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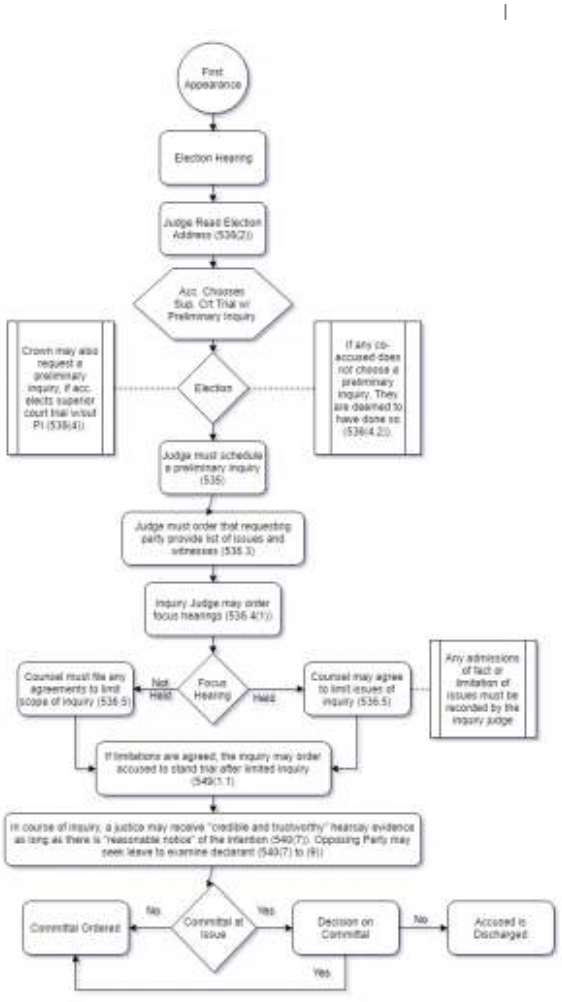
General Principles

The preliminary inquiry justice derives all of its authority from Part XVIII of the Code. [1]

> **Inquiry by justice**

> 535 If an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) [*request for preliminary inquiry*] or 536.1(3) [*request for preliminary inquiry – Nunavut*], the justice shall, in accordance with this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*], inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*].
> R.S., 1985, c. C-46, s. 535; R.S., 1985, c. 27 (1st Supp.), s. 96; 2002, c. 13, s. 24; 2019, c. 25, s. 238.
> [*annotation(s) added*]
>
> – CCC



Preliminary Inquiry Flowchart

The powers of a preliminary inquiry judge exist only in statute and within Part XVIII of the Code.[2]

1. *R v Hynes*, 2001 SCC 82 (CanLII), [2001] 3 SCR 623, 159 CCC (3d) 359, *per* McLachlin CJ

2. *Hynes*, *supra*, at para 28

Availability

Where an election for trial by superior court judge (alone or with jury) *and* the maximum penalty is 14 year or more, the provincial court judge receiving the election must inquire whether the accused wishes to have a preliminary inquiry.[1] Where a preliminary inquiry is requested, the provincial court judge has jurisdiction to take evidence as a preliminary inquiry judge.[2]

Dangerous Offender Application

Where the Crown provides proper notice of an intention to seek a Dangerous Offender Order prior to election and plea on an offence with a penalty under 14 years. The prospects of a Dangerous Offender Order does not create .[3]

Retrospectivity of Bill C-75 Changes

On September 19, 2019, Bill C-75 removed the availability of preliminary inquiries to offences with maximum penalty of 10 years or less.

There is a division in the case law of whether the amendments in Bill C-75 removing the preliminary inquiry for certain offences will affect those matters with inquiries already scheduled.[4]

Offences that had a maximum penalty of 10 years at the time they were permitted but have since been increased to 14 years or more are not entitled to a preliminary inquiry under the current law. [5]

1. see s. 535
2. see s. 535
3. *R v Windebank*, 2021 ONCA 157 (CanLII), *per* Nordheimer JA
4. Not Retro.: *R v RS*, 2019 ONCA 906 (CanLII), OJ No 5773, *per* Doherty JA
   R v Fraser, 2019 ONCJ 652 (CanLII), OJ No 4729, *per* Konyer J
   Retro.: *R v Kozak*, 2019 ONSC 5979 (CanLII), [2019] OJ No 5307, *per* Cambpell J
   R v Lamoureux, 2019 QCCQ 6616, *per* Galiatsatos J
5. *R v CTB*, 2021 NSCA 58 (CanLII), *per* Van den Eynden JA(*complete citation pending*)
   R v SS, 2021 ONCA 479 (CanLII), *per* Nordheimer JA(*complete citation pending*)

Purpose

The purpose of the preliminary inquiry is to determine if there is sufficient evidence to set the matter down for trial before a Justice of the Superior Court.[1] In practice the Inquiry is used to test the strength of the Crown's case.

Its purpose is also "to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process." [2]

It is an "expeditious charge-screening mechanism"[3]

The inquiry judge has a general power to regulate the inquiry process under s. 537. The judge may require counsel to define the issues for which evidence will be called (see s.536.3), and may further limit the scope of the inquiry under section 536.5 and 549.

There is no constitutional right to a preliminary inquiry. Thus, any deprivation of a preliminary inquiry does not violate any principles of fundamental justice.[4]

1. *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, *per* L'Heureux-Dubé J, at para 134 ("The primary function of the preliminary inquiry...is undoubtedly to ascertain that the Crown has sufficient evidence to commit the accused to trial")
   R v Hynes, 2001 SCC 82 (CanLII), [2001] 3 SCR 623, *per* McLachlin CJ, at paras 30 to 31
   R v Coke, [1996] OJ No 808(*no CanLII links) , *per* Hill J, at paras 8 to 11
   R v Deschamplain, 2004 SCC 76 (CanLII), [2004] 3 SCR 601, *per* Major J
   R v MS, 2010 CanLII 61755 (NL PC), *per* Gorman J, at para 24
2. *Skogman v The Queen*, 1984 CanLII 22 (SCC), [1984] 2 SCR 93, *per* Estey J, at p. 105
3. *Hynes*, *supra*, at para 48
4. *R v SJL*, 2009 SCC 14 (CanLII), [2009] 1 SCR 426, *per* Deschamps J, at para 21

Discovery Function

Prior to the amendments in 2005, it has also been used as a venue for discovery.[1]

Since the passing of the Criminal Law Amendment Act, 2002, c. 13 (Bill C-15A), discovery has lost some relevancy as a purpose of the preliminary inquiry. [2] The discovery purpose is "ancillary" to the main purpose of the hearing.[3]

The discovery function of the preliminary inquiry "does not encompass the right of the accused to call evidence ... which is solely relevant to a proposed application to exclude evidence at trial".[4]

Where the accused is in possession of all disclosure covering the investigation and offence there is some suggestion that the discovery purpose of the preliminary inquiry becomes largely irrelevant.[5]

Discovery function does not impose any obligations upon Crown to call all relevant evidence for trial.[6]

Cross-examining Warrant Affiant (Dawson Applicantion)

There is some support to allow the accused to cross-examine the affiant during the preliminary inquiry.[7] In Ontario, this requires an application before the preliminary inquiry judge to determine if it is available.

1. *R v Skogman*, 1984 CanLII 22 (SCC), [1984] 2 SCR 93, *per* Estey J, at p. 105 (SCR) ("the preliminary hearing has become a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial where the requisite evidence is found to be present")
   See *R v Kasook*, 2000 NWTSC 33 (CanLII), 2 WWR 683, *per* Vertes J, at para 25
2. see *R v SJL*, 2009 SCC 14 (CanLII), [2009] 1 SCR 426, *per* Deschamps J, at paras 21 and 23, 24
3. *R v Bjelland*, 2009 SCC 38 (CanLII), [2009] 2 SCR 651, *per* Rothstein J, at para 36
   SJL, *supra*, at paras 21 to 24
   R v Kushimo, 2015 ONCJ 28 (Ont.C.J.)(*no CanLII links) , at para 18
   R v Stinert, 2015 ABPC 4 (CanLII), 604 AR 151, *per* Rosborough J, at paras 6 to 17
4. *R v Cowan*, 2015 BCSC 224 (CanLII), *per* Ross J, at para 96
5. *R v Thomas*, 2017 BCSC 841 (CanLII), *per* Baird J, at para 21 ("... I note that Mr. Thomas has had disclosure of the entire Crown case, including the specifics of his arrest. The form of additional Charter discovery that he requested at the preliminary inquiry stage was irrelevant to the primary purpose of that proceeding.")
6. *R v Pietruk*, 1990 CanLII 6822 (ON SC), 74 OR (2d) 220, *per* Isaac J - application to compel Crown to call witnesses at preliminary inquiry denied
   see also Electing a Preliminary Inquiry
7. *R v Dawson*, 1998 CanLII 1010 (ON CA), 39 OR (3d) 436, *per* Carthy JA

Topics

Electing a Preliminary Inquiry

General Principles

Crown and defence have the right to elect to hold a preliminary inquiry for indictable and hybrid offences prosecuted by indictment that have a maximum penalty of 14 years or more.

A preliminary inquiry judge who sits at the provincial court level presides over the hearing and determines whether to make an order of committal directing that the accused stand trial before a superior court judge or jury.

Offences Eligible for a Preliminary Inquiry

A Preliminary Inquiry can only be available for indictable offences with a maximum penalty of 14 years or more (s.535). A hearing will be scheduled in any one of the following situations:

- the accused elects trial by judge alone or judge and jury (s. 536(2), (4))
- the accused is charged with an offence under s. 469 (e.g. murder, treason, etc)
- the accused refuses to make an election (s. 565)
- the judge exercises discretion in ordering the matter be prosecuted by indictment (s 555(1))
- the attorney general orders a trial by judge and jury (s. 568)

On the election the judge must endorse the information to show the election and who made the election. (s. 536(4.1))

Where there are more than one accused, if one person elects to have a preliminary inquiry the remainder are deemed to have made the same election. (s. 536(4.2), 567)

The time limit is set by the rules of the Court pursuant to s. 482 and 482.1

Parties Able to Request a Preliminary Inquiry

Under 536(4) either the Defence or the Crown may request that a preliminary inquiry so long it is within the time-limit as set by the rules of court or the justice.

