seek protection behind their delays and errors in laying a charge reasonably promptly as required under s. 505.[6] There is a variation on the second line of cases which suggests that the time should be at the time the charges are sworn or when they *should have* been sworn.[7]

End of Clock

Under the presumptive Jordan ceilings, the time period ends once the deliberations begin.[8] The rights under s. 11(b) continues throughout the proceedings, but simply not under the Jordan timetable.[9]

Under the pre-Jordan framework, the delay clock ended only after sentencing.[10]

Effect of Crown Stay

A Crown of proceedings will stop the Jordan clock absent of element of "illegitimacy or manipulation".[11]

Effect of Guilty Plea

The right against delay is extinguished upon a guilty plea as it constitutes a waiver of trial rights.[12] The waiver however does not affect the right to speedy sentencing.[13]

1. *R v KN*, 2018 BCCA 246 (CanLII), 362 CCC (3d) 288, *per* Fenlon JA, at para 20 ("Jordan revised the analytical framework but did not depart from the longstanding principle that the period of delay to be considered on a s. 11(b) application is not assumed to be equivalent to total delay. In both Jordan and R v Cody, 2017 SCC 31, the Court assessed whether the remaining delay — not the total delay — was reasonable.")
2. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 51
3. *R v Kalanj*, 1989 CanLII 63 (SCC), [1989] 1 SCR 1594, *per* McIntyre J, at paras 17, 54
   R v Akumu, 2018 BCCA 297 (CanLII), *per* Harris JA
   R v Thind, 2018 ONSC 1337 (CanLII), *per* Coroza J, at paras 55 to 61
   R v Sundralingam, 2017 ONCJ 400 (CanLII), OJ No 3097, *per* Blacklock J
   R v Isaacs, 2016 ONSC 6214 (CanLII), OJ No 5225, *per* Lemay J
   R v Ashraf, 2016 ONCJ 584 (CanLII), 367 CRR (2d) 30, *per* Band J
   R v Gandhi, 2016 ONSC 5612 (CanLII), 133 WCB (2d) 29, *per* Code J, at para 5 ("In R v Jordan, supra at paras. 49, 61 and 63, the majority held that the "most important feature of the new framework" for s. 11(b) analysis is that "it sets a ceiling beyond which delay is presumptively unreasonable." The ceiling for an indictable trial in this Court is "30 months from the charge to the actual or anticipated end of trial." However, the majority went on to hold that "delay attributable to the defence must be subtracted" and that this subtracted period includes both "delay waived by the defence" and "delays caused solely or directly by the defence's conduct."")
   R v Rice, 2018 QCCA 198 (CanLII), 44 CR (7th) 83, *per* Vauclair JA, at para 41
   R v Millar, 2019 BCCA 298 (CanLII), 1 CTC 182, *per* Fitch JA, at para 80
4. *Kalanj*, *supra*, at paras 17, 54
   R v Nguyen, 2013 ONCA 169 (CanLII), 2 CR (7th) 70, *per* Watt JA, at para 49
   R v Milani, 2014 ONCA 536 (CanLII), 314 CCC (3d) 101, *per* van Rensburg JA, at para 25
   R v McHale, 2010 ONCA 361 (CanLII), 256 CCC (3d) 26, *per* Watt JA, at para 70
   R v Sanghera, 2012 BCSC 711 (CanLII), *per* Holmes J, at para 39
   R v Carter, 1986 CanLII 18 (SCC), [1986] 1 SCR 981, *per* Lamer J, at paras 11, 13
   Morin, *supra*, at para 35
5. *R v Gleiser*2018 ONSC 2858 (CanLII)(*no CanLII links) (*complete citation pending*) - judge took into calculation three week delay between arrest and laying and information
   R v Albardy, 2018 ONCJ 114 (CanLII), *per* Doody J, at para 9
   R v Luoma, 2016 ONCJ 670 (CanLII), *per* Schreck J, at paras 19 to 31
   see also pre-Jordan case of *R v Nash*, 2014 ONSC 6025 (CanLII), *per* Bale J, at para 7 ("From the date of the arrest, therefore, the accused was engaged in the criminal justice system. He was an "accused" as defined in section 193 of the Criminal Code, and was required to attend, on particular dates, both at the local police station (pursuant to the *Identification of Criminals Act*), and in court. ...Notwithstanding that no information had yet been laid, he was therefore subject to constraint, and stood accused before the community of committing a crime. The individual rights that section 11(b) seeks to protect, in particular, the right to security of the person, and the right to liberty, were then placed in jeopardy.")
6. *Luoma*, *supra*
7. *Luoma*, *supra*
8. *R v KGK*, 2020 SCC 7 (CanLII), 61 CR (7th) 233, *per* Moldaver J, at para 23 ("Although the right to be tried within a reasonable time enshrined in s. 11(b) of the Charter extends beyond the end of the evidence and argument at trial, I am of the view that the presumptive ceilings established by this Court in Jordan do not.")
9. *KGK*, *ibid.*
10. *R v MacDougall*, 1998 CanLII 763 (SCC), 128 CCC (3d) 483, *per* McLachlin J, at paras 33 to 37
    R v Gallant, 1998 CanLII 764 (SCC), [1998] 3 SCR 80, *per* McLachlin J
11. *R v Kanda*, 2021 BCCA 267 (CanLII), *per* Grauer JA
12. *R v Naderi*, 1996 CanLII 8168 (ONSC), 40 CRR (2d) 312 (Gen Div), *per* Marchand J
    R v Lachance, 2002 CMAC 7 (CanLII), 6 CMAR 274, *per* Letourneau JA
13. *Lachance*, *ibid.*

Jordan Analytical Framework

Three Step Framework

The first step requires the court to "calculat[e] the total delay from the charge to the actual or anticipated end of trial".[1] The second step is to subtract the delay attributable to the defence.[2] The "net delay" is then compared to the presumptive ceilings. The third step will depend on whether the net delay is above or below the ceiling.[3]

Delay *Under* the Presumptive Ceiling

Where the net delay is below the presumptive ceiling the matter can still be stayed for delay.[4]

The onus is upon the accused to show that the net delay that is under the presumptive ceiling was "unreasonable".[5] This requires that the accused show that:[6]

1. it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and
2. the case took markedly longer than it reasonably should have.

Delay *Over* the Presumptive Ceiling

Where the net delay exceeds the presumptive ceiling, the burden is upon the Crown to establish the "presence of exceptional circumstances" otherwise the proceedings must be stayed.[7]

Recommended Approach

A recommended approach to Jordan analysis involves the following:[8]

1. Calculate the total time between charge to actual or anticipated conclusion of trial[9]
2. subtract from the total time, the defence delay, resulting in the "net delay"[10]
3. compare the net delay to the presumptive ceiling[11]
4. If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of exceptional circumstances [12]. If it cannot rebut the presumption, a stay will follow[13]. In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases [14].
5. Subtract delay caused by discrete events from the Net Delay (leaving the "Remaining Delay") for the purpose of determining whether the presumptive ceiling has been reached[15].
6. If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable[16].
7. If the Remaining Delay falls below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable[17].
8. The new framework, including the presumptive ceiling, applies to cases already in the system when Jordan was released (the "Transitional Cases")[18].

Expectation

One cannot usually take into account events occurring before the charges were laid.[19]

Anticipatory Delay

Anticipatory delay is generally not considered.[20]

Replacement Informations

Where a replacement information is laid charging effectively the same offence as an initial information, the time is still calculated from the time of the first information.[21]

Gap Time

Under the pre-Jordan framework, s. 11(b) does not apply to delays arising from an appeal from conviction (ie. appellate delay).[22]

The time between the discharge of an information by a preliminary inquiry judge and the re-commencement of a charge by a direct indictment does not count as delay time.[23]

Calculating

Where there is cascading delay or rippling-effect resulting from a single small delay can be accounted for in the attribution analysis.[24]

1. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 60
   R v Cody, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 21 ("The first step under this framework entails “calculating the total delay from the charge to the actual or anticipated end of trial” (Jordan, at para. 60). In this case, an information was sworn against Mr. Cody on January 12, 2010, and his trial was scheduled to conclude on January 30, 2015. This makes the total delay approximately 60.5 months.")
2. *Jordan*, *supra*, at para 60
   Cody, *supra*, at para 22 ("After the total delay is calculated, “delay attributable to the defence must be subtracted” (Jordan, at para. 60). The result, or net delay, must then be compared to the applicable presumptive ceiling. The analysis then “depends upon whether the remaining delay — that is, the delay which was not caused by the defence — is above or below the presumptive ceiling”")
3. *Cody*, *supra*, at para 22 ("After the total delay is calculated, “delay attributable to the defence must be subtracted” (Jordan, at para. 60). The result, or net delay, must then be compared to the applicable presumptive ceiling. The analysis then “depends upon whether the remaining delay — that is, the delay which was not caused by the defence — is above or below the presumptive ceiling”")
   Jordan, *supra*, at para 67

4. *Jordan*, *supra*, at para 48
   Cody, *supra*, at para 23 ("If the net delay falls below the ceiling, ...then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have.")
5. *Jordan*, *supra*, at para 48 ("If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.")
   Cody, *supra*, at para 23 ("If the net delay falls below the ceiling, ...then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have.")
6. *Jordan*, *supra*, at para 48 ("If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.")
   Cody, *supra*, at para 23 ("If the net delay falls below the ceiling, ...then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have.")
7. *Jordan*, *supra*, at para 47 ("If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.")
   Cody, *supra*, at para 24 ("f the net delay exceeds the ceiling,...then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.")
8. *R v Coulter*, 2016 ONCA 704 (CanLII), 340 CCC (3d) 429, *per* Gillese JA, at paras 34 to 41
9. *Jordan*, *supra*, at para 47
10. *Jordan*, *supra*, at para 66
11. *Jordan*, *supra*, at para 66
12. *Jordan*, *supra*, at para 47
13. *Jordan*, *supra*, at para 47
14. *Jordan*, *supra*, at para 71
15. *Jordan*, *supra*, at para 75
16. *Jordan*, *supra*, at para 80
17. *Jordan*, *supra*, at para 48
18. *Jordan*, *supra*, at para 96
19. *R v AK and AV*, 2005 CanLII 11389 (ON CA), 195 CCC (3d) 501, *per curiam* at 162
20. *R v Norman*, 1988 CanLII 5407 (NLSCTD), 223 APR 177, *per* Noel J, at para 7 ("It was an error in law to accept the anticipated delay as a breach of the respondent's right to be tried within a reasonable time")
21. *R v Travassos*, [2003] OJ 1877 (ONCJ)(*no CanLII links)
22. *R v Potvin*, 1993 CanLII 113 (SCC), [1993] 2 SCR 880, *per* Sopinka J
23. *R v Milani*, 2014 ONCA 536 (CanLII), 314 CCC (3d) 101, *per* van Rensburg J
24. *R v Pugh*, 2021 BCCA 293 (CanLII), *per* JA, at para 73 ("In R. v. Potter; R. v. Colpitts, 2020 NSCA 9, the court confirmed it appropriate for a judge to assess the “ripple-effect” of developments in a case (at para. 331). As noted at para. 332 of the decision, “[r]elatively small timing delays” that have a “cascading effect” may result in a significant attribution of delay, depending on the circumstances.")
    R v Colpitts, 2020 NSCA 9 (CanLII)(*complete citation pending*)

Defence Delay

- Defence Delay Under Jordan Framework

Extraordinary Circumstances

- Extraordinary Circumstances in Jordan Delay Analysis

Breach Within the Presumptive Ceiling

- Breach Within the Presumptive Ceiling

Unreasonable Delay in Verdict

The reasonableness of the delay in rendering verdict must account for the realities that there are other commitments. The consideration should regard to their workload, different approaches to reasoning, and realities of daily lives.[1]

While there are significant limitations of judicial resources, judges “must work within these institutional restrictions and manage their workloads as efficiently as possible.”[2]

1. *R v KGK*, 2020 SCC 7 (CanLII), 61 CR (7th) 233, *per* Moldaver J, at para j5zfd (“... a reasonable amount of verdict deliberation time must account for the practical constraints that trial judges face, both individually and institutionally. Reasonableness under s. 11(b) has always accounted for the reality that “[n]o case is an island to be treated as if it were the only case with a legitimate demand on court resources” ... verdict deliberation time that goes to one case cannot go to another. The appropriate division of time between cases therefore has regard to individual judges’ workloads, different approaches to reasons and reasoning, and the realities of their daily lives (see, e.g., K.J.M., at para. 102). That said, trial judges can and should consider proximity to the Jordan ceiling in determining how to prioritize cases in their workload.“)
2. *KGK*, *ibid.*, at para j5zfd

Application to Pre-Jordan Cases / Transitional Exception

The "Jordan" framework came into effect on July 8, 2016. It should be applied "contextually and flexibly for cases currently in the system".[1]

Where the administrative guidelines are exceeded it is only a factor to consider and does not automatically compel a breach of s. 11(b) of the Charter.[2]

Courts cannot ignore the delay jurisprudence pre-existing Jordan. Jordan was a revisiting of the framework.[3]

The new framework does not apply strictly to traditional cases since "the analysis must be contextually sensitive to the law and the legal culture that exists at the relevant time".[4]

Burden

The burden is upon the Crown to show that the transitional exception applies.[5]

Standard

The Crown must show that the net time is justifiable on the basis of "reasonable reliance on the law as it previously existed".[6] This includes reliance on the acceptability of the speed of the case under the old rules in light of the old factors such as seriousness of the offence and prejudice to the accused.[7]

Factors that are considered include:[8]

1. the complexity of the case
2. the period of delay in excess of the Morin guidelines
3. the Crown's response to institutional delays
4. the defence efforts to move the case along
5. the prejudice to the accused.