> 536
> [*omitted (1), (2), (2.1) and (3)*]
>
> **Request for preliminary inquiry**
>
> (4) 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, or if an accused is charged with an offence listed in section 469 [*exclusive jurisdiction offences*] that is

punishable by 14 years or more of imprisonment, the justice shall, subject to section 577 [*direct indictments*], on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court made under section 482 [*powers of the superior and appellate court to make rules*] or 482.1 [*powers of the superior and appellate court to make case management rules*] or, if there are no such rules, by the justice, hold a preliminary inquiry into the charge.
[*omitted (4.1), (4.11), (4.12), (4.2) and (4.3)*]

Jurisdiction

(5) Where a justice before whom a preliminary inquiry is being or is to be held has not commenced to take evidence, any justice having jurisdiction in the province where the offence with which the accused is charged is alleged to have been committed has jurisdiction for the purposes of subsection (4) [*request for preliminary inquiry*].
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

The obligation upon the accused under s. 536(4) to request a hearing does not violate their freedom of expression or right against self-crimination.[1]

There is no requirement of *when* the request for a preliminary inquiry must be made.[2] It is preferred practice that the counsel requesting the preliminary inquiry identify the issues to addressed and witnesses required at the time of the request.[3]

1. *R v Seniuk*, 2007 SKQB 73 (CanLII), 292 Sask R 278, *per* Allbright J
2. *R v Stinert*, 2015 ABPC 4 (CanLII), 604 AR 151, *per* Rosborough J, at para 19
   R v Young, 2011 BCPC 421 (CanLII), *per* de Couto J
3. *Stinert*, *supra*, at paras 20 and 21
   R v Hathway, 2005 SKPC 99 (CanLII), 249 CCC (3d) 84, *per* Whelan J, at para 62

Setting of Preliminary Inquiry Hearing

Under s. 536, at sometime before the setting of a preliminary inquiry date, the judge must read the accused his election address:

> “ 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? ”

Statement of Issues and Witnesses

- Statement of Issues and Witnesses Under Section 536.3

Preliminary Inquiry Evidence

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79483)

< Procedure and Practice < Preliminary Inquiry

General Principles

During a preliminary inquiry, the justice presiding the inquiry will accept evidence from witnesses and will permit cross-examination.

> **Taking evidence**
>
> 540 (1) Where an accused is before a justice holding a preliminary inquiry, the justice shall
>
> (a) take the evidence under oath of the witnesses called on the part of the prosecution, subject to subsection 537(1.01) [*power limit issues and witnesses*], and allow the accused or counsel for the accused to cross-examine them; and
> (b) cause a record of the evidence of each witness to be taken
>
> (i) in legible writing in the form of a deposition, in Form 31 [*forms*], or by a stenographer appointed by him or pursuant to law, or
> (ii) in a province where a sound recording apparatus is authorized by or under provincial legislation for use in civil cases, by the type of apparatus so authorized and in accordance with the requirements of the provincial legislation.
>
> [*omitted (2), (3), (4), (5), (6), (7), (8) and (9)*]
> R.S., 1985, c. C-46, s. 540; R.S., 1985, c. 27 (1st Supp.), s. 98; 1997, c. 18, s. 65; 2002, c. 13, s. 29; 2019, c. 25, s. 243.
> [*annotation(s) added*]
>
> – CCC

The taking of evidence will include evidence "that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case, including a statement that is made by a witness in writing or otherwise recorded." (s.540 (7)) Anytime evidence is put forward under s.540(7)

there must be reasonable notice to the other parties of "the intention to tender it, together with a copy of the statement". (s. 540(8))

The crown may adduce evidence of an admission or confession by the accused “that by law is admissible” against him. (s. 542(1))

Under s. 548(1), the Court must decide whether any admissible evidence upon which a reasonable jury, properly instructed, could return a guilty verdict. [1]

Where direct evidence on each element of an offence is presented, the court must order the accused to stand trial on the charge. Exculpatory evidence will not result in a discharge of the charges.

The judge may not exclude evidence at the inquiry due to any constitutional violations.[2]

The judge does not have the authority to compel the Crown to provide particulars or disclosure to the defence or compel the production of Third Party Records. Further, the judge cannot order a stay proceedings for abuse of process. [3]

The judge however may exclude a statement of the accused as involuntary.[4]

Expert Evidence

It is an error of jurisdiction by the preliminary inquiry judge to refuse to consider the "sufficiency of the foundation" of the expert evidence.[5]

Crown Evidence

The Crown has unfettered discretion on whom they wish to call as witnesses. A judge has no authority to direct the Crown to call witnesses.[6]

1. See *R v Arcuri*, 2001 SCC 54 (CanLII), [2001] 2 SCR 828, *per* McLachlin CJ
   United States of America v Shephard, 1976 CanLII 8 (SCC), [1977] 2 SCR 1067, *per* Ritchie J
   Mezzo v R, 1986 CanLII 16 (SCC), [1986] 1 SCR 802
   Dubois v The Queen, 1986 CanLII 60 (SCC), [1986] 1 SCR 366, *per* Estey J
   R v Charemski, 1998 CanLII 819 (SCC), [1998] 1 SCR 679, *per* Bastarache J
   R v Monteleone, 1987 CanLII 16 (SCC), [1987] 2 SCR 154, *per* McIntyre J
2. See, *R v R(L)*, 1995 CanLII 8928 (ON CA), (1995), 28 CRR (2d) 173, *per* Arbour JA, at p. 183
   also *R v Mills*, 1986 CanLII 17 (SCC), 26 CCC (3d) 481, *per* McIntyre J
   R v Seaboyer, 1991 CanLII 76 (SCC), 66 CCC (3d) 321, *per* McLachlin J
   R v Hynes, 2001 SCC 82 (CanLII), [2001] 3 SCR 623, 159 CCC (3d) 359, *per* McLachlin CJ, at paras 28, 32
3. *Hynes*, *supra*, at paras 33 and 38
   R v Chew, 1967 CanLII 214 (ON CA), [1968] 2 CCC 127 , [1968] 1 OR 97, 1967 CLB 46, *per* Aylesworth JA
4. *Hynes*, *supra*, at paras 32 and 47
5. *R v King*, 2011 ABQB 162 (CanLII), 276 CCC (3d) 371, *per* Strekaf J
6. *R v Brass*, 1981 CanLII 2366 (SKQB), 64 CCC (2d) 206 (Sask. Q.B.), *per* Kindred J

Relevancy

Given the discovery function of the preliminary inquiry, the defence should be entitled to cross-examine on issues unrelated to committal but related to ultimate issues at trial.[1]

1. *R v Al-Amoud*, 1992 CanLII 7600 (ONSC), 10 OR (3d) 676, *per* Then J
R v Kasook, 2000 NWTSC 33 (CanLII), 2 WWR 683, *per* Vertes J - defence permitted to re-open case for inquiry judge refusing to allow defence to test relevant evidence

Depositions

> 540
> [*omitted (1)*]
>
> **Reading and signing depositions**
>
> (2) Where a deposition is taken down in writing, the justice shall, in the presence of the accused, before asking the accused if he wishes to call witnesses,
>
> (a) cause the deposition to be read to the witness;
> (b) cause the deposition to be signed by the witness; and
> (c) sign the deposition himself.
>
> **Authentication by justice**
>
> (3) Where depositions are taken down in writing, the justice may sign
>
> (a) at the end of each deposition; or
> (b) at the end of several or of all the depositions in a manner that will indicate that his signature is intended to authenticate each deposition.
>
> [*omitted (4), (5), (6), (7), (8) and (9)*]
> R.S., 1985, c. C-46, s. 540; R.S., 1985, c. 27 (1st Supp.), s. 98; 1997, c. 18, s. 65; 2002, c. 13, s. 29; 2019, c. 25, s. 243.
> [*annotation(s) added*]
>
> – CCC

Defence Concessions at Preliminary Inquiry

Any concessions or waiver of voir dires made at the preliminary inquiry stage are irrelevant and have no binding effect upon counsel at trial.[1]

1. *R v Al-Amoud*, 1992 CanLII 7600 (ONSC), 10 OR (3d) 676, *per* Then J
R v Cover, 1988 CanLII 7118 (ONSC), (1988), 40 CRR 381, 44 CCC (3d) 34, *per* Campbell J, at pp. 383-84 ("It is irrelevant that a voir dire was waived at the preliminary. Notwithstanding any waiver of a voir dire, the accused still retains the right to test the Crown's case and pin down witnesses on areas that might be relevant at trial")

Circumstantial Evidence, Inferences and Weighing Evidence

Where circumstantial evidence is presented, the court engages in "limited weighing" of all the evidence, to determine whether a reasonable jury, properly instructed, could return a guilty verdict. This involves considering the reasonableness of the inferences drawn from the evidence.