Like under the Morin framework, the existence of prejudice may be inferred by the passage of time. [9]

The seriousness of the case also continues to be a factor.[10]

Rarely will the transitional exception be permitted where the case would have failed under Morin.[11]

1. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 94
2. *R v Swaminathan*, 2016 ONSC 4913 (CanLII), OJ No 4150, *per* O'Marra J, at para 13
3. *R v KN*, 2018 BCCA 246 (CanLII), 362 CCC (3d) 288, *per* Fenlon JA, at para 20
4. *R v Porter*, 2016 ONSC 7173 (CanLII), *per* Pomerance J, at para 7
   R v Cabrera, 2016 ABQB 707 (CanLII), 372 CRR (2d) 62, *per* Poelman J, at para 42
5. *Cabrera*, *ibid.*, at para 43
6. *Cabrera*, *ibid.*, at para 43
7. *R v Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 68
8. *R v C(J)*, 2018 ONCA 986 (CanLII), *per curiam*, at para 21
9. *R v Rice*, 2018 QCCA 198 (CanLII), 44 CR (7th) 83, *per* Vauclair JA, at para 20
   C(J), *supra*, at para 45
10. *R v Picard*, 2017 ONCA 692 (CanLII), 354 CCC (3d) 212, *per* Rouleau JA
    R v Regan, 2018 ABCA 55 (CanLII), 359 CCC (3d) 53, *per curiam*
11. Thanabalasingham, 2020 SCC 18 at para 8{{fix}]

Remedy on Breach

Where a delay is unreasonable under s. 11(b) of the Charter, the only available remedy is a stay of proceedings.[1]

The standard for a stay in only the "clearest of cases" does not apply to s. 11(b) as a stay is the only available remedy.[2]

Where the breach is insufficient to warrant a stay of proceedings, the delay can still be a mitigating factor on sentence in limited circumstances.[3]

Postponement of a sentencing hearing can in some circumstances result in mitigation of sentence.[4]

1. *R v Mills*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863, *per* McIntyre J
2. *R v Thomson*, 2009 ONCA 771 (CanLII), 248 CCC (3d) 477, *per curiam*
3. see Sentencing Factors Relating to the Offender
4. *R v Patterson*, 2000 CanLII 16873 (ON CA), 135 OAC 324, *per* MacPherson JA
   R v KN, [1999] OJ 4572 (ONSC)(*no CanLII links)

Procedure

Judge Cannot Raise Delay

The judge should generally not raise a Charter delay issue on behalf of the accused.[1]

Evidence

The applicant must establish an evidentiary foundation for their application.[2]

Often counsel can draft an agreed statement of fact on the history of proceedings.[3]

The applicant should also file a transcript of the previous proceedings.[4]

Notice

The applicant must give sufficient notice to the Crown to allow them to respond with evidence.[5]

Timing

The trial process should generally be permitted to "run its carefully laid course" before a court should engage in an application under s. 11(b) of the Charter to stay proceedings.[6]

A failure to bring an application under s. 11(b) before or at trial will usually be fatal to the applicant.[7]

1. *R v Foisy*, 2000 CanLII 16959 (ON CA), 138 OAC 188, *per* Finlayson J
2. *R v GCM*, 1991 CanLII 7057 (ON CA), 65 CCC (3d) 232, *per* Osborne J ("Generally, s.11(b) applications are matters for the trial court. For it to succeed, there must be an evidentiary foundation for the application. Absent evidence, the alleged violation cannot be found."
3. *GCM*, *ibid.* ("In many cases, the history of the proceedings will best be dealt with by an agreed statement of fact.")
4. *R v Silveira*, [1998] OJ No 1622 (SCJ)(*no CanLII links)
5. *R v Firth*, 1992 CanLII 2585 (NS CA), 70 CCC (3d) 376, *per* Hallett JA *GCM*, *supra* ("Notice should be given to the Crown. I do not think rigid rules should be established by this court concerning the amount of notice required. It should at least be reasonable - that is, sufficient to give the Crown an opportunity to respond.")
6. *R v Fast*, 2016 ONSC 6426 (CanLII), *per* Leach J, at paras 21 and 22
   R v Spears, 2017 NSPC 17 (CanLII), *per* Derrick J, at para 21
   R v Colpitts, 2017 NSSC 22 (CanLII), *per* Coady J
7. *R v Rabba*, 1991 CanLII 7073 (ON CA), , 3 OR (3d) 238, *per* Arbour JA (2:1), at p. 239 (CA) ("the failure to move for a stay of proceedings, either before or at trial, would, in most cases, be fatal. The failure to move for a stay of proceedings would normally amount to a waiver of any claim which may arise under s. 11(b) of the Charter.")
   R v Cortes Rivera, 2019 ABCA 62 (CanLII), *per* Costigan JA, at para 4 (“ In Warring, this Court concluded that the record established the appellant sat on his s 11(b) rights until after he was convicted. The Court found support for this conclusion in R v Rabba ... where the court stated “the failure to move for a stay of proceedings, either before or at trial, would, in most cases, be fatal. The failure to move for a stay of proceedings would normally amount to a waiver of any claim which may arise under s. 11(b) of the Charter.””)

Appeals from Jordan Rulings

The standard of review of the analysis of the delay factors and allocation of time periods is reviewable on a standard of correctness.[1]

Allocation of Time

The characterization and allocation of time of periods of delay are reviewable on the standard of correctness.[2]

Findings of Fact

Findings of fact underlying the delay however are reviewed on a standard of palpable and overriding error.[3]

Decision to Stay Owed Deference

The ultimate decision to stay a proceeding as a remedy under s.24(1) of the Charter on finding of a breach is owed deference.[4] However, it is a question of law reviewable on a standard of correctness.[5]

Appellate Consideration *ab initio*

Appellate courts should reluctant to make findings of s. 11(b) where the trial judge had not considered it on the merits.[6]

1. *R v Christhurajah*, 2019 BCCA 210 (CanLII), 376 CCC (3d) 423, *per curiam*, at paras 110 to 113
   R v KN, 2018 BCCA 246 (CanLII), 362 CCC (3d) 288, *per* Fenlon JA, at para 13
   R v Khan, 2011 ONCA 173 (CanLII), 270 CCC (3d) 1, *per* Karakatsanis JA, at para 18, appeal refused [2011] SCCA No 195
   R v Schertzer, 2009 ONCA 742 (CanLII), 248 CCC (3d) 270, *per curiam*, at para 71, appeal refused [2010] SCCA No 3
   R v Williamson, 2014 ONCA 598 (CanLII), 314 CCC (3d) 156, *per* Lauwers JA (the characterization of delay is the application of a legal principle to fact)
   R v Komstantaskos, 2014 ONCA 21 (CanLII), 298 CRR (2d) 310, *per curiam*, at para 5
   R v D(C), 2014 ABCA 333 (CanLII), 316 CCC (3d) 457, *per curiam*, at para 5
   R v Vassell, 2015 ABCA 409 (CanLII), 331 CCC (3d) 97, *per curiam* (2:1), at paras 5 or 7
   R v Widdifield, 2014 BCCA 170 (CanLII), 354 BCAC 237, *per* Frankel JA, at para 76
2. *R v Horner*, 2012 BCCA 7 (CanLII), 283 CCC (3d) 453, *per* Ryan JA, at para 70
   R v KN, 2018 BCCA 246 (CanLII), 362 CCC (3d) 288, *per* Fenlon JA, at para 13
3. *Schertzer*, *supra*, at para 71
   D(C), *supra*, at paras 5 to 6
   Horner, *supra*, at para 70
4. *R v Bellusci*, 2012 SCC 44 (CanLII), [2012] 2 SCR 509, *per* Fish J
5. *R v Conway*, 1989 CanLII 66 (SCC), [1989] 1 SCR 1659, *per* L'Heureux-Dubé J, at p. 1676
   Widdifield, *supra*
6. *R v Imola*, 2019 ONCA 556 (CanLII), 439 CRR (2d) 352, *per curiam*, at para 24 ("Appellate courts should be reluctant to determine a s. 11(b) application where a trial court has not done so on its merits")
   R v Rabba, 1991 CanLII 7073 (ON CA), , 3 OR (3d) 238, *per* Arbour JA

Delay Outside of Jordan Framework

The temporal scope of 11(b) of the *Charter of Rights and Freedoms* includes the verdict deliberation time, which is not part of the Jordan framework.[1]

Sentencing Delay

There has been proposed a separate ceiling for sentencing as being set at 5 months.[2] The suggested remedy for breach of this ceiling is not a stay of proceedings but rather sentence mitigation.[3]

The 5 month ceiling will not be counted as including time necessary to litigate a dangerous offender application regardless of its outcome.[4]

1. *R v KGK*, 2020 SCC 7 (CanLII), 61 CR (7th) 233, *per* Moldaver J, at para 26 ("On this appeal, no one disputes the temporal scope of s. 11(b). Specifically, the parties agree that the right to be tried within a reasonable time encompasses verdict deliberation time.")
2. *R v Charley*, 2019 ONCA 726 (CanLII), 147 OR (3d) 497, *per* Doherty JA, at para 3
3. *R v Hartling*, 2020 ONCA 243 (CanLII), 150 OR (3d) 224, *per* Benotto JA
4. *R v JC*, 2021 ONCA 131 (CanLII), 70 CR (7th) 38, *per* Paciocco JA

Morin Framework (Pre-Jordan, 2016 SCC 27)

- Morin Framework (Pre-Jordan 2016)

See Also

- Sentencing Factors Relating to the Criminal Proceedings#Delay
- Charter Delay (Cases)
- Charter Applications
- Detention Order for Things Seized Under Section 489 or 487.11 - detention may be extended under s. 490(3) where delays occur without charge
- Alberta Court of Queen's Bench Policy on Inquiry of Verdict Delay

Defence Delay Under Jordan Framework

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General Principles

The second step of the Jordan framework concerns deduction of time due to defence-caused delay.[1] This concerns any action or inaction that "solely or directly" caused the delay [2] or defence action that is illegitimate as it is not done to respond to the charges.[3]

Any delay that is the cause of the defence will not be used as time against the calculation of the presumptive ceiling.[4]

Defence counsel is prohibited from benefitting from its own conduct that causes delay.[5]

Defence delay takes one of two forms. Either it is a defence waiver or it is a delay caused by the conduct of the defence.[6]

The Court may consider both the defence's decision to take a particular step and the manner in which the particular step was taken to decide whether to attribute delay to defence.[7]

Courts can consider the timeliness of filing of defence applications.[8] As well as the number, strength, importance, and proximity to the Jordan ceiling.[9]

Inefficiencies in the defences approach to their applications will also be of possible attribution.[10]

Judges should not "second-guess" the steps taken by defence counsel in responding to the charges.[11]

Defence Delay That is *Not* to be Counted

The Jordan framework recognizes preparation as a necessary delay and does not go into the calculation.[12]

Any "actions legitimately taken to respond to the charges fall outside ... defence delay".[13]

It has been suggested that normally a 1.5 month benchmark should be sufficient time for defence to prepare for a summary conviction case when taking into account their other work.[14]

Appellate Review

Attribution of defence delay is "highly discretionary" and so should be accorded deference.[15]

The process of according delay to one party or another is not given deference.[16] Efforts to expedite matters are determined on a standard of correctness.[17]

1. *R v Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 28
2. *Cody*, *ibid.*, at paras 28 and 30
3. *Cody*, *ibid.*, at para 30
4. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 21 ("Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(b) was not intended to be a sword to frustrate the ends of justice.")
5. *Jordan*, *supra*, at para 60 ("The defence should not be allowed to benefit from its own delay-causing conduct. As Sopinka J. wrote in Morin: "The purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits" ")

6. *R v Coulter*, 2016 ONCA 704 (CanLII), 340 CCC (3d) 429, *per* Gillese JA, at para 42
   Cody, *supra*, at paras 27, 30
7. *Cody*, *supra*, at para 32 ("Defence conduct encompasses both substance and procedure — the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. ... Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.")
8. *Cody*, *supra*, at para 32 ("The overall number, strength, importance, proximity to the Jordan ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations.")
9. *Cody*, *supra*, at para 32 ("The overall number, strength, importance, proximity to the Jordan ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations.")
10. *Cody*, *supra*, at para 32
11. *Cody*, *supra*
    R v Mullen, 2018 ABQB 831 (CanLII), *per* Michalyshyn J, at para 47
12. *Cody*, *supra*, at para 29 ("this Court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case")
    Jordan, *supra*, at para 65, also 53 and 83 ("defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay.",
13. *Cody*, *supra*, at para 29]
    Jordan, *supra*, at para 65 ("To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed.")
14. *R v Zikhali*, 2019 ONCJ 24 (CanLII), 428 CRR (2d) 44, at para 33
15. *Cody*, *supra*, at para 31] ("The determination of whether defence conduct is legitimate is ... highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.")
16. *R v Jurkus*, 2018 ONCA 489 (CanLII), 363 CCC (3d) 246, *per* Fairburn JA, at paras 25 to 26
17. *R v Tummillo*, 2018 MBCA 95 (CanLII), *per* Cameron JA, at para 53

Defence Waiver of Delay

Any period of time that has been waived by the defence must be subtracted from the total time delayed.[1]

Waiver while not fully apprised by the circumstances of the court docket does not necessarily render the time deductable from the Jordan ceiling.[2]

Burden

The burden is on the crown to prove there has been a waiver of any delay rights.

Requirements

A waiver must be clear, unequivocal and with full knowledge of the right being waived.[3] It does not have to be explicit, however.[4]

An agreement as to a date does not amount to a waiver where the agreement is a "mere acquiescence to the inevitable".[5] The absence of any evidence that the "consents amount to acquiescence in the inevitable, the consents constitut[e] wavier or, as actions of the accused, were attributable to him".[6]

1. *R v Sharma*, 1992 CanLII 90 (SCC), [1992] 1 SCR 814, *per* Sopinka J, at p. 191 (CCC)
   R v Morin, 1992 CanLII 89 (SCC), [1992] 1 SCR 771, *per* Sopinka J, at p. 15
2. *Tummillo*, *supra* - accused waived delay of trial conference even though the conference was double-booked with other matters.
3. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 61]
   R v Cody, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 27 ("A waiver of delay by the defence may be explicit or implicit, but must be informed, clear and unequivocal ... .")
   R v White, 1998 CanLII 13319 (NL CA), Nfld. & PEIR 309 (NLCA), *per* Cameron JA, at para 10]
   R v Richard, 1996 CanLII 185 (SCC), [1996] 3 SCR 525, *per* La Forest J
4. *R v Coulter*, 2016 ONCA 704 (CanLII), 340 CCC (3d) 429, *per* Gillese JA, at para 43 ("Waiver can be explicit or implicit but, in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights")
   Jordan, *supra*, at para 61
5. *R v Askov*, 1990 CanLII 45 (SCC), [1990] 2 SCR 1199, *per* Cory J, at pp. 48l to 482 (CCC)
   Morin, *supra*, at p. l5 (CCC)
   R v Pusic, 1996 CanLII 8215 (ON SC), OR (3d) 692, at pp. 70l to 702
   R v Richards, 2012 SKCA 120 (CanLII), 405 Sask R 127, *per* Richards JA, at para 25
   R v Brassard, 1993 CanLII 42 (SCC), [1993] 4 SCR 287, *per* L'Heureux-Dube J, at p. 287, 288 (SCR) *R v Nuosci*, 1993 CanLII 40 (SCC), [1993] 4 SCR 283, *per* Sopkina J, at p. 284 (An "[a]greement to suggested dates cannot be characterized as acquiescing in the inevitable in the absence of evidence to that effect")
6. *Brassard*, *ibid.*, at p. 287 (SCR)

Types of Defence Delay

Defence delay concerns a various number of defence conduct. It encompasses "the decision to take a step, as well as the manner in which it is conducted".[1] It will include any conduct that is deemed not "legitimate" which will include conduct "designed to delay", shows "marked inefficiency" or "marked indifference towards defence delay".[2]

Incentivising Advancement

Courts are directed to incentivize counsel to move matter forward in order to eliminate the "culture of complacency".[3]

Attributing Illegitimate Actions

Illegitimate action, inaction or omissions will be defence-attributable delay.[4] This includes a failure of engaging in their duty to "collaborat[e] with the Crown" and "us[e] court time efficiently".[5]

What constitutes "illegitimate" does not need to rise to the level of "professional or ethical misconduct".[6]

Unreasonable Action of Counsel

Delay attributable to the defence in a Jordan analysis includes all "unreasonable actions" on the part of the defence.[7]

Unreasonable actions include:

- last-minute changes in counsel[8]
- adjournments flowing from a lack of diligence[9]

Defence Assumed Diligent

Courts may consider "the level of diligence displayed by the accused" as a relevant factor.[10]

The defence's refusal to conceded uncontested matters is "fair game" to consider on whether defence cause delay.[11]

Adjournments

Traditionally, a party who causes an adjournment is responsible for the entire period of delay until the matter is re-scheduled.[12]

1. *R v Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 32
2. *Cody*, *ibid.*, at para 32
3. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ (5:4), at paras 94 and 104
   Cody, *supra*, at para 1
4. *Cody*, *supra*, at para 33
5. *Cody*, *supra*, at para 33
   Jordan, *supra*, at para 138
6. *Cody*, *supra*, at para 35
7. *Jordan*, *supra*, at para 193
8. *Jordan*, *supra*, at para 193
9. *Jordan*, *supra*, at para 193
10. *Jordan*, *supra*, at para 86
11. *R v Moreira*, 2019 ONSC 2536 (CanLII), *per* Akhtar J, at paras 28 to 29 ("At the preliminary inquiry, identity was not conceded until the Crown played video evidence. In addition, the defence originally indicated that all the Mr. Big witnesses were required to testify at the preliminary hearing. However, during the hearing, they specified that only two witnesses were required....these matters should have been conceded in advance of the hearing particularly after multiple judicial pre-trials had been held. I also agree that these matters are fair game when it comes to assessing defence-caused delay in s. 11(b) applications...")
12. *R v Picard*, 2017 ONCA 692 (CanLII), 354 CCC (3d) 212, *per* Rouleau JA, at para 117
    R v M(NN), 2006 CanLII 14957 (ON CA), 209 OAC 331, 141 CRR (2d) 95 (CA), *per* Juriansz JA (“the party who causes an adjournment is responsible for the entire delay until the matter can be re-scheduled, unless the other party is unavailable for an unreasonable length of time”)

Lawyer-Client Events

Failure of Accused to Maintain Contact

The Court has the discretion to find that the failure of the accused to maintain contact with their counsel constitutes "illegitimate defence conduct" and will not be added to the delay calculation.[1]

Change of Counsel

Any actions that relate to the change of counsel will be attributed to defence delay.[2]

1. *R v Evans*, 2019 ABCA 74 (CanLII), AJ No 229, *per curiam* (3:0), at paras 24 to 25
2. *R v Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at para 40 ("In this case, we would deduct two periods of time as defence delay. First, it was undisputed throughout the proceedings that the delay resulting from Mr. Cody’s first change of counsel should be deducted as defence delay.")
   R v Teng, 2017 ONSC 568 (CanLII), *per* MacDonnell J, at paras 63 to 69
   R v Chonkolay, 2017 ABQB 148 (CanLII), at paras 21 to 25
   R v Pelletier, 2016 BCSC 2496 (CanLII), 136 WCB (2d) 264, at paras 29 to 30

Delay of Election and Plea

Intake Period

Under the pre-Jordan framekwork, intake period of two months for the purpose of retaining counsel, reviewing disclosure, and resolution meetings are considered typical.[1]

The presumptive ceiling takes into account an "intake period" which includes time to review disclosure, resolution meetings and retain counsel. It does not get removed from the delay period.[2]

Lawyers are not expected to be able to review the entirety of disclosure as soon as it arrives. It is expected that it will take in the range of 4 to 6 weeks.[3]

Legal Aid and Rowbotham Applications

The period required to seek a Rowbotham application or to seek the release of money for legal expenses is not attributable to defence as it is necessary to full answer and defence.[4] However, where the application for legal aid or Rowbotham counsel is delayed this will be attributable to defence.[5]

Trial Readiness

Where the Crown and Court are ready to proceed but the defence is not will be a delay attributable to the defence.[6] This does not include necessary "preparation time" for the defence.[7]

1. *R v Meisner*, 2003 CanLII 49317 (ON SC), *per* Hill J, at paras 30 to 32 aff'd 2004 CanLII 30221 (ONCA)
2. *Cody*, *ibid.*, at para 29
R v Gandhi, 2016 ONSC 5612 (CanLII), 133 WCB (2d) 29, *per* Code J, at para 24
R v McCready, 2017 ONCJ 15 (CanLII), *per* Hawke J, at para 35
R v Luoma, 2016 ONCJ 670 (CanLII), *per* Schreck J, at para 22
3. *R v Regan*, 2018 ABCA 55 (CanLII), 359 CCC (3d) 53, *per curiam*, at paras 61 to 62
R v Taylor, 2017 ONSC 2263 (CanLII), *per* Gordon J
R v McNab, 2016 SKQB 333 (CanLII), 365 CRR (2d) 215, *per* McMurtry J, at paras 40 to 41
4. *R v S(DM)*, 2016 NBCA 71 (CanLII), 353 CCC (3d) 396, *per* Quigg JA
R v Isaacs, 2016 ONSC 6214 (CanLII), [2016] OJ No 5225, *per* Lemay J, *per* Lemay J, at paras 88, 92
R v Ny, 2016 ONSC 8031 (CanLII), 343 CCC (3d) 512, *per* Fairburn J
5. *R v Sacoccia*, 2017 ONSC 2737 (CanLII), *per* Thorburn J
R v Paauw, 2016 ONSC 7394 (CanLII), *per* LaLiberte J
R v R(D), 2017 ONSC 1770 (CanLII), *per* Molloy J
R v McCully, 2016 NSPC 70 (CanLII), *per* Tax J
6. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ (5:4), at para 64 (" As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence.")
R v Coulter, 2016 ONCA 704 (CanLII), 340 CCC (3d) 429, *per* Gillese JA, at para 44
7. *Jordan*, *supra*, at para 65 ("To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. ... While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.")

Advancing to Trial Without Complete Disclosure

Defence cannot wait until they receive every last shred of relevant material before agreeing to move the matter forward to trial.[1]

Defence should proceed once they have "substantial dislosure".[2]

However, delay arising out of the Crown's failure to disclose cannot be then used against the accused.[3]

No Delay for Non-Relevant Disclosure

The defence should not be permitted to generate delay by requesting evidence that is not relevant, even where the Crown agrees to disclose.[4]

Sufficiency of Disclosure

Generally, defence should be equipped with sufficient disclosure to ensure efficiency at the pre-trial phase of proceedings.[5]

Defence are expected to have a "reasonable opportunity to review the essential aspects of the Crown case".[6] The necessary disclosure before advancing to trial should be those materials that are "pivotal in understanding the nature of the case, the proof and the material's impact on advising her client on issues such as the nature of the plea, mode of trial" and similar.[7] Failure to have an opportunity to review such material would be "irresponsible" and would waste judicial resources.[8]

Example Disclosure

The availability of a preliminary inquiry transcript was considered crucial enough to the advancement of the matter to trial.[9]

1. *R v Regan*, 2018 ABCA 55 (CanLII), 359 CCC (3d) 53, *per curiam*, at para 65 ("The accused cannot hold out for every last shred of disclosure before setting hearing dates: ... In some cases it is reasonable to expect defence counsel to book a trial or preliminary inquiry before they have had an opportunity to review all of the Crown's disclosure.")
R v Kovacs-Tatar, 2004 CanLII 42923 (ON CA), 73 OR (3d) 161, *per curiam*, at para 47
R v NNM, 2006 CanLII 14957 (ON CA), 209 OAC 331, *per* Juriansz JA, at para 37
R v JEK, 2016 ABCA 171 (CanLII), 337 CCC (3d) 222, at para 66
R v Gandhi, 2016 ONSC 5612 (CanLII), 133 WCB (2d) 29, *per* Code J, at paras 31 to 33
2. *Gandhi*, *supra*, at paras 31 to 33 (refences the standard of "substantial disclosure")
3. *R v Frail*, 2017 ONSC 5886 (CanLII), *per* Schreck J, at para 44 ("Crown cannot fail to meet its obligation to make timely disclosure and then attempt to attribute the ensuing delay to the defence for failing to do without material it ought to have received")
R v Walker, 2013 SKCA 95 (CanLII), 291 CRR (2d) 41, *per* Ottenbreit JA, at paras 28 to 30
R v Stanley, 2016 ONCJ 730 (CanLII), *per* Schreck J, at para 29
4. *NNM*, *supra*, at para 37 ("A person charged with an offence should not be able to generate a basis for a s. 11(b) application by making a continuous stream of requests for materials that have no potential relevance, even if the Crown agrees to provide them.")
5. *R v Jurkus*, 2018 ONCA 489 (CanLII), 363 CCC (3d) 246, *per* Fairburn JA, at para 32
6. *Regan*, *supra*, at para 65 ("But defence counsel should not be expected to set a hearing date before they have a reasonable opportunity to review the essential aspects of the Crown's case.")
7. *R v Vitalis*, 2018 ONCJ 43 (CanLII), *per* O'Marra J, at para 41
8. *Vitalis*, *ibid.*, at para 42
R v Mahenthiranathan, 2017 ONCJ 497 (CanLII), *per* Bhabha J, at paras 17, 31
9. *R v King*, 2018 NLCA 66 (CanLII), 369 CCC (3d) 1, *per* Barry JA, at paras 78 to 80 and, at paras 106 to 107

Scheduling

Unavailability of Defence Counsel

The dominant case law suggests that the unavailability of counsel when both court and Crown are available will be attributed to defence in most circumstances.[1] This effectively overturns the pre-Jordan rule established by *R v Godin*, which did not necessarily attribute delay to defence due to unavailability.[2]

However, there are some courts that maintain the rule from Godin still remains.[3]

1. *R v Mullen*, 2018 ABQB 831 (CanLII), *per* Michalyshyn J, at para 41
   R v RMP, 2018 ONSC 4117 (CanLII), 148 WCB (2d) 573, *per* Bell J
   R v Mamouni, 2017 ABCA 347 (CanLII), 356 CCC (3d) 153, *per* Watson JA
2. see *R v Godin*, 2009 SCC 26 (CanLII), [2009] 2 SCR 3, at paras 21 to 23
   R v P(RM), 2018 ONSC 4117 (CanLII), 148 WCB (2d) 573, at paras 44 to 45
   R v Ewanochko, 2018 MBPC 14 (CanLII), at para 37
   R v Grewal, 2018 ONCJ 108 (CanLII), 405 CRR (2d) 30, *per* Monahan J, at paras 14 to 16
   cf. *R v Albinowski*, 2018 ONCA 1084 (CanLII), 371 CCC (3d) 190, *per* Roberts JA
   and *R v King*, 2018 NLCA 66 (CanLII), 369 CCC (3d) 1, *per* Barry JA, at para 108
3. *R v Roberts*, 2018 ONSC 545 (CanLII), OJ No 732, at para 92
   R v Bardsley, 2017 ONCJ 42 (CanLII)Template:PreONCJ, at para 40
   R v Sepka, 2017 BCPC 356 (CanLII), at para 46
   R v Wu, 2017 BCSC 2373 (CanLII), at para 62
   R v Akumu, 2017 BCSC 896 (CanLII), *per* Fisher J, at para 114
   R v Ashraf, 2016 ONCJ 584 (CanLII), 367 CRR (2d) 30, *per* Band J
   R v Gasana, 2016 ONCJ 724 (CanLII), *per* Monahan J

Defence Applications

Defence applications to seek out evidence to which the Crown had a McNeil duty to seek out would result in the time required to obtain the records would not be attributable to the defence.[1]

Frivolous Application

Any frivolous application will be delay attributable to the defence.[2]

1. e.g. *R v King (No. 5)*, 2017 CanLII 15296 (NLSCTD), *per* Marshall J, at para 53
2. *R v Coulter*, 2016 ONCA 704 (CanLII), 340 CCC (3d) 429, *per* Gillese JA, at para 44
   R v Jordan, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ (5:4), at para 63 ("Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.")

Multiple Co-Accused

The delay caused by multiple co-accused should be taken as a "fact of life" and should be taken into account for what is a "reasonable" amount of time. One accused can prevent a co-accused from proceeding expeditiously. In such a case the court should look at whether the delayed accused took "proactive steps", including prompt disclosure review, pushing for case management, collaborate with Crown to streamline issues, make concessions, and make Crown and Court aware of delay problems.[1] The court should not simply question whether the petitioning accused caused delay or not.[2]

The approach on such cases should be "individualized".[3]

The main question is whether it is in the "interest of justice" to have matters advanced jointly.[4] Where the interests of justice are no longer being served, the Crown is expected to mitigate delay caused by co-accused matters where one co-accused is being "held hostage" by the delay caused by another.[5]

1. *R v Vassell*, 2016 SCC 26 (CanLII), [2016] 1 SCR 625, *per* Moldaver J, at para 6 ("In many cases, delay caused by proceeding against multiple co-accused must be accepted as a fact of life and must be considered in deciding what constitutes a reasonable time for trial. ... the delay caused by the various co-accused not only prevented the Crown's case from moving forward, it also prevented Mr. Vassell from proceeding expeditiously, ... it is [a case] in which he took proactive steps throughout, from start to finish, to have his case tried as soon as possible. In this regard, his counsel reviewed disclosure promptly, pushed for a pre-trial conference or case management, worked with the Crown to streamline the issues at trial, agreed to admit an expert report, made the Crown and the Court aware of s. 11(b) problems, and at all times sought early dates.")
   R v Gopie, 2017 ONCA 728 (CanLII), 140 OR (3d) 171, *per* Gillese JA, at para 174
2. *Vassell*, *ibid.*, at para 6("Importantly, this is not a case where Mr. Vassell simply did not cause any of the delay; ")
3. *Gopie*, *supra*, at para 128 ("an individualized approach must be taken to the attribution of defence-caused delay in cases of jointly-charged accused")
4. *R v Albinowski*, 2018 ONCA 1084 (CanLII), 371 CCC (3d) 190, *per* Roberts JA, at paras 36 to 39
   Gopie, *supra*, at para 171
   R v Manasseri, 2016 ONCA 703 (CanLII), 344 CCC (3d) 281, *per* Watts JA, at para 323
5. *Albinowski*, *supra*, at para 39
   Vassell, *supra*, at para 7
   see Joinder and Severance of Charges

Defence Obligation to Bring the Matter to Trial

It is not enough for defence counsel to make "token efforts" on the record to seek early trial dates.[1]

Courts may consider whether the defence have acted with diligence in bringing the matter to trial.[2] This would be with a view to:[3]

- whether counsel raised the issue of delay;
- whether counsel took active steps to move the matter forward expeditiously by inquiring on early trial dates;
- whether counsel met in advance of hearings to streamline the process;
- the seriousness of the charges
- the prejudice they delay had on the evidence

1. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at para 85
2. *R v Summerfield*, 2016 MBQB 241 (CanLII), MJ No 366, *per* Edmond J
   R v Amyot and Emslie, 2016 MBQB 186(*no CanLII links)
3. *Summerfield*, *supra*, at para 38

Morin Framework (Pre-Jordan, 2016 SCC 27)

- Morin Framework (Pre-Jordan 2016)

See Also

- Charter Delay (Cases)
- Charter Applications

Breach Within the Presumptive Ceiling

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General Principles

The Jordan framework allows for a finding of a breach of s. 11(b) even where the presumptive ceiling has not been reached.[1]

It has been suggested that the court may still stay a charge within the Jordan time limitation where the delay is "shocking, inordinate and unconscionable".[2]

A stay is still available while the period of time is within the ceiling, so long as the defence can establish:[3]

1. "it took meaningful steps to demonstrate a sustained effort to expedite the proceedings", and
2. "the case took markedly longer than it reasonably should have".