A preliminary inquiry judge may not rely entirely on a circumstantial case by making inferences.[1]

A "reasonable interpretation or permissible inference from the evidence, properly admissible against the accused, beyond conjecture or speculation, is to be resolved in favour of the prosecution."[2] If the justice "does not consider the competing inferences in a manner that gives the maximum reasonable benefit to the Crown, the case law characterizes this as the justice exceeding his or her jurisdiction."[3]

1. *R v Herman*, 1984 CanLII 2664 (SK CA), [1984] S.J. No 206, (1984), 30 Sask.R. 148, 11 CCC (3d) 102, *per* Campbell JA
   cf. *R v Coke*, [1996] OJ No 808(*no CanLII links) , *per* Hill J, at para 9
2. *Coke*, *ibid.*, at para 9
3. *R v Corazza*, 2013 ONCJ 433 (CanLII), *per* Reinhardt J , at para 93

Admissions or Confessions

Confessions, admissions or statements of the accused are admissible under the same test to be applied at trial.[1] Thus the crown must advance some evidence that the statement was made and to establish beyond a reasonable doubt that it was voluntary.[2]

1. See, *R v Pickett*, 1975 CanLII 1428 (ON CA), 28 CCC (2d) 297, *per* Jessup JA, at p. 303
2. For example, *R v Mulligan*, 1955 CanLII 124 (ON CA), 111 CCC 173, *per* MacKay JA, at pp. 176-7
   Pickett, *supra*, at p. 302

Defence Evidence

Under s. 541(2), once the Crown has closed its case at the preliminary inquiry, the presiding judge must ask the accused whether he wishes to testify on his own behalf. The address to the accused is as follows:

> “ Do you wish to say anything in answer to these charges or to any other charges which might have arisen from the evidence led by the prosecution? You are not obliged to say anything, but whatever you do say may be given in evidence against you at your trial. You should not make any confession or admission of guilt because of any promise or threat made to you but if you do make any statement it may be given in evidence against you at your trial in spite of the promise or threat. ”

Anything the accused says can be taken down and used as evidence.(s. 541(2))

The accused is entitled to call any witnesses he wishes (s. 541(4)). The judge should be sure to inquire whether the accused is calling any other witnesses.(s.541(3))

The judge must inquire into whether a self-represented accused has any witnesses to call as evidence.[1]

Section 657 permits any statement made under s. 541(3) to be admitted into evidence against the accused without proof of a judge's signature upon the statement.

Hearing of witnesses

541 (1) When the evidence of the witnesses called on the part of the prosecution has been taken down and, if required by this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*], has been read, the justice shall, subject to this section and subsection 537(1.01) [*power limit issues and witnesses*], hear the witnesses called by the accused.

Contents of address to accused

(2) Before hearing any witness called by an accused who is not represented by counsel, the justice shall address the accused as follows or to the like effect:

> "Do you wish to say anything in answer to these charges or to any other charges which might have arisen from the evidence led by the prosecution? You are not obliged to say anything, but whatever you do say may be given in evidence against you at your trial. You should not make any confession or admission of guilt because of any promise or threat made to you but if you do make any statement it may be given in evidence against you at your trial in spite of the promise or threat."

Statement of accused

(3) Where the accused who is not represented by counsel says anything in answer to the address made by the justice pursuant to subsection (2) [*contents of address to accused*], the answer shall be taken down in writing and shall be signed by the justice and kept with the evidence of the witnesses and dealt with in accordance with this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*].

Witnesses for accused

(4) Where an accused is not represented by counsel, the justice shall ask the accused if he or she wishes to call any witnesses after subsections (2) [*contents of address to accused*] and (3) [*statements of accused*] have been complied with.

Depositions of witnesses

(5) Subject to subsection 537(1.01) [*power limit issues and witnesses*], the justice shall hear each witness called by the accused who testifies to any matter relevant to the inquiry, and for the purposes of this subsection, section 540 [*taking evidence by preliminary inquiry judge*] applies with any modifications that the circumstances require.

R.S., 1985, c. C-46, s. 541; R.S., 1985, c. 27 (1st Supp.), s. 99; 1994, c. 44, s. 54; 2019, c. 25, s. 244.
[*annotation(s) added*]

– CCC

Confession or admission of accused

542 (1) Nothing in this Act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him.

Restriction of publication of reports of preliminary inquiry

(2) Every one who publishes in any document, or broadcasts or transmits in any way, a report that any admission or confession was tendered in evidence at a preliminary inquiry or a report of the nature of such admission or confession so tendered in evidence unless

(a) the accused has been discharged, or
(b) if the accused has been ordered to stand trial, the trial has ended,

is guilty of an offence punishable on summary conviction.

(3) [Repealed, 2005, c. 32, s. 19]
R.S., 1985, c. C-46, s. 542; R.S., 1985, c. 27 (1st Supp.), s. 101(E); 2005, c. 32, s. 19.
[*annotation(s) added*]

– CCC

No Right to Prevent Defence from Calling Witnesses

The inquiry judge has no ability to stop defence from calling relevant evidence even where they are satisfied that there is sufficient evidence for committal.[2]

1. *R v LeBlanc*, 2009 NBCA 84 (CanLII), 250 CCC (3d) 29, *per* Richard JA (3:0)
2. *R v Ward*, 1976 CanLII 1335 (ONSC), 31 CCC (2d) 466, *per* Cory J

Defence Evidence Useable at Trial

Any statement by an accused made under s. 541(3) can be admitted at trial:

Evidence on Trial
Use in evidence of statement by accused

657 A statement made by an accused under subsection 541(3) [*statements of accused*] and purporting to be signed by the justice before whom it was made may be given in evidence against the accused at his or her trial without proof of the signature of the justice, unless it is proved that the justice by whom the statement purports to be signed did not sign it.
R.S., 1985, c. C-46, s. 657; 1994, c. 44, s. 62.
[*annotation(s) added*]

– CCC

Hearsay Evidence

- Admission of Hearsay Evidence at Preliminary Inquiry

Recording of Evidence and Transcription

Taking evidence

540
[*omitted (1), (2) and (3)*]

Stenographer to be sworn

(4) Where the stenographer appointed to take down the evidence is not a duly sworn court stenographer, he shall make oath that he will truly and faithfully report the evidence.

Authentication of transcript

(5) Where the evidence is taken down by a stenographer appointed by the justice or pursuant to law, it need not be read to or signed by the witnesses, but, on request of the justice or of one of the parties, shall be transcribed, in whole or in part, by the stenographer and the transcript shall be accompanied by

(a) an affidavit of the stenographer that it is a true report of the evidence; or
(b) a certificate that it is a true report of the evidence if the stenographer is a duly sworn court stenographer.

Transcription of record taken by sound recording apparatus

(6) Where, in accordance with this Act, a record is taken in any proceedings under this Act by a sound recording apparatus, the record so taken shall, on request of the justice or of one of the parties, be dealt with and transcribed, in whole or in part, and the transcription certified and used in accordance with the provincial legislation, with

such modifications as the circumstances require mentioned in subsection (1) [*obligation to take and record evidence of inquiry witnesses*].
[*omitted (7), (8) and (9)*]
R.S., 1985, c. C-46, s. 540; R.S., 1985, c. 27 (1st Supp.), s. 98; 1997, c. 18, s. 65; 2002, c. 13, s. 29; 2019, c. 25, s. 243.

– CCC

See Also

- Public and Media Restrictions#Preliminary Inquiry Evidence

Air of Reality Test

This page was last substantively updated or reviewed *May 2020*. (Rev. # 79483)

< Criminal Law < Defences

General Principles

Before the trier-of-fact can consider a justification or excuse defence there must be an "air of reality" to the defence.[1] Should there be an air of reality to the advanced defence, the burden is then upon the Crown to disprove at least one of the elements of the defence beyond a reasonable doubt.[2]

The air of reality test asks "whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit.[3]

Purpose

The purpose of the air of reality test is to prevent "outlandish defences" being put to the jury that would be "confusing and would invite unreasonable verdicts."[4]

As part of the trial judge's gatekeeper function, the judge must ensure that the trier-of-fact "does not become sidetracked from the real issues in a case by considering defences that the evidence cannot reasonably support".[5]

The purpose of the test is not intended "to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed". It only asks "whether the record contains a sufficient factual foundation for a properly instructed jury to give effect to the defence".[6]

Nature of Burden Upon Accused

The air of reality test creates an evidential burden, not a persuasive burden.[7]

Jury Trials

In the context of a jury trial, the test determines whether the judge will give instructions to the jury that they should consider the particular defences. The jury should be instructed *only* of the defences that have evidence supporting it.[8] By inference, a "judge has a positive duty to keep from the jury defences lacking an evidential foundation".[9] There must be evidence support *each* element of the defence.[10]

Where it Applies

The test applies to *all* defences[11] as well as all elements of each defence.[12]

Applicable Test

The test requires that there must be "some evidence" upon which "a properly instructed jury acting reasonably could base an acquittal".[13]

Evaluation of Evidence

The judge must consider the "totality of the evidence" and assume that the defence evidence is all true.[14] The judge should not consider credibility, make findings of fact, draw inferences, or "weigh" the evidence.[15] He should not consider the likelihood of success of the defence.[16]

The judge may perform a limited, common sense weighing of the evidence.[17]

The judge must consider whether inferences would be necessary for the defence to succeed and whether those inferences from the evidence are reasonable.[18]

Where the stories of witnesses differ, the trier-of-fact may "cobble together some of the complainant's evidence and some of the accused's evidence" to determine if there is an air of reality.[19]

Incompatible Theories

There is no rule against putting an alternative defence theory to the jury that is factually incompatible with the defence's principal theory. The only applicable test is whether there is an air of reality based on the evidence.[20]

Appellate Review

Whether there is an air of reality to a defence is a question of law and is reviewable on a standard of correctness.[21]

However, the decision on whether to leave a defence to the jury is entitled to "some deference".[22] This apparent conflict between standards can prove difficult.[23] The distinction can be reconciled whereby direct evidence cases do not afford deference while those involving limited inferences should be accorded "some deference".[24]

1. *R v Cinous*, 2002 SCC 29 (CanLII), [2002] 2 SCR 3, *per* McLachlin CJ and Bastarache J, at paras 53 to 54 and 65
   e.g. comments of Watt J. In *R v Tomlinson*, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA (3:0), at para 51
2. *Cinous*, *supra*
3. *Cinous*, *supra*, at para 49 ("The correct approach to the air of reality test is well established. The test is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit. ...")
4. *Cinous*, *supra*, at para 84