Burden

The burden is upon the defence to show that it "took meaningful, sustained steps to expedite the proceedings".[4]

Rarity of Under-Ceiling Breaches

A stay within the presumptive ceiling should be considered "rare" and "limited to clear cases".[5]

Reasonable Time Requirement

The reasonable time requirement will depend on factors including: [6]

1. complexity of the case;
2. local considerations;
3. Crown efforts to expedite the proceedings.

Local considerations should involve the judge "employ[ing] the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances."[7]

1. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at paras 82 to 91
2. *R v KGK*, 2019 MBCA 9 (CanLII), 373 CCC (3d) 1, *per* Cameron JA (2:1), at para 174
3. *Jordan*, *ibid.*, at paras 48, 82 to 83, 105
4. *Jordan*, *supra*, at para 84
5. *Jordan*, *ibid.*, at paras 48, 69
6. *Jordan*, *supra*, at para 87
7. *Jordan*, *supra*, at para 89

"Meaningful" and "Sustained" Steps

For a breach to be found when within the presumptive ceiling the defence must show "initiative" through "meaningful and sustained steps" to be tried quickly.[1]

The exercise of determining whether appropriate steps were taken requires that the judge to "consider what the defence could have done, and what it actually did, to get the case heard as quickly as possible".[2]

The defence are expected to act "reasonably" not perfectly".[3]

To look for meaningful and sustained steps, the court should consider:[4]

1. attempt to set earliest possible hearing dates;
2. being cooperative and responsive to the Crown and court
3. put Crown on notice when delay is becoming a problem;
4. conduct applications reasonably and expeditiously.

Example of Appropriate Steps

In a given case, the accused can express an intention to expedite the case in any number of methods including:[5]

- "At the set date appearance, [accused] could ... ask[] the court to direct that the trial co-ordinator find earlier dates."
- "counsel [could] point out that he was in custody on these charges or in any way emphasize his custodial status."
- "If ... stuck with accepting [later] dates, [counsel] could ... ask[] that the case be put on a wait list for consideration of earlier dates if they became available."
- Counsel "could ... ask[] for the case to return periodically to check for any newly available dates."
- Counsel could seek "the assistance and co-operation of Crown counsel in getting earlier dates."
- Counsel could make "reasonable admissions – such as continuity – that would have shortened the time requirements of the case."

Prejudice as a Factor

Where the ceiling is breached, prejudice to the accused is not relevant.[6] However, it is relevant to analysis for the finding of a breach where the ceiling has not been surpassed.[7]

1. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ, at to 86 para 84 to 86
2. *Jordan*, *ibid.*, at para 84
3. *Jordan*, *ibid.*, at para 85
4. *Jordan*, *ibid.*(defence must show that they "attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(b) application) reasonably and expeditiously")
5. *R v Carman*, 2017 ONCJ 11 (CanLII), *per* Duncan J, at para 30
6. *Jordan*, *supra*, at paras 81, 109 to 110
7. *R v Lai*, 2018 BCSC 867 (CanLII), *per* Schultes J, at para 236
   R v Patrois, 2018 ONSC 934 (CanLII), 404 CRR (2d) 360, *per* R Smith J, at para 61
   R v Hammer, 2017 BCPC 377 (CanLII), 42 CR (7th) 386, *per* Keyes J, at para 91
   R v Jeyakanth, 2017 ONCJ 31 (CanLII), *per* Henschel J, at paras 31 to 42
   R v Basha, 2017 ONSC 337 (CanLII), *per* Maranger J
   R v Ching, 2016 ONSC 7533 (CanLII), *per* Ducharme J, at para 21
   R v Akumu, 2017 BCSC 896 (CanLII), *per* Fisher J, at para 148
   R v Bamilla, 2017 ABCA 347 (CanLII), 356 CCC (3d) 153, *per* Watson JA, at para 65
   R v Mitchell, 2017 ABQB 717 (CanLII), *per* Yamauchi J, at para 50
   R v Tetreault, 2017 ABQB 349 (CanLII), 57 Alta LR (6th) 159, *per* Renke J, at para 87
   R v Grant, 2017 MBQB 39 (CanLII), 376 CRR (2d) 316, *per* Toews J, at para 44
   R v Mebrahtu, 2017 MBQB 59 (CanLII), MJ No 105, *per* Greenberg J, at paras 36 to 39
   R v Manh, 2016 ONSC 6970 (CanLII), at para 39
   R v Maione, 2016 ONSC 7207 (CanLII), *per* Varpio J, at para 39
   R v Isaacs, 2016 ONSC 6214 (CanLII), OJ No 5225, *per* Lemay J, at paras 186 to 188

See Also

- Charter Delay (Cases)

Reasons for Delay

< Procedure and Practice < Delay

General Principles

It is "the ultimate responsibility of moving a case forward rests with the Crown". [1] However, the Crown is not to take responsibility for defence counsel's failings to properly represent the interests of their client.

1. *R v Stephen*, 2012 ONCA 411 (CanLII), OJ No 2678, *per curiam*, at para 7

Intake Period / Pre-Charge Delay

The intake period refers to the period of time between the beginning of the investigation and the eventual swearing the Information and sending of disclosure to the Crown.

This period can be divided into two types of delay:[1]

1. delay between the offence occurring and the reporting to police
2. delay between the reporting of the offence and the police laying a charge

The intake period will vary on the type of charges investigated.

Drinking and driving cases typically have an intake period of roughly two months.[2]

1. *R v A(S)*, 2011 NUCJ 7 (CanLII), *per* Sharkey J
2. *R v Meisner*, 2003 CanLII 49317 (ONSC), [2003] OJ No 1948 (ONSC), *per* Hill J

Re-Scheduling of trial time

This period of time concerns delay resulting from the inability to finish the trial during the initial time booked.

It is generally expected that incomplete cases will be given priority over other matters in court. Delays due to re-scheduling of trial time is treated as institutional delay or as part of the inherent time requirements. [1] Gross underestimate of the time requirements for trial will be attributable to institutional delay.[2]

Defence counsel are not expected to "hold themselves in a state of perpetual availability".[3]

1. *R v Lahiry*, 2011 ONSC 6780 (CanLII), 283 CCC (3d) 525, *per* Code J, at para 67
   R v Godin, 2009 SCC 26 (CanLII), [2009] 2 SCR 3, *per* Cromwell J
   R v Brace, 2010 ONCA 689 (CanLII), 261 CCC (3d) 455, *per* Juriansz JA, at paras 14 to 16 (Ont. C.A.)
   R v Allen, 1996 CanLII 4011 (ON CA), 110 CCC (3d) 331, *per* Doherty JA, at pp. 347-351
   R v Satkunanathan, 2001 CanLII 24061 (ON CA), 152 CCC (3d) 321, *per curiam*, at paras 43 to 45 and 54 to 55 (Ont. C.A.)
   R v M(R), 2003 CanLII 50092 (ON CA), 180 C.C.C (3d) 49, *per* MacPherson JA, at paras 6 to 9
   R v W(AJ), 2009 ONCA 661 (CanLII), 257 OAC 11, *per* Rosenberg JA, at paras 29 to 43(ONCA)
2. *R v Qureshi*, 2004 CanLII 40657 (ON CA), 190 CCC (3d) 453, *per* Laskin JA
3. *Godin*, *supra*, at para 23

Institutional or Systemic Delay

Institutional or systemic delays arise where the case is ready for trial but "trial a judge, courtroom or essential court staff may not be available and so the case cannot go on."[1] It "runs from the time the parties are ready for trial and continues until the system can accommodate the proceedings."[2]

The Supreme Court in Morin suggested a "guideline of between 8 and 10 months for institutional delay in Provincial Courts."[3]

Delay required to hold judicial pre-trial conferences are attributable as institutional delay.[4]

The failure of courts to identify "true availability of dates within the system" may risk the rights under s.11(d) to becomes "meaningless".[5]

Institutional Delay is Attributed to the Crown

Institutional delay is attributable to the Crown.[6] This is because delays caused by lack of institutional resources should not be legitimized as acceptable reasons for delay.[7]

1. *R v Morin*, 1992 CanLII 89 (SCC), [1992] 1 SCR 771, *per* Sopinka J
2. *Morin*, *ibid.*
3. *Morin*, *ibid.*
4. *R v CRG*, 2005 CanLII 32192 (ON CA), [2005] OJ 3764 (ONCA), *per* Rosenberg JA
5. *R v Patrick Sikorski & Daniel Griffiths*, 2013 ONSC 1714 (CanLII), [2013] OJ No 1654, *per* Nordheimer J, at para 97
6. *R v Lahiry*, 2011 ONSC 6780 (CanLII), 283 CCC (3d) 525, *per* Code J, at paras 25 to 37
7. *R v Mills*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863, *per* McIntyre J, at p. 935 ("It is imperative, however, that in recognizing the need for such a criterion we do not simply legitimize current and future delays resulting from inadequate institutional resources. For the criterion of institutional resources, more than any other, threatens to become a source of justification for prolonged and unacceptable delay. There must, therefore, be some limit to which inadequate resources can be used to excuse delay and impair the interests of the individual.")

Inherent Delays

By contrast "inherent delay" are those that are necessary to move a case forward. The more complicated the case the longer the preparation time will be required. In addition, counsel "cannot be expected to devote their time exclusively to one case." The inherent delays are excusable. This is determined on a case by case basis. [1]

Inherent time requirements are neutral periods that do not count against accused or the Crown.[2]

Time spent scheduling, preparing and conducting pre-trial hearings are considered inherent time requirements.[3]

While the accused is struggling to retain and keep counsel, the court and Crown are in a "holding pattern" and that time is attributed as inherent delay.[4]

Complexity

The more "complex case is, the longer it will take counsel to prepare, the longer it will take to assemble witnesses and evidence, and the longer the trial may take."[5]

Mis-estimating Requirements

Where counsel mis-estimate the time it will take to prosecute the case resulting in an adjournment to finish the case will normally count as "inherent time requirement".[6]

Multiple Accused

Where there are multiple co-accused or multiple charges the inherent time requirements will increase.[7]

Judgement Under Reserve

The time in which a judgment is under reserve is generally considered an inherent time requirement.[8]

In exceptional circumstances, such as an 11 month delay for a decision on a directed verdict, would constitute unreasonable delay.[9]

1. *R v Richards*, 2012 SKCA 120 (CanLII), 2 WWR 637, *per* Richards JA, at para 33
   R v Morin, 1992 CanLII 89 (SCC), [1992] 1 SCR 771, *per* Sopinka J, at pp. 791-2
2. *R v MacDougall*, 1998 CanLII 763 (SCC), [1998] 3 SCR 45, *per* McLachlin J, at para 44
3. *R v Nguyen*, 2013 ONCA 169 (CanLII), 2 CR (7th) 70, *per* Watt JA, at paras 54, 59, 60
4. *R v Baron*, 2017 ONCA 772 (CanLII), 356 CCC (3d) 212, *per* Trotter JA, at para 59
5. *R v Lee*, 2015 SKCA 53 (CanLII), 323 CCC (3d) 313, *per* Whitmore JA, at para 53
6. *R v Allen*(1996), 110 CCC (3d) 311(*no CanLII links) , at p. 344 (ONCA) aff'd at [1997] 3 SCR 700, 1997 CanLII 331 (SCC), *per* Sopinka J
7. *Rusic*, *supra*, at p. 703
   R v Faulds, 1996 CanLII 2579 , 111 CCC (3d) 39, *per* Finlayson JA
8. *R v MacIsaac*, 2018 ONCA 650 (CanLII), 365 CCC (3d) 361, *per* Huscroft JA, at para 35 ("Prior to Jordan, the time a judgment was under reserve was typically considered to be part of the inherent time requirements of a case")
   R v Ferguson, 2005 CanLII 28538 (ON SC), OTC 746, *per* Durno J, at para 213 ("The inherent time requirements also include the time for the court to prepare its rulings and judgment.") leave refused 2008 ONCA 764 (CanLII), *per curiam*
   R v Schertzer, 2009 ONCA 742 (CanLII), 248 CCC (3d) 270, *per curiam*, at para 114
   R v Lamacchia, 2012 ONSC 2583 (CanLII), 258 CRR (2d) 370, *per* Trotter J, at para 7 ("Generally speaking, the period of time a judge takes to prepare reasons should be considered to be part of the inherent time requirements of the case. Within reasonable limits, it is desirable that judges take the time that they need to prepare carefully reasoned decisions. Considered reasons enhance the quality of justice in the criminal process in many ways and must be encouraged")
9. eg. *R v Rahey*, 1987 CanLII 52 (SCC), [1987] 1 SCR 588, *per* Lamer J

Accused Caused Delay

Where delay is largely "attributable to the accused" or defence counsel, a prima facie case of unreasonable delay cannot bemade out.[1]

Defence counsel cannot be expected to be perpetually available.[2]

The accused cannot use adjournment either requested or consented to by defence as weighing in favour of unreasonable delay.[3]