5. *R v Singh*, 2016 ONSC 3739 (CanLII), 131 WCB (2d) 140, *per* Fairburn J, at para 36
   R v Ronald, 2019 ONCA 971 (CanLII), *per* Doherty JA, at para 44
6. *R v Buzizi*, 2013 SCC 27 (CanLII), [2013] 2 SCR 248, *per* Fish J (3:2), at para 16
   R v Cairney, 2013 SCC 55 (CanLII), [2013] 3 SCR 420, *per* McLachlin CJ, at para 21
   R v Suarez-Noa, 2017 ONCA 627 (CanLII), 350 CCC (3d) 267, *per* Doherty JA, at para 41
7. *Cinous*, *supra*, at para 52 ("It is trite law that the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive.")
8. *R v Ribic*, 2008 ONCA 790 (CanLII), 238 CCC (3d) 225, *per* Cronk JA, at para 38 (all defences "that are realistically available on the evidence")
   Cinous, *supra*, at para 50 (“a defence should be put to a jury if and only if there is an evidential foundation for it”)
9. *R v Gunning*, 2005 SCC 27 (CanLII), [2005] 1 SCR 627, *per* Charron J, at para 29
10. *Ribic*, *supra*, at para 38 ("if evidential support for a necessary element of a defence is lacking, the air of reality test will not be met.")
11. *Cinous*, *supra*, at paras 57 and 82
12. *Ribic*, *supra*, at para 38
13. *Cinous*, *supra*, at para 83
14. *Cinous*, *supra*, at para 53 ("In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true")
15. *Cinous*, *supra*, at para 54 ("The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences")
16. *Cinous*, *supra*, at para 54 ("whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day")
17. *R v Larose*, 2013 BCCA 12 (CanLII), *per* Chiasson JA, at paras 27 to 28
18. *Cinous*, *supra*, at paras 65 and 51tb83
    R v Savoury, 2005 CanLII 25884 (ON CA), 200 CCC (3d) 94, *per* Doherty JA, at para 45
    R v Basit, 2013 BCSC 70 (CanLII), *per* Voith J, at para 7
19. *R v Park*, 1995 CanLII 104 (SCC), [1995] 2 SCR 836, *per* Lamer CJ
    R v Esau, 1997 CanLII 312 (SCC), [1997] 2 SCR 777, *per* Major J
20. *R v Gauthier*, 2013 SCC 32 (CanLII), [2013] 2 SCR 403, *per* Wagner J, at para 29
21. *Cinous*, *supra*, at para 55
    R v Tran, 2010 SCC 58 (CanLII), [2010] 3 SCR 350, *per* Charron J, at para 40
    R v McRae, 2005 CanLII 26592 (ON CA), 199 CCC (3d) 536, *per* Simmons JA, at para 38 (" [T]he question of whether there was an air of reality to the defence of duress is an issue of law")
    R v Ryan, 2011 NSCA 30 (CanLII), 269 CCC (3d) 480, *per* MacDonald JA, at para 114
    R v Budhoo, 2015 ONCA 912 (CanLII), 343 OAC 269, *per* Benotto JA, at para 40 (" determination as to whether there is an air of reality to a defence is a question of law, subject to appellate review on a correctness standard")
22. *R v Dupe*, 2016 ONCA 653 (CanLII), 340 CCC (3d) 508, *per* Doherty JA, at para 79
23. *R v Land*, 2019 ONCA 39 (CanLII), 145 OR (3d) 29, *per* Paciocco JA, at para 71
24. *R v Paul*, 2020 ONCA 259 (CanLII), *per* Harvison Young JA, at paras 26 to 31

See Also

- Self-Defence and Defence of Another

Procedural Powers of a Preliminary Inquiry Judge

< Procedure and Practice < Preliminary Inquiry

General Principles

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;
(b) remand the accused to custody for the purposes of the *Identification of Criminals Act*;
(c) except where the accused is authorized pursuant to Part XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] to be at large, remand the accused to custody in a prison by warrant in Form 19 [*forms*];
(d) resume an inquiry before the expiration of a period for which it has been adjourned with the consent of the prosecutor and the accused or his counsel;
(e) order in writing, in Form 30, that the accused be brought before him, or any other justice for the same territorial division, at any time before the expiration of the time for which the accused has been remanded;
(f) grant or refuse permission to the prosecutor or his counsel to address him in support of the charge, by way of opening or summing up or by way of reply on any evidence that is given on behalf of the accused;
(g) receive evidence on the part of the prosecutor or the accused, as the case may be, after hearing any evidence that has been given on behalf of either of them;
(h) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing;
(i) regulate the course of the inquiry in any way that appears to the justice to be desirable, including to promote a fair and expeditious inquiry, that is consistent with this Act and that, unless the justice is satisfied that to do so would be contrary to the best interests of the administration of justice, is in accordance with any admission of fact or agreement recorded under subsection 536.4(2) [*agreement to be recorded*] or agreement made under section 536.5 [*agreement to limit scope of preliminary inquiry*];
[*omitted (j)*]
(j.1) permit, on the request of the accused, that the accused be out of court during the whole or any part of the inquiry on any conditions that the justice considers appropriate; and
[*omitted (k)*]

Power provided under paragraph (1)(i)

(1.01) For the purpose of paragraph (1)(i) [*power to regulating inquiry*], the justice may, among other things, limit the scope of the preliminary inquiry to specific issues and limit the witnesses to be heard on these issues.

Section 715 or 715.01

(1.02) If a justice grants a request under paragraph (1)(j.1) [*power to permit accused to be absent during inquiry*], the Court must inform the accused that the evidence taken during their absence could still be admissible under section 715 [*evidence at*

preliminary inquiry may be read at trial in certain cases] or 715.01 [*transcript of evidence of peace officer admissible at trial*].

Inappropriate questioning

(1.1) A justice acting under this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] shall order the immediate cessation of any part of an examination or cross-examination of a witness that is, in the opinion of the justice, abusive, too repetitive or otherwise inappropriate.

Change of venue

(2) Where a justice changes the place of hearing under paragraph (1)(a) to a place in the same province, other than a place in a territorial division in which the justice has jurisdiction, any justice who has jurisdiction in the place to which the hearing is changed may continue the hearing.

(3) and (4) [Repealed, 1991, c. 43, s. 9]

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; 2019, c. 25, s. 242.
[*annotation(s) added*]

– CCC

Organization

538 Where an accused is an organization, subsections 556(1) [*organization to appear by agent or counsel*] and (2) [*consequence of non-appearance by organization*] apply with such modifications as the circumstances require.

R.S., 1985, c. C-46, s. 538; 2003, c. 21, s. 8.
[*annotation(s) added*]

– CCC

Powers described in s. 537 should be "interpreted broadly so that the judge can carry out his mandate effectively."[1]

Disclosure

The accused right to disclosure has no connection with the course of the preliminary inquiry. The power of the court to ensure that disclosure is met is not affected by the inquiry process.[2] Unavailable evidence that would assist in full answer and defence has no bearing on the preliminary inquiry process.[3]

1. *R v Swystun*, 1990 CanLII 7682 (SK CA), 84 Sask R 238, *per* Gerwing JA
   R v Stinert, 2015 ABPC 4 (CanLII), 604 AR 151, *per* Rosborough J, at para 41
2. *R v Girimonte*, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA
   R v Paulishyn, 2017 ABQB 61 (CanLII), 377 CRR (2d) 29, *per* Yamauchi J
3. *Paulishyn*, *ibid.*

Focus Hearings

Order for hearing

536.4 (1) The justice before whom a preliminary inquiry is to be held may order, on application of the prosecutor or the accused or on the justice's own motion, that a hearing be held, within the period fixed by rules of court made under section 482 [*powers of the superior and appellate court to make rules*] or 482.1 [*powers of the superior and appellate court to make case management rules*] or, if there are no such rules, by the justice, to

> (a) assist the parties to identify the issues on which evidence will be given at the inquiry;
> (b) assist the parties to identify the witnesses to be heard at the inquiry, taking into account the witnesses' needs and circumstances; and
> (c) encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.

Agreement to be recorded

(2) When the hearing is completed, the justice shall record any admissions of fact agreed to by the parties and any agreement reached by the parties.
2002, c. 13, s. 27.
[*annotation(s) added*]

– CCC

Agreement to limit scope of preliminary inquiry

536.5 Whether or not a hearing is held under section 536.4 [*order for preliminary inquiry hearing*], the prosecutor and the accused may agree to limit the scope of the preliminary inquiry to specific issues. An agreement shall be filed with the court or recorded under subsection 536.4(2) [*agreement to be recorded*], as the case may be.

2002, c. 13, s. 27; 2019, c. 25, s. 241(E)
[*annotation(s) added*]

– CCC

Publication Bans

There are several publication bans available for preliminary inquires:

- complainant's identity (s. 486.4(1) and (2), 486.4(3) [mandatory]; s. 486.4(1), 486.5(1))
- accused's confessions (s. 542) [mandatory]
- evidence of preliminary inquiry (s. 539)
- witnesse's identity (s. 486.5(1))
- justice system participant's identity (s. 486.2(5))

Absence of Accused or Video-link Attendance

Order of Committal to Stand Trial

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79483)

< Procedure and Practice < Preliminary Inquiry

General Principles

The test for a preliminary inquiry is the same as a motion for non-suit or directed verdict.[1] The test is: "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty".[2]

The analysis requires the judge to determine whether "there is admissible evidence which could, if it were believed, result in a conviction".[3]

The evidentiary standard is "very low". There must simply be "some or a scintilla of evidence on each essential element of the offence".[4]

If the "evidence is capable of belief, it is to be believed".[5]

The evidence cannot be considered "piecemeal" but rather the judge must examine the evidence as a whole.[6]

After hearing evidence and argument the court must make a ruling on whether to commit the accused to stand trial for the charges alleged.[7]

Where the evidence "consists solely of eyewitness testimony that would necessarily leave reasonable doubt in the mind of a reasonable juror, the trial judge must direct an acquittal upon a motion for directed verdict".[8]

1. *R v Arcuri*, 2001 SCC 54 (CanLII), [2001] 2 SCR 828, *per* McLachlin J
   United States of America v Shephard, 1976 CanLII 8 (SCC), [1977] 2 SCR 1067, (1976) 30 CCC (2d) 424, *per* Ritchie J, at p. 427
   R v Mezzo, 1986 CanLII 16 (SCC), [1986] 1 SCR 802, *per* McIntyre J, at pp. 842-43

2. *Arcuri*, *supra*, at para 21
3. *USA v Shephard*, *supra*, at p. 427
4. see *R v Hyra*, 2013 MBCA 59 (CanLII), *per* Chartier JA, at para 10
5. *R v Eckstein*, 2012 MBCA 96 (CanLII), [2012] MJ No 352 (CA), *per* Chartier JA, at para 18
6. *R v Muir*, 2008 ONCA 608 (CanLII), [2008] OJ No 3418 (CA), *per curiam*
7. *R v Coke*, [1996] OJ No 808(*no CanLII links) , *per* Hill J, at paras 8 to 11
8. *R v Hay*, 2013 SCC 61 (CanLII), *per* Rothstein J

Inferences and Circumstantial Evidence

The test remains the same whether the evidence is circumstantial or direct. [1]

Where inferences may be drawn, it is not important if "more than one inference can be drawn...only the inferences that favour the Crown are to be considered".[2]

1. see *Mezzo v The Queen*, 1986 CanLII 16 (SCC), [1986] 1 SCR 802
2. *R v Sazant*, 2004 SCC 77 (CanLII), [2004] 3 SCR 635, *per* Major J, at para 18
see also *R v Noddie*, [2009] OJ No 855(*no CanLII links) - trial judge weighs inferences, ruling overturned

Insufficient Evidence

Where the evidence is not sufficient to commit the matter to trial the Judge may discharge the accused of the charges alleged:

> **Order to stand trial or discharge**
>
> 548 (1) When all the evidence has been taken by the justice, he shall
>
> > (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
> > (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.
>
> [*omitted (2), (2.1) and (3)*]
> R.S., 1985, c. C-46, s. 548; R.S., 1985, c. 27 (1st Supp.), s. 101; 1994, c. 44, s. 56.
>
> – CCC

Standard of Review

Errors of jurisdiction

Where a judge incorrectly decides on the issue of committal there may be a loss of jurisdiction reviewable on a writ of certiorari.

A committal where there is an absence of evidence on an essential element of the charge is a jurisdictional error.[1]

An error in an evidentiary ruling on an element of the offence is not a jurisdictional error that is reviewable.[2]

1. *R v Skogman*, 1984 CanLII 22 (SCC), [1984] 2 SCR 93, (1984) 13 CCC (3d) 161, at p. 170-171
2. *R v Beaven*, 2012 SKCA 59 (CanLII), 290 CCC (3d) 312 ("erroneous evidentiary ruling under which the only evidence on an essential ingredient of an offence is admitted is not a jurisdictional error")
R v LeBlanc, 2009 NBCA 84 (CanLII), 250 CCC (3d) 29

Consent to Committal

At any time before the conclusion of the preliminary inquiry the accused may consent to committal.

Order to stand trial at any stage of inquiry with consent

549 (1) Notwithstanding any other provision of this Act, the justice may, at any stage of a preliminary inquiry, with the consent of the accused and the prosecutor, order the accused to stand trial in the court having criminal jurisdiction, without taking or recording any evidence or further evidence.

Limited preliminary inquiry

(1.1) If the prosecutor and the accused agree under section 536.5 [*agreement to limit scope of preliminary inquiry*] to limit the scope of a preliminary inquiry to specific issues, the justice, without taking or recording evidence on any other issues, may order the accused to stand trial in the court having criminal jurisdiction.

Procedure

(2) If an accused is ordered to stand trial under this section, the justice shall endorse on the information a statement of the consent of the accused and the prosecutor, and the accused shall after that be dealt with in all respects as if ordered to stand trial under section 548.

R.S., 1985, c. C-46, s. 549; R.S., 1985, c. 27 (1st Supp.), s. 101; 2002, c. 13, s. 30; 2019, c. 25, s. 247.

– CCC

Ordering Committal

When the preliminary inquiry judge makes an order of committal he must transfer the record of the matter (the information, evidence, exhibits and statements made under s. 541, release documents, etc) to the superior court. That is stated in s. 551:

> **Transmission of record by justice**
>
> 551 If a justice orders an accused to stand trial, the justice shall immediately send to the clerk or other proper officer of the court by which the accused is to be tried, any information, evidence, exhibits, or 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 justice.
> R.S., 1985, c. C-46, s. 551; R.S., 1985, c. 27 (1st Supp.), s. 102; 2019, c. 25, s. 249.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

Fixing Dates

> 548
> [*omitted (1) and (2)*]
>
> **Where accused ordered to stand trial**
>
> (2.1) A justice who orders that an accused is to stand trial has the power to fix the date for the trial or the date on which the accused must appear in the trial court to have that date fixed.
> [*omitted (3)*]
> R.S., 1985, c. C-46, s. 548; R.S., 1985, c. 27 (1st Supp.), s. 101; 1994, c. 44, s. 56.
>
> – CCC

New Charges

548
[*omitted (1)*]

Endorsing charge

(2) Where the justice orders the accused to stand trial for an indictable offence, other than or in addition to the one with which the accused was charged, the justice shall endorse on the information the charges on which he orders the accused to stand trial.
[*omitted (2.1) and (3)*]
R.S., 1985, c. C-46, s. 548; R.S., 1985, c. 27 (1st Supp.), s. 101; 1994, c. 44, s. 56.

– CCC

Defects to Order

548
[*omitted (1), (2) and (2.1)*]

Defect not to affect validity

(3) The validity of an order to stand trial is not affected by any defect apparent on the face of the information in respect of which the preliminary inquiry is held or in respect of any charge on which the accused is ordered to stand trial unless, in the opinion of the court before which an objection to the information or charge is taken, the accused has been misled or prejudiced in his defence by reason of that defect.
R.S., 1985, c. C-46, s. 548; R.S., 1985, c. 27 (1st Supp.), s. 101; 1994, c. 44, s. 56.

– CCC

Order Transferring Detained Property

490
[*omitted (1), (2), (3) and (3.1)*]

When accused ordered to stand trial

(4) When an accused has been ordered to stand trial, the justice shall forward anything detained pursuant to subsections (1) to (3) [*detention of things seized without consent (various means)*] to the clerk of the court to which the accused has been ordered to stand trial to be detained by the clerk of the court and disposed of as the court directs.
[*omitted (5), (6), (7), (8), (9), (9.1), (10), (11), (12), (13), (14), (15), (16), (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; 2017, c. 7, s. 63(F).
[*annotation(s) added*]

– CCC

Trial Process

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79483)

< Procedure and Practice < Trials

Introduction

Purpose of a trial

A trial is a process by which a judge attempts to ascertain the truth in order to convict the guilty and acquit the innocent.[1] The process does not go so far as to determine "actual innocence" as the standard of proof a trial is proof beyond reasonable doubt and does not evaluate degrees of acquittal and is not the ultimate purpose of criminal law.[2]

The trial fundamentally is "about the search for the truth as well as fairness to the accused".[3] This is guided by these principles:

1. the presumption of innocence[4]
2. the right against self-incrimination [5]
3. the ultimate burden on the crown to prove guilt beyond a reasonable doubt.[6]

The trial process is the primary means of resolving disputes in a "just, peaceful, and orderly way".[7]

Trial is Not Scientific

The trier-of-fact is not engaging "in a scientific investigation".[8] It is irrelevant to the trial process that there may exist relevant evidence that has not been put before the court. Judges are not to go looking for evidence "like detectives".[9]