Time taken for the accused to find counsel is usually treated as attributable to the accused.[4]

Where delay is contributed to by the defence's use of the preliminary inquiry as a lengthy discovery it cannot be used towards unreasonable delay.[5]

The Crown may show that some delay was attributable to the accused where there were earlier dates available for a defence application or where the delay is relating to providing disclosure but there was a delay in requesting disclosure. If established, the onus shifts to the defence to show that the earlier dates were not available to defence or that the earlier dates would not have sped things up, or that relevance did not become apparent until later.[6]

Pre-trial motions advanced by the accused will often mean that the resultant delay will be attributable to the accused. This includes motions such as:

- resisting extradition[7]
- change of venue[8]
- challenge a search warrant[9]
- quashing the order of committal[10]

1. *R v Morin*, 1992 CanLII 89, , [1992] 1 SCR 77, *per* Sopinka J
   R v Kwok, 2002 BCCA 177 (CanLII), 164 CCC (3d) 182, *per* Braidwood JA
2. *R v Godin*, 2009 SCC 26 (CanLII), [2009] 2 SCR 3, *per* Cromwell J
3. *R v Heaslip*, 1983 CanLII 3519, , 9 CCC (3d) 480, *per* Martin JA
   R v Deloli, 1985 CanLII 3482, , 20 CCC (3d) 153, *per* Matas JA
4. *R v Koruz*, 1992 ABCA 144 (CanLII), 125 AR 161, *per curiam* (2:1), at para 86, find accused counsel “should be treated as either a neutral factor or a delay attributable to Koruz.”)
5. *R v Bazinet*, 2002 BCCA 536 (CanLII), 168 CCC (3d) 344, *per* Low JA , at para 21
6. *R v Innes*, 2011 ONSC 2638 (CanLII), *per* Ellies J, at para 32
7. *R v White*, 1997 CanLII 2426 , *per* Laskin and Charron JJA
8. *Conway*, *supra*
9. *Morin*, *supra*, at pp. 17 to 18
10. *Conway*, *supra*

Crown Caused Delay

Any delay caused by the Crown is not excusable when calculating the total time of delay.[1]

There are two categories of crown delay: (1) delay caused by decisions at the core of prosecutorial discretion and (2) decisions concerning adjournments, disclosure, and change in manner of proceedings. Those of the first category are only reviewable for abuse of process and otherwise cannot be attributed against the crown. The second category is reviewable for crown caused delay.[2]

Where the Crown refuses disclosure and is subsequently ordered to disclose documents, the delay arising from the refusal is attributable to the Crown.[3]

1. *R v Pusic*, 1996 CanLII 8215 (ON SC), 30 OR (3d) 692, *per* Hill J, at p. 704
2. *R v Ghavami*, 2010 BCCA 126 (CanLII), 253 CCC (3d) 74, *per* Donald JA and Huddart JA
3. *R v Innes*, 2011 ONSC 2638 (CanLII), *per* Ellies J, at para 31

Complexity of the Case

A particularly complex case that requires lengthy documentary evidence may tolerate longer delays that normal cases.[1] The Crown must present "cogent evidence that proves the complexity of the case".[2]

Insufficiency of resources alone is not an indicator of a high degree of complexity.[3]

The need for technical expertise to examine the computer does not necessarily make a case complex for The purpose of Morin analysis.[4]

Complexity remains an important factor under the transitional exception cases under the Jordan Framework.[5]

1. *R v Atkinson*, 1991 CanLII 7113 (ON CA), 68 CCC (3d) 109, *per* Osborne JA, at p. 127 (ONCA)
2. *R v Giorgio*, 2004 CanLII 30094 (ON SC), 123 CRR (2d) 189, *per* Trafford J
3. *Moyer, Re*, 1994 CanLII 7551 (ON SC), 95 CCC (3d) 174, *per* Fedak J
4. *R v Charbonneau*, 2015 BCPC 4 (CanLII), *per* Brecknell J , at para 108
5. *R v Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659, *per curiam*, at paras 70 to 71
   R v Picard, 2017 ONCA 692 (CanLII), 354 CCC (3d) 212, *per* Rouleau JA, at para 79
   R v Gopie, 2017 ONCA 728 (CanLII), 356 CCC (3d) 36, *per* Gillese JA, at para 119

Child Pornography Offences

The Police are permitted to triage their analysis of computers by conducting preliminary analysis and then holding off on full analysis until after it was clear there would be a contest of the charges. [1]

An intake period of 9 months for child pornography charges can be reasonable given that much of the investigation occurs after charges and the frequent need for breaks while categorizing the materials.[2]

1. *R v Charbonneau*, 2015 BCPC 4 (CanLII), *per* Brecknell J, at pp. 128 to 130
2. *R v Stilwell*, 2014 ONCA 563 (CanLII), 313 CCC (3d) 257, *per* Pepall JA, at para 9

Delayed Disclosure

Failure to make timely disclosure will cause delay attributable to the Crown.[1]

It is not necessary that the defence have the Crown expert report before being able to make election and plea.[2] The use of trial confirmation hearings one or two months before trial can be used as delivery dates for remaining reports. If reports are not disclosed, it would be entitled a defence adjournment at the cost of the Crown.[3]

When Crown protection of privilege results in delay is attributable to the Crown.[4]

1. *R v Collins; R v Pelfrey*, 1995 CanLII 114 (SCC), [1995] 2 SCR 1104, *per* Sopinka J, at p. 389
2. *R v Crant*, 2014 ONSC 6233 (CanLII), *per* Goldstein J
   R v Kovacs-Tatar, 2004 CanLII 42923 (ON CA), 192 CCC (3d) 91, *per curiam*, at para 47
   R v Lahiry, 2011 ONSC 6780 (CanLII), 283 CCC (3d) 525, *per* Code J, at para 114 ("Sophisticated forensic testing and ongoing investigative steps often take time and they cannot be allowed to hold the process hostage by preventing the setting of timely trial dates. It is only when the missing disclosure is truly material to "crucial steps" in the process, like election and plea, that it will justify delay at these early stages.")
3. *Lahiry*, *supra*, at para 114
4. *R v Philips*, 1993 CanLII 14721 (ON CA), (1993) 80 CCC (3d) 167, *per* Doherty JA

Other Circumstances

Crown requests for an adjournment is a Crown delay.[1]

The time accrued during which a Crown stay of proceedings under s. 579 of the Code has been invoked will be attributable to the Crown.[2]

1. *Collins*, *supra*
2. *R v Lanteigne*, 2010 NBCA 91 (CanLII), 265 CCC (3d) 123, *per* Bell JA, at para 13
   R v AS, 2008 CanLII 48150 (ON SC), 182 CRR 1, *per* Belobaba J, at paras 20 to 22
   R v Condello (1997), 38 O.T.C. 362, 36 WCB (2d) 48(*no CanLII links) , at para 39
   R v Randell, 2015 CanLII 79127 (NLSCTD), *per* Murphy J, at para 115
   R v Durack, 1997 CanLII 11290 (SKQB), [1997] S.J. No 518 (Sask. Q.B.), *per* Pritchard J, at para 18
   R v Keevik, 1996 CanLII 3625 (NWT SC), [1996] NWTJ No 32 (Sup. Ct.), *per* Richard J, at para 12

Classifying Delay

Delay that is unrelated to defence does not presumptively or automatically attribute to the Crown.[1]

Delay Caused by Unavailable Defence Counsel on Crown Adjournment

Where Crown offers a trial date after the original adjourned trial date, additional delay after that offered date due to defence counsel's unavailability was found to be neutral.[2]

Defence counsel's unavailability after a denied date due to Crown and Court's unavailability is not attributable to the Crown.[3]

Unforeseen Crown Adjournments

Crown adjournment for unforeseen factors can be considered neutral.[4]

Delays Cause by Defence Pre-Trial Motions

The delays necessary to hear defence motions are neutral.[5]

Delay Caused by Conflict of Interest

Delay caused by the judge recusing himself as he had previously represented the accused when he was a lawyer was considered neutral.[6]

Caused by Co-accused

Delay caused by the inaction of a co-accused will generally be seen as neutral.[7] However, delay caused by the Crown assisting one party to the detriment of another may be attributed to the crown.[8]

Delay for a Re-Trial

A retrial should be scheduled "without further delay". Only a "short period" of delay will be expected. Anything longer may open the possibility of a s. 11(b) Charter delay.[9]

Delay by Crown Attempting to Assist in Obtaining 3rd Party Records

Where the Crown agrees to obtain materials that are third party records, the delay that results from their participation is either neutral or inherent time.[10]

Factors "Outside" of Court Proceedings

Delay due to "weather conditions or infrastructure problems; illnesses of key witnesses, parties or the court; interference by outside agencies not caused by the state; or conflicting court obligations by the accused person" are all treated as neutral unless there is some unusual situation.[11]

Delay Caused by Missing or Absconding Accused

There is no obligation on the part of the accused to voluntarily return to the jurisdiction to face prosecution. Refusal to return does not waive the delay in prosecution.[12]

1. *R v Biorac*, 2006 CanLII 14237 (ON CA), [2006] OJ No 1778 (ONCA), *per curiam*
2. *R v PA*, 2002 CanLII 53216 (ON CA), [2002] OJ 2490 (ONCA), *per* Catzman and Zeiler JJA aff'd at SCC
   R v NNM, 2006 CanLII 14957 (ON CA), [2006] OJ 1802 (ONCA), *per* Juriansz JA
3. *R v Nikolovski*, 2005 CanLII 3328 (ON CA), [2005] OJ 494 (ONCA), *per curiam*
   cf. *R v Rego*, 2005 CanLII 40718 (ON CA), [2005] OJ 4768 (ONCA), *per curiam*
   and *R v Lof*, [2004] OJ 4963 (ONCJ)(*no CanLII links)
4. *R v Meisner*, 2004 CanLII 30221 (ON CA), [2004] OJ 3812 (ONCA), *per curiam*
   R v Bell, [2005] OJ No 4755 (SCJ)(*no CanLII links)
5. *R v Hape*, 2005 CanLII 26591 (ON CA), [2005] OJ 3188 (ONCA), *per curiam*
6. *R v Meisner*, 2004 CanLII 30221 (ON CA), [2004] OJ 3812 (ONCA), *per curiam*, at para 12
7. *R v Farewell*, 2008 BCCA 9 (CanLII), 229 CCC (3d) 17, *per* Thackray JA, at para 89
8. *R v Sandhu*2013 BCSC 963(*no CanLII links) , at paras 69 to 76
   R v Topol, 2008 ONCA 113 (CanLII), [2008] OJ 535 (ONCA), *per curiam*
9. *R v Brace*, 2010 ONCA 689 (CanLII), 261 CCC (3d) 455, *per* Juriansz JA, at para 15
   see also Mistrials
10. *NNM*, *supra*
11. *R v CD*, 2014 ABCA 333 (CanLII), 316 CCC (3d) 457, *per curiam*, at para 31
12. *R v MacIntosh*, 2011 NSCA 111 (CanLII), 281 CCC (3d) 291, *per* Beveridge JA Crown appeal dismissed by SCC

Morin Framework (Pre-Jordan 2016)

< Procedure and Practice < Delay

General Principles

Section 11(b) does not impose an obligation that "one's trial proceed according to a constitutionally mandated timetable".[1]

The length of permissible time to have a matter tried cannot be based on the mere passage of time. If it were it would effectively be a judicially created limitation period for criminal offences.[2]

The Court's exercise focuses on balancing societal rights against individual rights.[3]

Findings of delay are "extremely fact-specific".[4]

The remaining time must be considered in light of the "interests section 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused"[5]

The societal interests to continue the prosecution will increase with the seriousness of the offence.[6]

There is no duty on the part of the accused to press for a trial.[7] However, any conduct that is inconsistent with the desire for a speedy trial will be considered in the analysis of prejudice.[8]

Burden/Onus

The burden is on the applicant to prove a breach of s.11(b) of the Charter on a balance of probabilities.[9] The Crown has the burden of proving any waiver of rights.[10] It is preferable that little influence be placed on the burden and rather the matter should turn on the facts of the case.[11]

Standard of Proof

A breach of s. 7 of the Charter for delay requires proof of a "significant breach of the principle of fundamental justice".[12]

No Obligation on Defence

There are no obligations on the accused to press for a trial. However, action or inaction by the accused that is inconsistent with the desire for a speedy trial is relevant to the assessment of whether there is any prejudice.[13]

The applicant must first establish that the period raises the issue of "reasonableness".[14] Once reasonableness has been raised, the delay that can be attributed to the applicant or waived by the applicant must be calculated to be subtracted from the overall calculation.