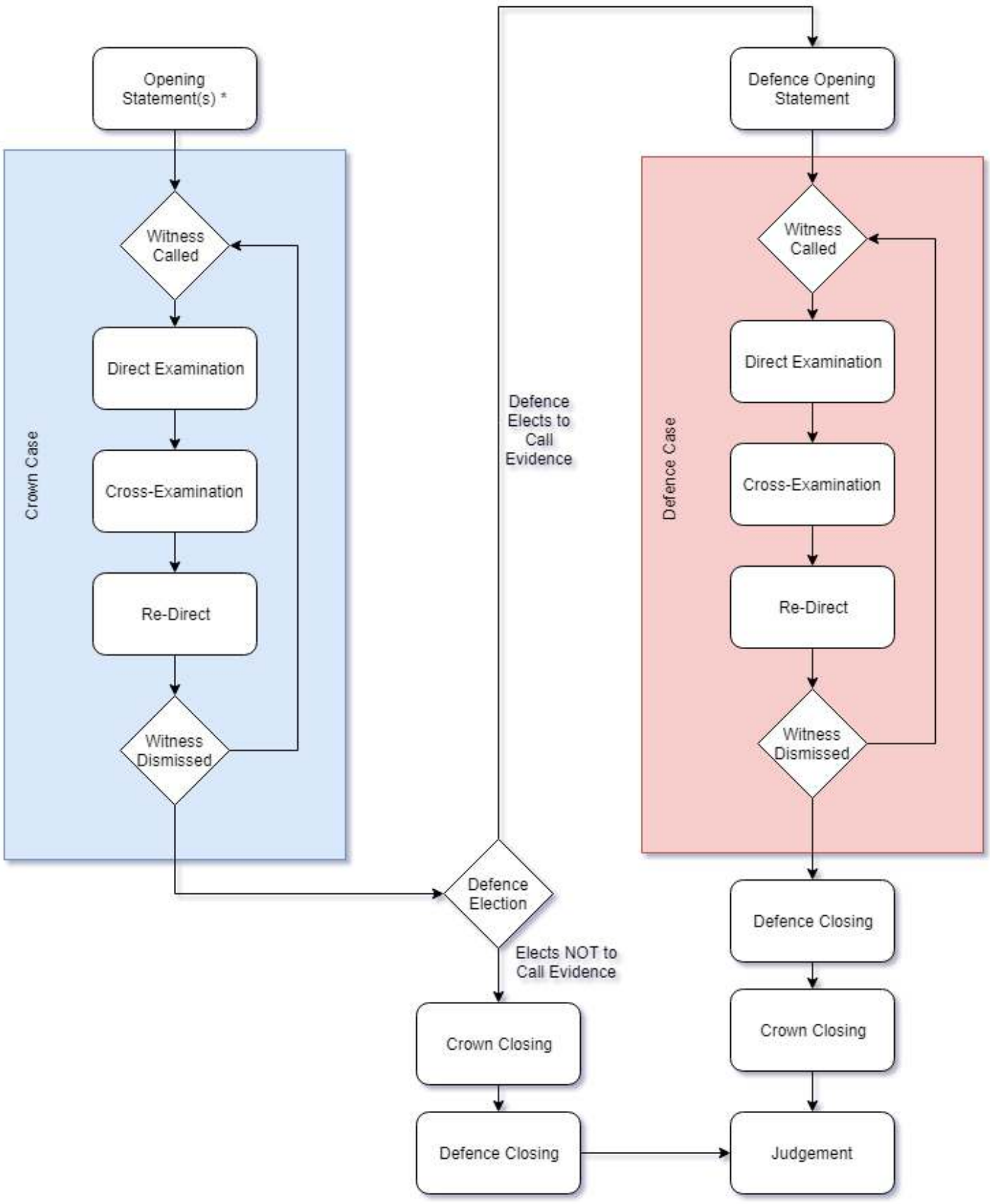
A trial is Not to Vindicate the Complainant

The purpose of a trial is not to vindicate the complainant. It is to determine whether a criminal offence has been committed.[10]

A failure to convict does not mean that the complainant is not believed or believable.[11] It is also not equivalent to a finding that the allegations did not happen.[12]

1. *R v Levogiannis*, 1993 CanLII 47 (SCC), [1993] 4 SCR 475, *per* L'Heureux-Dubé J ("The goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.")
   R v Nikolovski, 1996 CanLII 158 (SCC), [1996] 3 SCR 1197, *per* Cory J ("The ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth.")
   R v G(B), 1999 CanLII 690 (SCC), [1999] 2 SCR 475, *per* Bastarache J ("[T]he essential principle of every criminal trial [is] the search for truth.")
   R v Chamandy, 1934 CanLII 130 (ON CA), 61 CCC 224, *per* Riddell JA ("A criminal trial is not a contest between individuals nor is it a contest between the Crown and the accused; it is an investigation that should be conducted without animus on the part of the prosecution, with the single view of determining the truth.")
2. *R v Mullins-Johnson*, 2007 ONCA 720 (CanLII), 228 CCC (3d) 505, *per curiam*
3. *R v Handy*, 2002 SCC 56 (CanLII), [2002] 2 SCR 908, *per* Binnie J ("[t]he criminal trial is, after all, about the search for truth as well fairness to an accused")
4. *Handy*, *ibid.*, at para 44
   see also Presumptions
5. s. 11(d) of the Charter
6. Section 11(c) of the Charter
7. *Groia v Law Society of Upper Canada*, 2018 SCC 27 (CanLII), [2018] 1 SCR 772, at para 1 ("Trials are the primary mechanism whereby disputes are resolved in a just, peaceful, and orderly way.")
8. *R v Barbour*, 1938 CanLII 29 (SCC), [1938] SCR 465, *per* Duff CJ
   Shortland v Hill & Anor [2017] EW Misc 14 (UK) (CC) [1] , at para 20("So ours is not a system of scientific certainty in finding the truth. It is one that seeks the *most likely* answer based on the evidence that *the parties* have chosen to place before it".)
9. *Shortland v Hill*, *ibid.*, at para 20
10. *R v Nyznik*, 2017 ONSC 4392 (CanLII), 350 CCC (3d) 335, *per* Molloy J, at para 16
11. *R v WN*, 2019 CanLII 4547 (NL PC), *per* Gorman J, at para 4
12. *R v Jackson*, 2019 NSSC 202 (CanLII), *per* Brothers J, at para 152

Ordering of Trial



* If the defence do not elect to call any evidence, they may do opening after the Crown

Fair Trial

"Trial fairness" does not equate the right to a "perfect" trial. [1]

Trial fairness is not exclusively a consideration for the benefit of the accused. A "fair trial" is not one that appears fair solely from the perspective of the accused. It should be considered "from the perspective of the community". It must satisfy the "public interest in getting at the truth" while preserving the "basic procedural fairness for the accused".[2]

1. *R v Lyons*, 1987 CanLII 25 (SCC), [1987] 2 SCR 309, *per* La Forest J at 362B ("The Charter guarantees the accused a fundamentally fair trial, not a perfect trial.")
   R v Harrer, 1995 CanLII 70 (SCC), [1995] 3 SCR 562, *per* La Forest J, at p. 587
2. *R v Spackman*, 2012 ONCA 905 (CanLII), 295 CCC (3d) 177, *per* Watt JA, at para 102 ("Trial fairness is not the exclusive preserve of those charged with crime. A fair trial is a trial that appears fair, not only from the perspective of the accused, the person on trial, but also from the perspective of the community … A fair trial is a trial that satisfies the public interest in getting at the truth, but at the same time preserves basic procedural fairness for the accused.")
   Harrer, *supra*, at para 45 ("At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view:... Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.")
   Lyons, *supra*, at p. 362 (SCR)

Right to a Fair Trial

Section 11(d) of the Charter guarantees:

> **Proceedings in criminal and penal matters**
>
> 11. Any person charged with an offence has the right ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> – CCRF

The right to a fair trial and the principles of fundamental justice "do not guarantee defence counsel the right to precisely the same privileges and procedures as the Crown and the police".[1]

1. *R v Quesnelle*, 2014 SCC 46 (CanLII), [2014] 2 SCR 390, *per* Karakatsanis J, at para 64
   R v Mills, 1999 CanLII 637 (SCC), [1999] 3 SCR 668, *per* McLachlin and Iacobucci JJ
   see also Principles of Fundamental Justice

Venue of Trial

As a general rule, an accused "should be tried in the community of territory where the alleged offence was committed." And should only change where an application for a change of venue under s. 599 has been made.[1]

There is no unfettered discretion to try a matter anywhere within the province. Otherwise, the law could become an "engine of oppression and injustice".[2]

1. *R v Donahue*, 2005 NLTD 117 (CanLII), 743 APR 307, *per* Barry J, at para 19
2. *R v Simons*, 1976 CanLII 1369 (ON CA), 30 CCC (2d) 162 (ONCA), *per* Dubin JA, at p. 168
   Donahue, *supra*, at para 19 citing Simons
   R v Sherman, 1995 CanLII 4269 (NS CA), 418 APR 122, *per* Hallett JA citing Simons
   R v Blonde, 2015 ONSC 2113 (CanLII), *per* P Smith J, at para 60, citing Simons

Crown's Case

The Crown will always be the first party to call evidence. It is expected that the crown will call all available witnesses that it intends to rely upon to establish the elements of the offences charged beyond a reasonable doubt.[1]

The crown is expected to go first in order to prevent "unfair surprise, prejudice, and confusion but could result if the crown were allowed to split its case".[2]

The Crown is expected to call, as part of its case, evidence that may rebut any alibi evidence and evidence of similar facts.[3]

The accused is entitled to know to full case against the accused once the Crown closes its case.[4]

1. *R v KT*, 2013 ONCA 257 (CanLII), 295 CCC (3d) 283, *per* Watt JA, at para 41
   R v Krause, 1986 CanLII 39 (SCC), [1986] 2 SCR 466, *per* McIntyre J
2. *KT*, *supra*, at para 42
3. *R v Biddle*, 1995 CanLII 134 (SCC), [1995] 1 SCR 761, *per* Sopinka J
4. *R v Krause*, 1986 CanLII 39 (SCC), [1986] 2 SCR 466, *per* J, at para 15

Defence's Case

At the end of the Crown's case the defence will be permitted to either make a motion for directed verdict, elect to call evidence, or elect not to call evidence.

If the accused elects to call evidence, an opening statement may be given to introduce the trier-of-fact to the defence's case.

The defence has discretion on the order of the calling of witnesses.

If the accused does not call evidence, there will be no need for an opening statement. The case will proceed to closing statements beginning with the Crown's submissions.

Multiple Co-Accused

The order in which the accused are to be asked for their election on whether to call evidence after the closing of the Crown's case will depend on the tradition for the particular jurisdiction.[1] However, most frequently the accused will be addressed in the order in which they appear in the information.[2]

An accused can apply to the trial judge to have the convention changed. The Judge's trial management powers entitle the judge to change the ordering subject to consideration of the risks inherent with the proposed changes.[3]

1. *R v Colpitts*, 2016 NSSC 271 (CanLII), *per* Coady J, at paras 4 to 6, 17 - cites examples of jurisdictions where ordering is based on the order of seniority or the order of seriousness of the charges
2. *Colpitts*, *ibid.*, at para 6
3. *Colpitts*, *ibid.*, at para 18

Adjournment of Trial

Under s. 645 a trial must be continuous unless the court adjourns the matter. There is no requirement of a formal adjournment process to create breaks in the proceeding.

Court Calling Witnesses

The Court has a residual discretionary power to call witnesses to testify where it is necessary for the discovery of truth or in the interests of justice.[1] This power should only be exercised "rarely" and "with caution" in order to avoid interference in the adversarial process or prejudice the accused.[2] It should not be used after the close of the defence's case unless due to an unforeseen matter.[3]

1. *R v Finta*, 1994 CanLII 129 (SCC), [1994] 1 SCR 701, *per* Gonthier, Cory and Major JJ, at pp. 856-858
   R v West, 2011 BCCA 109 (CanLII), BCJ No 583, *per* Neilson JA, at para 17
2. *West*, *ibid.*, at para 17
3. *West*, *ibid.*, at para 17

Rebuttal, Reply and Re-Opening a Case

- Rebuttal, Reply and Re-Opening a Case

Variation on Rules Depending on Venue

The Code is divided into Parts that outline different rules and procedures depending on the level of court and the type of criminal charge.

This can be divided into the following Parts:

- Part XVIII (18): Procedure on Preliminary Inquiry, s. 535 to 551
- Part XIX (19): Indictable Offences-Trial Without a Jury, s. 552 to 572
- Part XX (20) Procedure in Jury Trials and General Provisions, s. 574 to 672
- Part XXVII (27): Summary Convictions, s. 785 to 840

Summary Conviction Trials

Part states under s. 786 that the provisions applies to all proceedings captured in Part XXVII:

> **Application of Part**
>
> 786 (1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.
> [*omitted (2)*]
> R.S., 1985, c. C-46, s. 786; 1997, c. 18, s. 110.
>
> – CCC

> **Definitions**
>
> 785 In this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*],
> ...
> **"proceedings"** means
>
> (a) proceedings in respect of offences that are declared by an Act of Parliament or an enactment made thereunder to be punishable on summary conviction, and
> (b) proceedings where a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order; (procédures)
>
> ...
> R.S., 1985, c. C-46, s. 785; R.S., 1985, c. 27 (1st Supp.), ss. 170, 203; 1992, c. 1, s. 58; 1995, c. 22, s. 7, c. 39, s. 156; 1996, c. 19, s. 76; 1999, c. 25, s. 23(Preamble); 2002, c. 13, s. 78; 2006, c. 14, s. 7; 2013, c. 11, s. 4; 2018, c. 16, s. 223, c. 21, s. 26; 2019, c. 25, s. 314
> [*annotation(s) added*]
>
> – CCC

Section 800 requires that when both the accused and prosecutor appear for a summary conviction trial the judge must hold the trial:

> **When both parties appear**

800 (1) Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.
[*omitted (2), (2.1) and (3)*]

– CCC

Finding of Guilt

801
[*omitted (1)*]

Finding of guilt, conviction or order if charge admitted

(2) Where the defendant pleads guilty or does not show sufficient cause why an order should not be made against him, as the case may be, the summary conviction court shall convict the defendant, discharge the defendant under section 730 or make an order against the defendant accordingly.
[*omitted (3)*]
(4) and (5) [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 177] 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

Proceeding with Summary Trial

801
[*omitted (1) and (2)*]

Procedure if charge not admitted

(3) Where the defendant pleads not guilty or states that he has cause to show why an order should not be made against him, as the case may be, the summary conviction court shall proceed with the trial, and shall take the evidence of witnesses for the prosecutor and the defendant in accordance with the provisions of Part XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] relating to preliminary inquiries.
(4) and (5) [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 177]
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

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785 In this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*]
...
"trial" includes the hearing of a complaint. (procès ou instruction)
R.S., 1985, c. C-46, s. 785; R.S., 1985, c. 27 (1st Supp.), ss. 170, 203; 1992, c. 1, s. 58; 1995, c. 22, s. 7, c. 39, s. 156; 1996, c. 19, s. 76; 1999, c. 25, s. 23(Preamble); 2002, c. 13, s. 78; 2006, c. 14, s. 7; 2013, c. 11, s. 4; 2018, c. 16, s. 223, c. 21, s. 26; 2019, c. 25, s. 314.

– CCC

Compelling Appearances of Accused

On summary conviction offences, the procedure for compelling attendance is the same as found in Parts XVI and XVIII:

Application of Parts XVI, XVIII, XVIII.1, XX and XX.1

795 The provisions of Parts XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] and XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] with respect to compelling the appearance of an accused before a justice, and the provisions of Parts XVIII.1 [*Pt. XVIII.1 – Case Management Judge (s. 551.1 to 551.7)*], XX [*Pt. XX – Procedure in Jury Trials and General Provisions (s. 574 to 672)*] and XX.1 [*Pt. XX.1 – Mental Disorder (s. 672.1 to 672.95)*], in so far as they are not inconsistent with this Part, apply, with any necessary modifications, to proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*].
R.S., 1985, c. C-46, s. 795; R.S., 1985, c. 27 (1st Supp.), s. 176; 1991, c. 43, s. 7; 2011, c. 16, s. 16.
[*annotation(s) added*]

– CCC

Misc Definitions

> **Definitions**
>
> 785 In this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*],
> **"clerk of the appeal court"** includes a local clerk of the appeal court; (greffier de la cour d'appel)
> **"informant"** means a person who lays an information; (dénonciateur)
> ...
> **"order"** means any order, including an order for the payment of money; (ordonnance)
> ...
> R.S., 1985, c. C-46, s. 785; R.S., 1985, c. 27 (1st Supp.), ss. 170, 203; 1992, c. 1, s. 58; 1995, c. 22, s. 7, c. 39, s. 156; 1996, c. 19, s. 76; 1999, c. 25, s. 23(Preamble); 2002, c. 13, s. 78; 2006, c. 14, s. 7; 2013, c. 11, s. 4; 2018, c. 16, s. 223, c. 21, s. 26; 2019, c. 25, s. 314.
> [*annotation(s) added*]
>
> – CCC

Proceeding to Trial Ex Parte

- Ex Parte Trial Proceedings

Court Record

The provincial court, superior court and court of appeal are all "courts of record". The records of a "court of record" is presumed to be accurate without the need for an inquiry. Consequently, recordings of the clerk of the court are presumed accurate.[1]

1. *R v Hanna*, 2013 ABCA 134 (CanLII), 80 Alta LR (5th) 262, *per curiam* (2:1)
   Re Sproule, 1886 CanLII 51 (SCC), (1886), 12 SCR 140, *per* Strong J, at p. 194
   R v Miller, 1985 CanLII 22 (SCC), [1985] 2 SCR 613, *per* Le Dain J, at pp. 631, 633

Superior Courts

Superior Court Judge-Alone Proceedings Are a Court of Record

> **Court of record**
>
> 559 (1) A judge who holds a trial under this Part [*Part XIX Indictable Offences — Trial Without Jury*] shall, for all purposes thereof and proceedings connected therewith or relating thereto, be a court of record.

Custody of records

(2) The record of a trial that a judge holds under this Part shall be kept in the court over which the judge presides.
R.S., c. C-34, s. 489.

[*annotation(s) added*]

– CCC

Provincial Court

A provincial court must receive evidence in the same manner described in for a preliminary inquiry judge:

Taking evidence

557 If an accused is tried by a provincial court judge or a judge of the Nunavut Court of Justice in accordance with this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], the evidence of witnesses for the prosecutor and the accused must be taken in accordance with the provisions of Part XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*], other than subsections 540(7) to (9) [*adducing hearsay and other credible and trustworthy evidence*], relating to preliminary inquiries.
R.S., 1985, c. C-46, s. 557; R.S., 1985, c. 27 (1st Supp.), s. 203; 1999, c. 3, s. 41; 2002, c. 13, s. 35.
[*annotation(s) added*]

– CCC

Case Digests

- Trial Process (Cases)

This page was last substantively updated or reviewed *January 2019*. (Rev. # 79483)

General Principles

Organizations as Accused

800
[*omitted (1), (2) and (2.1)*]

Appearance by organization

(3) Where the defendant is an organization, it shall appear by counsel or agent and, if it does not appear, the summary conviction court may, on proof of service of the summons, proceed ex parte to hold the trial.
R.S., 1985, c. C-46, s. 800; 1997, c. 18, s. 111; 2003, c. 21, s. 21.

– CCC

Summary Conviction Accused

803 [*omitted (1)*]

Non-appearance of defendant

(2) If a defendant who is tried alone or together with others does not appear at the time and place appointed for the trial after having been notified of that time and place, or does not appear for the resumption of a trial that has been adjourned in accordance with subsection (1) [*summary offences – right to adjourn matters*], the summary conviction court

> (a) may proceed ex parte to hear and determine the proceedings in the absence of that defendant as if they had appeared; or
> (b) may, if it thinks fit, issue a warrant in Form 7 [*forms*] for the arrest of that defendant and adjourn the trial to await their appearance under the warrant.

[*omitted (3) and (4)*]
(5) to (8) [Repealed, 1991, c. 43, s. 9]
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.
[*annotation(s) added*]

– CCC

Extra-Jurisdictional Offences

607
[*omitted (1), (2), (3), (4) and (5)*]

Exception — foreign trials in absentia

(6) A person who is alleged to have committed an act or omission outside Canada that is an offence in Canada by virtue of any of subsections 7(2) to (3.1) [*select extra-territorial offences*] or (3.7) [*extraterritorial offences re torture*], or an offence under the *Crimes Against Humanity and War Crimes Act*, and in respect of which the person has been tried and convicted outside Canada, may not plead autrefois convict with respect to a count that charges that offence if

> (a) at the trial outside Canada the person was not present and was not represented by counsel acting under the person's instructions, and
> (b) the person was not punished in accordance with the sentence imposed on conviction in respect of the act or omission,

notwithstanding that the person is deemed by virtue of subsection 7(6) , or subsection 12(1) of the *Crimes Against Humanity and War Crimes Act*, as the case may be, to have been tried and convicted in Canada in respect of the act or omission.
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

Representation at Trial

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79483)

< Procedure and Practice < Trials

General Principles

An accused person has the right to represent him or herself. They may also be entitled to representation by an agent or counsel, depending on the circumstances.