Adult vs Youth Prosecutions

The Morin guidelines remain the same whether the prosecution is for a youth as opposed to an adult.[15]

History

In 1986, the initial approach to s. 11(d) rights was that a breach would result in a variety of remedies, including damages in addition to a stay.[16] Shortly after the framework was developed with main factors: wavier, inherent time requirements, and limitations of resources.[17]

In 1990, delay guidelines were set for between 6 to 8 months between committal and trial to be on the "outside limit of what is reasonable".[18]

In 1992, the framework was again modified to put the onus on the accused to prove the prejudice caused by the delay.[19]

In 2016, the framework to delay was changed to remove focus on prejudice and instead concern itself with overall repute of the administration of justice.[20]

1. *R v Allen*, 1996 CanLII 4011 (ON CA), 110 CCC (3d) 331, *per* Doherty JA, at p. 345, aff'd 1997 CanLII 331 (SCC), [1997] 3 SCR 700, *per* Sopinka J ("I can see nothing in the language of s 11(b) which suggests any right to have one's trial proceed according to a constitutionally mandated timetable".)
2. *R v WKL*, 1991 CanLII 54 (SCC), [1991] 1 SCR 1091, *per* Stevenson J
3. *R v Qureshi*, 2004 CanLII 40657 (2004), 190 CCC (3d) 453, *per* Laskin JA, at para 10
4. *R v George (D.P.)*, 2006 MBCA 150 (CanLII), 215 CCC (3d) 1, *per* Steel JA, at para 72
5. *R v Morin*, 1992 CanLII 89 (SCC), [1992] 1 SCR 771, *per* Sopinka J, at para 32
   Also see *Qureshi*, *supra*, at para 12
6. *R v Morin*, 1992 CanLII 89, [1992] 1 SCR 77, *per* Sopinka J, at para 14, ("As the seriousness of the offence increase so does the societal demand that the accused be brought to trial.")
   R v Seegmiller, 2004 CanLII 46219 (ON CA), 191 CCC (3d) 347, *per* Cronk JA
7. Morin
8. *R v MacDougall*, 1998 CanLII 763 (SCC), 128 CCC (3d) 483, [1998] 3 SCR 45, *per* McLachlin J, at para 58
9. *Morin*, *supra*
   R v Gordon, 1998 CanLII 14952 (ONSC), 130 CCC (3d) 129, *per* Hill J, at para 20
   R v Durette, 1992 CanLII 2779 (ON CA), 72 CCC (3d) 421, *per* Finlayson JA
10. *R v CS*, 1999 CanLII 18948 (NL CA), 172 Nfld. & PEIR 175 (NLCA), *per* Gushue JA, at para 9
    R v Buckingham, 2007 NLTD 181 (CanLII), [2007] NJ No 367 (S.C.), *per* Adams J, at para 18
11. *R v Smith*, 1989 CanLII 12 (SCC), [1989] 2 SCR 1120, *per* Sopinka J, at para 28
    Morin, *supra*, at para 33
    R v Tilden, 2009 SKQB 495 (CanLII), [2009] S.J. No 741 (Sask. Q.B.), *per* Dufour J, at para 19
12. *R v Dias*, 2014 ABCA 402 (CanLII), 317 CCC (3d) 527, *per curiam*
13. *R v Gordon*, 1998 CanLII 14952 (ONSC), 130 CCC (3d) 129, *per* Hill J
    R v DG(J), 1999 CanLII 6234 (BC SC), *per* Romilly J, at para 15
14. See *Morin and Reid*, *supra*
15. *R v D(RC)*, 2006 BCCA 211 (CanLII), 209 CCC (3d) 153, *per* Hall JA
    R v RDR, 2011 NSCA 86 (CanLII), 277 CCC (3d) 357, *per* Beveridge JA, leave refused [2011] SCCA No 515
16. *R v Mills*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863, *per* McIntyre J ("remedy will vary with the circumstances")
17. *R v Rahey*, 1987 CanLII 52 (SCC), [1987] 1 SCR 588
    R v Conway, 1989 CanLII 66 (SCC), [1989] 1 SCR 1659, *per* L'Heureux-Dubé J
18. *R v Askov*, 1990 CanLII 45 (SCC), [1990] 2 SCR 1199, *per* Cory J
    Morin*infra* (In Askov the Court "went on to suggest that "a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable" (p. 1240). It is the interpretation and application of this statement that resulted in the large number of stays and withdrawals to which I have referred.")
19. *R v Morin*, 1992 CanLII 89 (SCC), [1992] 1 SCR 771, *per* Lamer CJ (dissent) summarizing the position of the majority stating ("Both of my colleagues in their reasons, McLachlin J. somewhat more so than Sopinka J., place the onus on the accused to prove prejudice. This is a fundamental change to the position that this Court has taken.")
20. *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, *per* Moldaver, Karakatsanis and Brown JJ

Factors of Delay

The factors that should be taken into account in determining if the length of delay to trial in unreasonable:[1]

1. The Length of the Delay: The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.
2. Explanation for the Delay.
    1. Delays Attributable to the Crown: Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused. Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers, and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.
    2. Systemic or Institutional Delays: Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.
    3. Delays Attributable to the Accused.

3. Waiver: If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.
4. Prejudice to the Accused: There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.

The court should take into account the societal interests in trying the case on the merits. This generally considers the nature of the allegation.[2]

The court should not take a "mathematical or administrative formula" in consideration. Instead, the court should balance the interests found in s. 11(b) of the Charter.[3]

1. *R v Askov*, 1990 CanLII 45 (SCC), [1990] 2 SCR 1199, *per* Cory J, at para 69
   R v Morin, 1992 CanLII 89 (SCC), [1992] 1 SCR 77, *per* Sopinka J
2. *Seegmiller*, *supra*
3. *R v Nguyen*, 2013 ONCA 169 (CanLII), 2 CR (7th) 70, *per* Watt JA, at para 49

Reason for Delay and Attribution

- Reasons for Delay (Morin Framework Only) Under Morin Framework

Prejudice

Prejudice is the harm caused to the accused due to the delay in resolving the matter. This does not include prejudice arising from the mere fact that the accused has been charged.[1] The more time that passes, the more likely an inference of prejudice [2]

The prejudice must arise out of the delay not simply caused by the charges being laid.[3]

A factor to consider to determine if there is prejudice include whether there has been an impact on accused's ability to make full answer and defence.

Proof of Prejudice

In proving prejudice beyond what can be inferred by the passage of time, it is upon the accused to prove it. In the context of proving actual prejudice beyond that which can be inferred, the burden will be on the accused it. [4]

Prejudice can be enhanced by greater public attention that exists for offences with great stigmas in smaller communities.[5]

Financial Prejudice

Prejudice can be financial when it arises from multiple court appearances that pass while disclosure is pending.[6]

Evidential Prejudice

The passage of time has a recognized prejudice upon the quality of evidence in a case whereby witnesses memories fade, their health fades and they move away. All contributing to their evidence being lost forever.[7]

1. *R v Conway*, 1989 CanLII 66 (SCC), [1989] 1 SCR 1659, *per* L'Heureux-Dube J ("protection is the impairment or prejudice arising from the delay in processing or disposing of the charges against an accused and not the impairment or prejudice arising from the fact that he has been charged")
   R v Rahey, 1987 CanLII 52 (SCC), [1987] 1 SCR 588
   R v Kovacs-Tatar, 2004 CanLII 42923 (ON CA), 192 CCC (3d) 91, *per curiam*, at paras 32 to 34
2. *R v Morin*, 1992 CanLII 89 (SCC), [1992] 1 SCR 771, *per* Sopinka J, at para 63
3. *Kovacs-Tatar*, *supra*
4. *R v Sharma*, 1992 CanLII 90 (SCC), [1992] 1 SCR 814, *per* Sopinka J
5. e.g. *R v Charbonneau*, 2015 BCPC 4 (CanLII), *per* Brecknell J, at paras 156 to 157
6. *R v Stilwell*, 2014 ONCA 563 (CanLII), 313 CCC (3d) 257, *per* Pepall JA, at para 22
7. *Askov*, *supra*, at p. 298

Defence Conduct As Evidence of Prejudice

Action or inaction on the part of the defence counsel that is inconsistent with a desire for timely trial must be considered in determining if prejudice is found.[1] The conduct of counsel may lead to the conclusion that certain delay was either neutral or defense delay[2]

Conduct short of waiver can negate prejudice.[3]

The fact that the accused did not "agitate" to move the case forward can be used as indications that the accused person is not "overly prejudiced".[4]

Alleged prejudice due to restrictive conditions of release may be negated by the failure of the accused to make application to vary the conditions.[5]

Co-Accused Caused Delay

Delay caused by a co-accused should be treated as neutral time.[6]

1. *R v Stillwell*, 2014 ONCA 563 (CanLII), 313 CCC (3d) 257, *per* Pepall JA, at para 53

2. *R v Dias*, 2014 ABCA 402 (CanLII), 317 CCC (3d) 527, *per curiam*, at para 20
3. *R v Morin*, 1992 CanLII 89, [1992] 1 SCR 771, *per* Sopinka J, at p. 802
4. *Dias*, *supra*, at para 21
   Stillwell, *supra*, at paras 46 to 60
5. *Stillwell*, *supra*, at para 60
6. *R v Whylie*, 2006 CanLII 9037 (ON CA), 207 CCC (3d) 97, *per* Laskin JA, at para 24
   R v LG, 2007 ONCA 654 (CanLII), 228 CCC (3d) 194, *per* Simmons JA, at paras 62 to 63
   R v Zvolensky, 2017 ONCA 273 (CanLII), 352 CCC (3d) 217, *per* Watt JA, at paras 245 and 255

Pre-Charge Delay

As a general rule, pre-charge time is not part of the analysis of s. 11(b).[1] Rather, it can only become an issue where the delay has an impact on the "principles of fundamental justice" under s. 7 of the Charter, including trial fairnes.[2] Section 7 violations are generally considered only in exceptional circumstances.[3]

It has been suggested that pre-charge delay should only be considered where it affects the right to full answer and defence or otherwise impacts trial fairness.[4]

For s. 11(b) analysis the clock is not running during the period of "withdrawing of a charge and the laying of a new information".[5]

Pre-Charge Delay Causes Personal Harm

The accused must present "actual evidence" of "psychological trauma" from pre-trial delay.[6]

Pre-Charge Delay Causes Lost Evidence

Where the accused alleges missing or lost evidence arising from pre-charge delay, the accused must establish that the lost evidence (e.g. memories) caused "actual prejudice" by impeding the ability to adequately cross-examine witnesses or call defence witnesses.[7]

Pre-charge delay in the range of 40 years can breach the right to full answer and defence where it is established that there was a "material loss of opportunity to garner evidence" due to key witnesses being dead.[8]

Complex Cases

Significant delays for swearing of the information can be justified where the matter involves complex investigations.[9]

Large commercial fraud allegations in jurisdictions where such offences are rare are expected to be slow in the investigation since there cannot be a "standing army of expert investigators at the ready to attend" to the investigation.[10]

Delay in Appeals

Delays of appeals can only be considered as a s. 7 violation only on the basis of trial fairness on the abuse of process doctrine.[11]

Delay at the appeal phase of proceedings must be brought before the court of appeal.[12]

Delay arising from an appeal by the accused or an appeal of the Crown is not part of the calculation for delay under s. 11(d).[13]

1. *R v Kalanj*, 1989 CanLII 63 (SCC), [1989] 1 SCR 1594, *per* McIntyre J
   R v WKL, 1991 CanLII 54 (SCC), [1991] 1 SCR 1091
2. *R v Stymiest*, 1993 CanLII 6881 (BCCA), 79 CCC (3d) 408, *per* Legg JA
   WKL, *supra*
3. *R v Young*, 1984 CanLII 2145 (ON CA), 13 CCC (3d) 1, *per* Dubin JA
4. *R v Finn*, 1996 CanLII 6632 (NL CA), (1996) 106 CCC (3d) 43, *per* Marshall JA
   e.g. *R v National Steel Car Ltd.*, 2003 CanLII 30223 (ON CA), 174 CCC (3d) 91, *per* Weiler JA
5. *R v R(GW)*, 1996 CanLII 427 (ON CA), 112 CCC (3d) 179, *per* Osborne J
6. *R v G(AD)*, 2001 NSCA 28 (CanLII), 599 APR 102, *per* Saunders JA
7. *R(GW)*, *ibid.*
8. *R v Grandjambe*, 1996 CanLII 10578 (AB QB), 108 CCC (3d) 338, *per* McMahon J
9. *R v Kalanj*, 1989 CanLII 63 (SCC), [1989] 1 SCR 1594, *per* McIntyre J: 8 months delay for complicated conspiracy charges
10. *R v Hunt*, 2016 NLCA 61 (CanLII), 33 CR (7th) 321, *per* Hoegg JA (in dissent) (2:1), at para 114, adopted in 2017 SCC 25 (CanLII), *per* Abella J
11. *R v Potvin*, 1993 CanLII 113 (SCC), [1993] 2 SCR 880, *per* Sopinka J
12. *Potvin*, *ibid.*
13. *Potvin*, *ibid.*

Prerogative Writs and Judicial Review

Mandamus, Certiorari, and Prohibition

< Procedure and Practice < Pre-Trial and Trial Matters

Prerogative Writs

Applications for prerogative writs consisting of certiorari, habeas corpus, mandamus, procedendo, or prohibition are governed by Part XXVI (s. 774 to 784):

> **Application of Part**

774 This Part applies to proceedings in criminal matters by way of certiorari, habeas corpus, mandamus, procedendo and prohibition.
R.S., 1985, c. C-46, s. 774; R.S., 1985, c. 27 (1st Supp.), s. 169.

– CCC

Courts should be "reluctant" to exercise interlocutory prerogative remedies.[1]

All "extrodinary remedies", including certiorari, are strictly limited in criminal matters to jurisdictional errors by a provincial court judge.[2] Jurisdictional errors occur where the provincial court (1) failes to observe mandatory provisions of a statute or (2) acts in breach of the principles of natural justice.[3]

The limited use of these rememdies is in order to avoid the rule against interlocutory appeals.[4]

1. *R v McGrath*, 2007 NSSC 255 (CanLII), 225 CCC (3d) 1, *per* Murphy J, at para 38
2. *R v Awashish*, 2018 SCC 45 (CanLII), 367 CCC (3d) 377, *per* Rowe J (9:0), at para 20
   R v Stipo, 2019 ONCA 3 (CanLII), 370 CCC (3d) 311, *per* Watt JA (3:0), at para 46
3. *Awashish*, *supra*, at para 23
   Stipo, *supra*, at para 47
4. *Awashish*, *supra*, at paras 10 to 11

Remedial Powers to Fix Defects

Section 777 permits the court to remedy certain defects in orders that would otherwise be invalid on application of certiorari.

Conviction or order remediable, when

777 (1) No conviction, order or warrant for enforcing a conviction or order shall, on being removed by certiorari, be held to be invalid by reason of any irregularity, informality or insufficiency therein, where the court before which or the judge before whom the question is raised, on perusal of the evidence, is satisfied

(a) that an offence of the nature described in the conviction, order or warrant, as the case may be, was committed,
(b) that there was jurisdiction to make the conviction or order or issue the warrant, as the case may be, and
(c) that the punishment imposed, if any, was not in excess of the punishment that might lawfully have been imposed,

but the court or judge has the same powers to deal with the proceedings in the manner that the court or judge considers proper that are conferred on a court to which an appeal might have been taken.

Correcting punishment

(2) Where, in proceedings to which subsection (1) [*conviction or order remediable, when*] applies, the court or judge is satisfied that a person was properly convicted of an offence but the punishment that was imposed is greater than the punishment that might lawfully have been imposed, the court or judge

(a) shall correct the sentence,

(i) where the punishment is a fine, by imposing a fine that does not exceed the maximum fine that might lawfully have been imposed,
(ii) where the punishment is imprisonment, and the person has not served a term of imprisonment under the sentence that is equal to or greater than the term of imprisonment that might lawfully have been imposed, by imposing a term of imprisonment that does not exceed the maximum term of imprisonment that might lawfully have been imposed, or
(iii) where the punishment is a fine and imprisonment, by imposing a punishment in accordance with subparagraph (i) or (ii), as the case requires; or

(b) shall remit the matter to the convicting judge, justice or provincial court judge and direct him to impose a punishment that is not greater than the punishment that may be lawfully imposed.

Amendment

(3) Where an adjudication is varied pursuant to subsection (1) [*conviction or order remediable, when*] or (2) [*correcting punishment*], the conviction and warrant of committal, if any, shall be amended to conform to the adjudication as varied.

Sufficiency of statement

(4) Any statement that appears in a conviction and is sufficient for the purpose of the conviction is sufficient for the purposes of an information, summons, order or warrant in which it appears in the proceedings.
R.S., 1985, c. C-46, s. 777; R.S., 1985, c. 27 (1st Supp.), s. 203.

– CCC

Irregularities within section 777

778 Without restricting the generality of section 777 [*powers to fix defects on conviction and punishment*], that section shall be deemed to apply where

(a) the statement of the adjudication or of any other matter or thing is in the past tense instead of in the present tense;
(b) the punishment imposed is less than the punishment that might by law have been imposed for the offence that appears by the evidence to have been committed; or
(c) there has been an omission to negative circumstances, the existence of which would make the act complained of lawful, whether those circumstances are stated by way of exception or otherwise in the provision under which the offence is charged or are stated in another provision.

R.S., c. C-34, s. 712.

– CCC

{{{3}}}

Further, a warrant of committal cannot be held void by writ where it contains a "valid conviction" and names the defendant as convicted.[1]

1. s. 782

Procedure

A judge may require that any applicant of certiorari enter into a recognizance for the duration of the application.[1]

Where an application to quash has been refused, the matter is to be returned to the original jurisdiction without need of an application of *procedendo*.[2]

1. see s. 779

2. see s. 780

Rules of Court

Superior courts have the authority to set their own rules regarding prerogative writs:

Power to make rules

482 (1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.
[*omitted (2)*]

Purpose of rules

(3) Rules under subsection (1) [*powers of the superior and appellate court to make rules*] or (2) [*powers of provincial and territorial coruts to make rules*] may be made

[*omitted (a) amd (b)*]
(c) to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences held under section 625.1 [*pre-hearing conference*], proceedings with respect to judicial interim release and preliminary inquiries and, in the case of rules under subsection (1) [*powers of the superior and appellate court to make rules*], proceedings with respect to mandamus, certiorari, habeas corpus, prohibition and procedendo and proceedings on an appeal under section 830 [*summary conviction appeal*]; and...
[*omitted (d)*]

[*omitted (4) and (5)*]
R.S., 1985, c. C-46, s. 482; R.S., 1985, c. 27 (1st Supp.), s. 66; 1994, c. 44, s. 35; 2002, c. 13, s. 17; 2019, c. 25, s. 186.
[*annotation(s) added*]

– CCC

Within each province, the superior courts will incorporate rules of procedure regarding applications for writs.[1]

1. e.g. Rule 64 of the Nova Scotia Civil Procedure Rules

General Principles of Mandamus

An order of *mandamus* (latin for "we command") is a common law "prerogative writ" power of a superior court to order a lower court or government agent to perform a mandatory duty correctly.[1]

It is a discretionary remedy to compel a lower court to exercise jurisdiction where it has incorrectly refused to do so.[2]

The order is only available where the body refuses to exercise its jurisdiction.[3]

A prerogative writ is a manner of correcting errors of jurisdiction made by inferior courts as well as correcting failures of natural justice or procedural fairness.[4]

Mandamus is available where an inferior judicial body "has either failed or wrongly exercised its jurisdiction such that there has been a jurisdictional error... If [the judicial body] erroneously refuses to act on the grounds that it lacks territorial or legal jurisdiction, mandamus will lie to compel it to accept jurisdiction."[5]

Where Review is Unavailable

When the duty is of a "judicial nature", mandamus is not available regardless of whether the decision was incorrect. No superior court can change that decision except for exceptional circumstances such as prejudice, bias, personal interest, dishonesty, and the like.[6]

Discretion to Refuse

Despite having jurisdiction, a superior court can refuse prerogative relief if there is an equally effective alternative remedy.[7]

1. *R v MPS*, 2013 BCSC 525 (CanLII), 298 CCC (3d) 458, *per* Romilly J ("Mandamus, ... is the name of the prerogative writ that issues from a court of superior jurisdiction to the inferior tribunal commanding the latter to exercise its jurisdiction.")
2. *R v MacDonald*, 2007 NSSC 255 (CanLII), 225 CCC (3d) 1, *per* Murphy J, at para 17
3. *R v Faber*, 1987 CanLII 6849 (QC CS), 38 CCC (3d) 49, *per* Boilard J, at p. 54
4. *R v Forsythe*, 1980 CanLII 15 (SCC), [1980] 2 SCR 268, 53 CCC (2d) 225, *per* Laskin CJ
5. *MPS*, *supra*, at para 10
6. *R v Coughlan*, 1969 CanLII 949 (AB QB), [1970] 3 CCC 61 (Alta. T.D.), *per* Riley J, at p. 72 ("The law respecting the same has been well established over the years and can be summarized on the basis that any inferior Court or board or person may be required to perform his duty if he refuses to do so but, if the duty is performed in any matter judicial in nature, certiorari and/or mandamus will not lie regardless of whether an incorrect decision is reached, and no superior Court can reverse or alter any decision or direct the inferior Court to come to a different decision, save in such exceptional circumstances as prejudice, bias, personal interest, dishonesty or the like. ")
7. *Harelkin v University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 SCR 561, *per* Beetz J, at p. 588

General Principles of Certiorari

- Writ of Certiorari

General Principles of Prohibition

An order of prohibition is a common law "prerogative writ" power of a superior court to order a lower court or government agent from prohibiting the performance of certain duties.[1]

A Court granting the order will "prevent [inferior judicial body] from exercising a jurisdiction it is not legally entitled to."[2]

1. *R v MPS*, 2013 BCSC 525 (CanLII), 298 CCC (3d) 458, *per* Romilly J ("It is the means whereby the inferior tribunal is prevented from exceeding its jurisdictional limits."), at para 16
2. *MPS*, *ibid.*, at para 16

General Principles of Habeas Corpus

- See Habeas Corpus

Court Authority to Order Recognizance on Writ Application

> #### General order for security by recognizance
>
> 779 (1) A court that has authority to quash a conviction, order or other proceeding on certiorari may prescribe by general order that no motion to quash any such conviction, order or other proceeding removed to the court by certiorari shall be heard unless the defendant has entered into a recognizance with one or more sufficient sureties, before one or more justices of the territorial division in which the conviction or order was made or before a judge or other officer, or has made a deposit to be prescribed with a condition

that the defendant will prosecute the writ of certiorari at his own expense, without wilful delay, and, if ordered, will pay to the person in whose favour the conviction, order or other proceeding is affirmed his full costs and charges to be taxed according to the practice of the court where the conviction, order or proceeding is affirmed.

Provisions of Part XXV

(2) The provisions of Part XXV [*Pt. XXV – Effect and Enforcement of Recognizances (s. 762 to 773)*] relating to forfeiture of an amount set out in a recognizance apply to a recognizance entered into under this section.
R.S., c. C-34, s. 713; 2019, c.25, s. 313.

[*annotation(s) added*]

– CCC

Exemption From Certiorari and Habeas Corpus

Want of proof of order in council

781 (1) No order, conviction or other proceeding shall be quashed or set aside, and no defendant shall be discharged, by reason only that evidence has not been given

(a) of a proclamation or order of the Governor in Council or the lieutenant governor in council;
(b) of rules, regulations or by-laws made by the Governor in Council under an Act of Parliament or by the lieutenant governor in council under an Act of the legislature of the province; or
(c) of the publication of a proclamation, order, rule, regulation or by-law in the Canada Gazette or in the official gazette for the province.

Judicial notice

(2) Proclamations, orders, rules, regulations and by-laws mentioned in subsection (1) [*want of proof of order in council*] and the publication thereof shall be judicially noticed.
R.S., c. C-34, s. 715.
[*annotation(s) added*]

– CCC

Defect in form

782 No warrant of committal shall, on certiorari or habeas corpus, be held to be void by reason only of any defect therein, where

(a) it is alleged in the warrant that the defendant was convicted; and
(b) there is a valid conviction to sustain the warrant.

R.S., c. C-34, s. 716.

– CCC

Other Forms of Judicial Review

There are several other types of judicial review in the Criminal Code for certain circumstances:

- s. 745.6 permits judicial review of an order of parole ineligibility
- s. 83.05 permits judicial review of an order of Governor in Council who includes an organization on a list of terrorist entities
- Part XXI.1 permits Ministerial Review

Consequences of Dismissing an Application

Effect of order dismissing application to quash

780 Where a motion to quash a conviction, order or other proceeding is refused, the order of the court refusing the application is sufficient authority for the clerk of the court forthwith to return the conviction, order or proceeding to the court from which or the person from whom it was removed, and for proceedings to be taken with respect thereto for the enforcement thereof.
R.S., c. C-34, s. 714.

– CCC

Consequences of Granting an Application to Quash

No action against official when conviction, etc., quashed

783 Where an application is made to quash a conviction, order or other proceeding made or held by a provincial court judge acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] or a justice on the ground that he exceeded his jurisdiction, the court to which or the judge to whom the application is made may, in quashing the conviction, order or other proceeding, order that no civil proceedings shall be taken against the justice or provincial court judge or against any officer who acted under the conviction, order or other proceeding or under any warrant issued to enforce it.
R.S., 1985, c. C-46, s. 783; R.S., 1985, c. 27 (1st Supp.), s. 203.
[*annotation(s) added*]

– CCC

Appeal from Judicial Review

- see Appeals Other than Verdicts or Sentences

Case Digests

- Mandamus, Certiorari, and Prohibition (Cases)

See Also

- Habeas Corpus
- Appeals

Habeas Corpus

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< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

Habeas Corpus refers to the common law prerogative writ of relief that challenges the detention of a detainee. A prerogative writ is a manner of correcting errors of jurisdiction made by inferior courts as well as correcting failures of natural justice or procedural fairness.[1]

This prerogative writ was also imported into section 10(c) of the Charter:

10. Everyone has the right on arrest or detention...

c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

– CCRF

Section 10(c) does not change the law of habeas corpus so much as it constitutionally entrenches it.[2]

Jurisdiction

Superior provincial courts have the ability to hear *habeas corpus* applications seeking to review decisions by prison authorities to reduce "residual liberty" for federal inmates.[3] The Superior Courts also have discretion to decline jurisdiction to review under *Habeas Corpus* where there exists a "complete, comprehensive and expert procedure for review".[4] The Parole Board of Canada is one such form of review.[5]

Burden of Proof

The onus of proof to establish the deprivation rests on the applicant while the onus to establish the lawfulness of the deprivation rests on the detaining authority.[6]

Requirements

An application for habeas corpus requires: [7]

1. a deprivation of liberty and
2. that the deprivation be unlawful.

The writ of habeas corpus requires a "generous and flexible interpretation".[8]

Timing

A failure to pursue options of appeal within the appropriate time limitation can close access to habeas corpus.[9]

1. *R v Forsythe*, 1980 CanLII 15 (SCC), [1980] 2 SCR 268, 53 CCC (2d) 225, *per* Laskin CJ
2. *R v Re Day* (1983), 62 NSR (2d) 67 (NSSC)(*no CanLII links)
   R v Wilson v R, (1986), 42 Man. R. (2d) 222 (Man. Q.B.)(*no CanLII links)
   R v Reimer, (1987), 47 Man. R. (2d) 156(*no CanLII links)
3. *R v Shoemaker*, 2019 ABCA 266 (CanLII), *per curiam*, at para 7 ("Provincial superior courts have the jurisdiction, by way of an application for habeas corpus, to review the validity of decisions by prison authorities to reduce the “residual liberty” of a federal inmate")
   May v Ferndale Institution, 2005 SCC 82 (CanLII), [2005] 3 SCR 809 , *per* LeBel and Fish JJ
   Mission Institution v Khela, 2014 SCC 24 (CanLII), [2014] 1 SCR 502, *per* Lebel J, at paras 33 to 34
   R v Miller, 1985 CanLII 22 (SCC), [1985] 2 SCR 613, 24 DLR (4th) 9, *per* Le Dain J, at para 35
4. *May v Ferndale Institution*, *supra*
5. *Blais v Canada (Attorney General)*, 2012 NSCA 109 (CanLII), 1018 APR 198, *per curiam*
6. *May*, *supra*
7. *May v Ferndale Institution*, *supra* at 74
8. *Idziak v Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 SCR 631, [1992] SCJ No 97, *per* Cory J, at para 26
9. *Boviz v Canada (Attorney General)*, 2018 ABQB 215 (CanLII), *per* Henderson J, at para 18
   Ewanchuk v Canada (Parole Board), 2015 ABQB 707 (CanLII), AJ No 1219, *per* Graesser J, at paras 87 to 88, aff’d on other grounds 2017 ABCA 145 (CanLII), *per curiam*

Review of Parole Decisions

Courts should refuse to hear habeas corpus applications that challenge the Parole Board of Canada,[1] including parole officers.[2] Such form of review is an abuse of the court's process.[3]

1. *Armaly v Canada (Parole Service)*, 2001 ABCA 280 (CanLII), 299 AR 188, leave to appeal to SCC refused, 29130 (3 April 2002)
   Lee v Attorney General of Canada, 2018 ABQB 40 (CanLII), 403 CRR (2d) 194, *per* Shelley J, at paras 147 to 151
2. *Latham v Alberta*, 2018 ABQB 141 (CanLII), *per* Henderson J, at paras 26 to 27
3. *Boviz v Canada (Attorney General)*, 2018 ABQB 215 (CanLII), *per* Henderson J, at para 22
   Lee v Attorney General of Canada, *supra*, at para 151
   Latham #2, *supra*, at paras 28 to 29

Review of Bail Decisions

Absent exceptional circumstances, a decision to deny an application for release on bail pending sentencing is not subject of *habeas corpus* review.[1]

1. *R v Passera*, 2017 ONCA 308 (CanLII), 352 CCC (3d) 478, *per curiam*

Procedure

The applicant's personal attendance in court is necessary for an application of habeas corpus:

> **Appearance in person — habeas corpus**
>
> 774.1 Despite any other provision of this Act, the person who is the subject of a writ of habeas corpus must appear personally in court. 2002, c. 13, s. 77.
>
> – CCC

Detention on inquiry to determine legality of imprisonment

775 Where proceedings to which this Part applies have been instituted before a judge or court having jurisdiction, by or in respect of a person who is in custody by reason that he is charged with or has been convicted of an offence, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or provincial court judge under whose warrant he is in custody, or any other judge, justice or provincial court judge, to take any proceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice.
R.S., 1985, c. C-46, s. 775; R.S., 1985, c. 27 (1st Supp.), s. 203.

– CCC

Provincial Rules of Court will have some direction on the exact process required for making application and responding to one.[1]

1. NS: Rule 7 of the Civil Procedure Rules
   ON: Judicial Review Procedure Act, R.S.O. 1990, c. J.1 and Rule 68 Civil Procedure Rules
   BC: Rule 23-3 Supreme Court Civil Rules, BC Reg 168/2009

Deprivation of Liberty

Occupancy of a Cell

The "double bunking" of inmates is generally not considered a from of deprivation of residual liberty.[1] Similarly, housing an inmate in a double occupancy room instead of a usual single occupancy does not engage a deprivation of liberty.[2]

Access to Resources in Custody

The restriction on access to legal research and other aspects of criminal legal proceedings.[3]

Bail Conditions

A habeas corpus application cannot be brought to challenge house arrest bail conditions.[4]

Sufficiency of Reasons

A decision to suspend parole must be accompanied by reasons. Where reasons are not given, the decision becomes unlawful, jurisdiction is lost, and so is reviewable under *hebeas corpus*.[5]

An inmate who is transferred to a higher security level of prison must be provided with sufficient information to permit a meaningful opportunity to challenge the allegations or else jurisdiction may be lost.[6]

1. See: *R v BRL v Canada*, [2000] F.C.J. No 108(*no CanLII links)
   R v Robert Collin v The Solicitor General of Canada, [1983] 1 F.C. 496(*no CanLII links)
   Piche v Canada (Solicitor General), 1989 CanLII 7246 (FCA), [1989] F.C.J. No 204, *per* MacGuigan JA
2. *Mennes v Canada (Attorney General)*, 2008 CanLII 6424 (ON SC), *per* MacDougall J
3. *MCCargar v Canada*, 2017 ABQB 416 (CanLII), 63 Alta LR (6th) 88, *per* Henderson J
4. *R v Ethier*, 2009 CanLII 11429 (ON SC), 2009 CarswellOnt 1391 (Ont. SCJ), *per* Kane J
5. *Woodhouse v Williams Head Institution*, 1999 BCCA 432 (CanLII), [2010] BCJ 1005, *per* Mackenzie JA
6. *Khela v Mission Institution*, 2010 BCSC 721 (CanLII), [2010] BCJ 971, *per* Bruce J

See Also

- Mandamus, Certiorari, and Prohibition
- Appeals#Prerogative Writs

Costs

< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

Costs against the Crown require Crown misconduct or a serious interference with the authority of the court or administration of justice. [1]

Costs against the Crown are "an exceptional or remarkable event".[2] Costs may be ordered as a remedy to a Charter breach.[3] Not just any Charter breach will result in costs.[4] It should be conduct where the Crown is "reponsible for some misconduct, complicit in it, or other unique circumstances exist."[5]

The reason behind this is that costs would have the effect of deterring the Crown from exercising their duties in the public interest to the fullest extent.[6]

While there is no closed list of circumstances, situations where costs may be ordered against the Crown is where the prosecution has been (1) frivolous, (2) for an oblique motive, or (3) where the Crown has taken up the matter as a test case.[7]

Jurisdiction

The "jurisdiction for awarding costs in criminal matters is extremely narrow and the threshold is very high."[8]

In determining whether there should be costs against the Crown, the Court may apply its "inherent power to protect against abuse of process".[9]

A provincial court has no jurisdiction to order punitive costs against the defence.[10]

A preliminary inquiry judge does not have the jurisdiction to make orders of cost against the crown.[11]

A Youth Justice Court sitting as a trial court has jurisdiction to award costs against the Crown for a Charter breach.[12]

Where the accused has been arraigned and entered a plea before a court of competent jurisdiction, that court becomes the trial court which may be able to hear costs even after a stay of proceedings is entered.[13]

A bail hearing judge under section 515 (1) is not a "court of competent jurisdiction" within the meaning of section 24 (1) of the Charter and so has no jurisdiction to order costs against the Crown.[14]

Case management roles created under section 482(3)(c) cannot convey jurisdiction upon the provincial court to order costs outside of the Charter or the Criminal Code.[15]

Costs Against the Crown

Costs against the Crown are "rare" but are permitted when they are "integrally connected to the court's control of its trial process, and are intended as a means of disciplining and discouraging behaviour".[16]

Costs Against Defence

There has been some suggestion that costs may also be ordered against the defence in certain circumstances.[17]

Appeal

Under s. 676.1, a party ordered to pay costs may appeal the order and amount with leave to the court of appeal.

Disclosure

Costs as a remedy for failure to provide timely disclosure requires that there be a "marked and unacceptable departure from the reasonable standards expected of the prosecution". It is not necessary to establish a "flagrant disregard for the accused's rights" or "egregious conduct". [18]

Test Case

A "test case" would be one where the Crown persues a valid social purpose by seeking to settle a point of law. This will incur a cost that should not be born by just one individual.[19]

However, where the accused "has a significant practical stake in the prosecution, high public interest in the outcome of the proceedings" then it should not be considered a "test case".[20]

1. *R v Magda*, 2006 CanLII 36822 (ON CA), 213 CCC (3d) 492, *per* Feldman JA
   R v Griffin, 2009 ABQB 696 (CanLII), 485 AR 251, *per* Greckol J, at para 176
2. *R v 974649 Ontario Inc*, 2001 SCC 81 (CanLII), [2001] 3 SCR 575, *per* McLachlin CJ, at para 86
3. *R v Singh*, 2009 NSSC 306 (CanLII), 900 APR 266, *per* Duncan J, at para 25 - it must be ordered by a superior court judge
   R v Ralph, 2008 NLCA 71 (CanLII), 863 APR 347, *per* Mercer JA, at para 12
   R v Pang, 1994 ABCA 371 (CanLII), 95 CCC (3d) 60, *per* Harradence JA
4. *R v SEL*, 2013 ABCA 45 (CanLII), 105 WCB (2d) 404, *per* Bielby JA, at para 9
5. *R v Taylor*, 2008 NSCA 5 (CanLII), 230 CCC (3d) 504, *per* Saunders JA, at para 43
6. *Ralph*, *supra*, at para 13
   Taylor, *supra*, at para 43
7. *R v King*, 1986 CanLII 1156 (BC CA), 26 CCC (3d) 349, *per* Lambert JA, at para 13
   see also *R v Neustaedter*, 2003 BCSC 39 (CanLII), BCJ No 3138, *per* Stromberg-Stein J, at para 7
8. *R v Leyshon-Hughes*, 2009 ONCA 16 (CanLII), 240 CCC (3d) 181, *per* Simmons JA, at para 55
9. *Canada (Attorney General) v Foster*, 2006 CanLII 38732 (ON CA), 215 CCC (3d) 59, *per* Rosenberg JA, at para 69
10. *R v Gunn*, 2003 ABQB 314 (CanLII), 105 CRR (2d) 39, *per* Langston J, at para 48
11. *R v Howard*, 2009 PECA 27 (CanLII), 250 CCC (3d) 102, *per* Jenkins CJ – Application for costs due to delay of disclosure
12. *R v Mills*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863, *per* McIntyre J
    R v Conway, 2010 SCC 22 (CanLII), [2010] 1 SCR 765, *per* Abella J
    R v 974649 Ontario Inc, 2001 SCC 81 (CanLII), [2001] 3 SCR 575, *per* McLachlin CJ
13. *R v CW*, 2011 ABPC 205 (CanLII), 512 AR 310, *per* Lefever J - re Youth Justice Court
    R v Pang, 1994 ABCA 371 (CanLII), 95 CCC (3d) 60, *per* Harradence JA - provincial court permitted in some circumstances
14. *R v Menard*, 2008 BCCA 521 (CanLII), 240 CCC (3d) 1, *per* Finch CJ
15. *R v Campbell*, 2008 BCSC 805 (CanLII), *per* Romilly J
16. *R v Kocet*, 2016 ONCJ 329 (CanLII), *per* McKay J, at para 6
    R v Singh, 2016 ONCA 108 (CanLII), 28 CR (7th) 124, *per* Pardu JA
    R v Ferncan Developments, 2016 ONCA 269 (CanLII), 335 CCC (3d) 519, *per* LaForme JA
17. *R v Dumont*, 2002 ABPC 44 (CanLII), 308 AR 334, *per* Lefeber J
18. *R v Henkel*, 2003 ABCA 23 (CanLII), [2003] AJ No 51 (ABCA), *per* Ritter JA
    R v Branton, 2010 NLTD 207 (CanLII), 951 APR 19, *per* Hndrigan J - costs awarded for delayed disclosure

19. *Ralph*, *supra*, at para 15
R v Trask, 1987 CanLII 24 (SCC), [1987] 2 SCR 304, *per* McIntyre J, at pp. 307-308

20. *Ralph*, *supra*, at para 18

Summary Conviction Court

> **Costs**
>
> 809 (1) The summary conviction court may in its discretion award and order such costs as it considers reasonable and not inconsistent with such of the fees established by section 840 [*fees and allowances*] as may be taken or allowed in proceedings before that summary conviction court, to be paid
>
> (a) to the informant by the defendant, where the summary conviction court convicts or makes an order against the defendant; or
> (b) to the defendant by the informant, where the summary conviction court dismisses an information.
>
> **Order set out**
>
> (2) An order under subsection (1) [*power to order costs by summary conviction court*] shall be set out in the conviction, order or order of dismissal, as the case may be.
>
> **Costs are part of fine**
>
> (3) Where a fine or sum of money or both are adjudged to be paid by a defendant and a term of imprisonment in default of payment is imposed, the defendant is, in default of payment, liable to serve the term of imprisonment imposed, and for the purposes of this subsection, any costs that are awarded against the defendant shall be deemed to be part of the fine or sum of money adjudged to be paid.
>
> **Where no fine imposed**
>
> (4) Where no fine or sum of money is adjudged to be paid by a defendant, but costs are awarded against the defendant or informant, the person who is liable to pay them is, in default of payment, liable to imprisonment for one month.
>
> **Definition of "costs"**
>
> (5) In this section, **"costs"** includes the costs and charges, after they have been ascertained, of committing and conveying to prison the person against whom costs have been awarded.
> R.S., c. C-34, s. 744.
> [*annotation(s) added*]
>
> – CCC

Costs Personally Against Counsel

There are three sources of authority to order costs against counsel:[1]

1. the inherent jurisdcition and the ancillary powers of the court over its own process[2]
2. as a remedy authorized under s. 24(1) of th Charter [3]
3. statute.

Section 482 and 482.1 permit the courts to make rules that would allow personal costs against counsel.[4]

Purpose

The purpose of awarding personal costs against counsel is to enforce compliance with the rules, change "the culture of complacency", "break bad habits" of counsel, and preserve "public confidence in the criminal justice system".[5] This will necessarily include a punitive and compensatory element.[6] By contrast, the purpose of a finding of contempt or abuse of process is purely to punish.[7]

Raising Costs

The issue of costs can be raised by opposing counsel or by the court on its own motion.[8]

Standard of Conduct

In exceptional cases costs can be awarded against a lawyer personally. This typically is where there is some form of wilful misconduct or dishonesty.[9] However, neither "bad faith" nor "wilful misconduct" are required.[10]

The power to orders costs should be "exercised with restraint", especially against defence counsel where the right to full answer and defence may be compromised.[11]

There is some suggestion that a standard to be applied is one of a "marked and unacceptable departure from the reasonable standards expected" test.[12] The standard of "marked departure" goes beyond mere negligence[13] or "inadvertent error".[14]

Costs should not apply to Charter breaches that are "routinely ordered".[15]

Standard of Proof

The standard of balance of probabilities should apply to a motion for costs.[16]

Procedure

Where costs are being considered, the court should ensure the procedure accomplishes the following:*Gowenlock*, *supra*, at para 100

1. the respondent has a right to notice, including the allegations, evidence, and consequences.
2. the respondent has a right to be heard.
3. opposing party will usually not have a role in the hearing but may be present.
4. Prior conduct outside of proceedings has no bearing at the liability phase, but may at the penalty phase.

The hearing for costs should normally be held after the merits of the initial proceedings are concluded.[17]

1. *R v Gowenlock*, 2019 MBCA 5 (CanLII), *per* Chartier CJ, at para 27 citing Ruby on Sentencing.
2. see also *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 (CanLII), [2017] 1 SCR 478, *per* Gascon J
3. see also *R v 974649 Ontario Inc*, 2001 SCC 81 (CanLII), [2001] 3 SCR 575, *per* McLachlin CJ
4. *Gowenlock*, *supra*, at para 63
5. *Gowenlock*, *supra*, at paras 47, 74, , at paras 86
6. *Gowenlock*, *supra*, at para 74
7. *Gowenlock*, *supra*, at para 75
8. *Gowenlock*, *supra*, at para 100
9. e.g. *AG Quebec v Cronier*, 1981 CanLII 3179 (QC CA), 63 CCC (3d) 437, *per* L'Heureux-Dube JA, at pp. 448-449
   Pacific Mobile Corp. v Hunter Douglas, 1979 CanLII 201 (SCC), [1979] 1 SCR 842, *per* Pigeon J
10. *Gowenlock*, *supra*, at para 71
11. *Gowenlock*, *supra*, at paras 79 and hx9q5106
    Jodoin, *supra*, at paras 16 to 17
12. *Gowenlock*, *supra*, at paras 71 ("The “marked and unacceptable departure from the reasonable standards expected” test has also been accepted in additional cases where costs were at issue in a non-Charter and/or statutory context.")80 ("I would adopt a lower standard of conduct than in Jodoin. I would opt for the standard set by the Supreme Court of Canada for Charter-infringement cases in 974649 Ontario Inc: the impugned conduct must be “a marked and unacceptable departure from the reasonable standards expected” ... of counsel, which, for all intents and purposes, is the same as the “reasonable excuse” standard found in r 2.03(1).")
13. *R v Singh*, 2016 ONCA 108 (CanLII), 28 CR (7th) 124, *per* Pardu JA, at para 33
14. *Singh*, *ibid.*, at para 38
15. *Singh*, *ibid.*, at para 38 ("As the above-noted passage makes clear, inadvertent error is not enough to justify an award of costs for breach of the disclosure obligation and costs awards for such breaches will not be routinely ordered in favour of accused persons who establish Charter violations"[*quotation marks removed*])
    R v Ciarniello, 2006 CanLII 29633 (ON CA), 211 CCC (3d) 540, at para 36
16. *Gowenlock*, *supra*, at para 100
17. *Gowenlock*, *supra*, at para 100

Case Digests

- *R v Brown*, 2009 ONCA 633 (CanLII), 247 CCC (3d) 11, *per* Sharpe JA - costs of $2000 for Crown continued delay of bail hearing for several weeks. Habeas Corpus application granted.
- *R v Kelln*, 2003 SKPC 1 (CanLII), 105 CRR (2d) 366, *per* Snell J - $500 costs against Crow for failure to provide officer notes on a timely manner. Notes were provided 11 months after request.
- *R v Yeun*, 2001 ABPC 145 (CanLII), 291 AR 359, *per* Lamoureux JA - costs against crown awarded for failure to provide disclosure ($2,200).

See Also

- Disclosure - see section on costs as remedy