Self-Representation

Representation by Agent

With some limitations the accused on a summary conviction matter may be represented by a non-lawyer referred to as an "agent".

An agent may appear on certain provincial offence matters.[1] However, inadequacies of the agent's abilities will not necessarily be grounds of an appeal.[2]

An agent may not appear on hybrid criminal matters.[3]

An agent generally may not represent an accused on a summary conviction appeal.[4]

These prohibitions exist under common law and under the provincial law society act. The primary reason is to protect the administration of justice and the right to a fair trial by ensuring competent representation.[5] Certain provinces, such as British Columbia[6] and Alberta[7], allow limited exception to this rule on the discretion of the judge.

Criminal Code Limits on Agents

Section 802.1 limits to use of agents in summary trials for penalties greater than 6 months.[8]

> **Limitation on the use of agents**
>
> 802.1 Despite subsections 800(2) [*organization appearance and ex parte trial option*] and 802(2) [*summary offences – right to examine witnesses*], a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless
>
> (a) the defendant is an organization;
> (b) the defendant is appearing to request an adjournment of the proceedings; or
> (c) the agent is authorized to do so under a program approved — or criteria established — by the lieutenant governor in council of the province.
>
> 2002, c. 13, s. 79; 2019, c. 25, s. 317.1.
> [*annotation(s) added*]
>
> – CCC

The purpose of s. 802.1 is to provide limited protections to an accused by balancing their need for assistance with the need for an acceptable level of competence.[9]

Section 800(2) permits a defendant to "appear personally or by counsel or agent" with some limitations. Section 802(2) permits a defendant to "examine and cross-examine witnesses personally or by counsel or agent.".

The penalty limitation in s. 802.1 applies to the maximum penalty and not the particular penalty for the case.[10]

An accused may use an agent to represent them under s. 802.1 on multiple charges where each offence has a maximum penalty of no more than 6 months. This rule applies per charge and not in sum total.[11]

A licensed and insured Ontario paralegal with instructions from legal counsel may appear as "counsel" within the meaning of a s. 650.01 designation for the purpose of a routine remand of an indictable offence.[12] The same authority exists for articling students who may appear in provincial court on routine bail matters.[13]

Discretion to Refuse an Agent

The trial judge retains discretion to refuse an agent from representing an accused person in a summary conviction matter on the basis that it would "damage the fairness of those proceedings, impair the ability of the tribunal to perform its function or otherwise undermine the integrity of the process".[14] It may also be refused any time that it is "necessary ... to protect the proper administration of justice".[15] This will include instances where the agent is facing criminal charges involving interference with the administration of justice or where their background "demonstrates pervasive dishonesty or blatant disrespect for the law".[16]

1. *R v Lawrie*, 1987 CanLII 4173 (ON CA), [1987] OJ 225, 59 OR (2d)161 (Ont CA), *per* Blair JA
   R v Gardener, 1998 ABQB 190 (CanLII), 224 AR 248, *per* Lee J
2. *R v Kane*, [1998] OJ 3595 (Ont.CJ Gen.Div.) (*no CanLII links)
3. *R v Wilson*, [1998] OJ 5190 (Ont.CJ)(*no CanLII links) , at para 28
4. See *R v Duggan*, 1976 CanLII 1392 (ON CA), 31 CCC (2d) 167, *per* MacKinnon JA, at paras 9, 11
   R v Stagg, 2011 MBQB 294 (CanLII), 279 Man R (2d) 225, *per* Oliphant J
   Aasland v Mirecki, [2002] MJ No 502, 37 C.P.C. (5th) 230(*no CanLII links)
5. *R v Romanowicz*, 1999 CanLII 1315 (ON CA), 138 CCC (3d) 225, *per curiam*, at para 74
6. *R v Dick*, 2002 BCCA 27 (CanLII), 163 BCAC 62, *per curiam*
7. *R v Crooks*, 2011 ABCA 239 (CanLII), 527 WAC 364, *per* Berger JA, at paras 8 to 10
8. *R v Spiry*, 2005 ABPC 309 (CanLII), 389 AR 108, *per* Fradsham J, at para 29
9. *Spiry*, *ibid.*, at para 25
10. *R v Frick*, 2010 ABPC 280 (CanLII), *per* Wheatley J
11. *R v May*, 2008 ABPC 312 (CanLII), *per* LeGrandeur J
12. *R v GYL*, 2009 CanLII 38516 (ON SC), 246 CCC (3d) 112, *per* McCombs J
13. *R v Golyanik*, 2003 CanLII 64228 (ONSC), 173 CCC (3d) 307, *per* Trafford J
14. *R v Romanowicz*, 1999 CanLII 1315 (ON CA), 138 CCC (3d) 225, *per curiam*, at para 61
15. *Romanowicz*, *ibid.*, at para 73
16. *Romanowicz*, *ibid.*, at para 74

Representation by Counsel

An accused need *not* necessarily be present at court and can sometimes have their counsel appear on their behalf. Where the offence is a summary offence (or a hybrid offence proceeded by summary conviction) the counsel can act as agent on the accused's behalf. Where the offence an indictable offence, the counsel may appear on the accused's behalf where the counsel has filed a "designation of counsel" pursuant to s. 650.01.[1]

A designation of counsel cannot permit the accused to be absent from the trial proper where oval evidence is being heard, where a jury is being selected, or where an application for habeas corpus is being made.[2]

1. see

Jurisdiction_of_the_Courts#Designations_of_Counsel; see s. 650.01(3)(a)

Representation by Articling Clerk

Articling clerks can only conduct trials "in association with a lawyer".[1]

Under the rules of the legal profession, am articling clerk is generally not treated as an agent of the lawyer. They are permitted to do certain limited lawyer duties while under the direct supervision of the supervising lawyer.[2]

1. *Power v Crowe*, [1983] NSJ 28; 59 NSR (2d) 312 (NSCo.Ct.)(*no CanLII links) - child custody trial ran by articling clerk. Client didn't know that the clerk was not a lawyer.
2. *Wawanesa Insurance Co. v Mann*, 2001 PESCTD 59 (PEISC Tri.Div.), 612 APR 37, *per* DesRoches J

Withdraw by Counsel

An accused has a right to defend himself (s. 651(2)) and so cannot be forced to retain or maintain counsel. The accused has a right to terminate representation by a lawyer at any time, including during trial. [1]

Counsel may not withdraw without leave of the court. Permission to withdraw will be granted where the interests of the lawyer and client are irreconcilable. Once the lawyer has withdrawn they are under no obligation to provide assistance to the accused by way of legal advice or counselling.

Where counsel is seeking to withdraw as counsel due to non-payment of the retainer. The court has discretion to refuse the request are require counsel to complete the matter.[2]

1. *R v Spataro*, 1972 CanLII 25 (SCC), [1974] SCR 253, *per* Judson J
2. *R v Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 SCR 331, *per* Rothstein J

Discharging Counsel

The accused has an unfettered right to discharge his counsel at any time for any reason. The Court has not authority to interfere with this decision or force an unwilling accused to continue to be represented by the discharged counsel.[1]

1. *R v Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 SCR 331, *per* Rothstein J, at para 9

Removal of Counsel

The trial judge has inherent jurisdiction to remove counsel from a proceedings due to misconduct.[1]

The test to remove counsel is determined on an objective standard, asking whether "a fair-minded reasonably informed member of the public would conclude that the proper administration of justice require[s] the removal of the solicitor."[2]

1. *R v Faulkner*, 2013 ONSC 1824 (CanLII), *per* Code J, at para 8
2. *Faulkner*, *ibid.*, at para 10

Court Appointed Counsel

- Court Appointed Counsel

Amicus Curae

- Amicus Curae

Competency of Counsel

See: Ineffective Counsel

See Also

- Right to Counsel
- Representation and Attendance on Appeal

Orders to Exclude Witnesses from Court

This page was last substantively updated or reviewed *January 2016*. (Rev. # 79483)

< Evidence < Testimonial Evidence

General Principles

A judge has the discretion to order the exclusion any witness from being present in court when other evidence is called.[1]

The power to exclude witnesses (sometimes called "sequestration of witnesses") is for the purpose of "detect[ing] falsehood by exposing inconsistencies", and prevents one witness from being "taught" by another witness.[2] And it prevents the risk of a witness to "alter, modify or change" their evidence due to hearing another witness testify and is particularly important where credibility is in issue. [3]

It has also been said that the purpose is for the purpose of:[4]

1. preventing the prospective witnesses from consulting each other;
2. preventing them from hearing a testifying witness; and
3. preventing them from consulting a witness who has left the stand.

A violation of an exclusion of witnesses order will permit a judge to consider how that may affect the Weight of the evidence and may instruct the jury on the wait.[5]

Where exclusion of witnesses order is violated, the judge cannot prohibit that witness from testifying, but may render the witness liable for contempt.[6]

Procedure

The exclusion of witnesses order will usually be read out in court by the judge or clerk in a form such as the following:[7]

> EXCLUSION OF WITNESSES
> BY DIRECTION OF HIS LORDSHIP (or HIS HONOUR) ALL WITNESSES IN THIS CASE WITH THE EXCEPTION OF ..... (as directed by the presiding judge) ..... ARE TO BE EXCLUDED FROM THE COURTROOM UNTIL CALLED. IF YOU ARE BEING CALLED AS A WITNESS YOU WILL LEAVE THE COURTROOM AT THIS TIME AND TAKE YOUR PLACE IN THE WITNESS ROOM (or the usual place depending upon the accommodation available) AND BE AVAILABLE TO COME TO THE COURTROOM WHEN REQUIRED. WHILE WAITING TO BE CALLED YOU WILL NOT ATTEMPT TO COMMUNICATE IN ANY WAY WITH ANY WITNESS WHO HAS PREVIOUSLY TESTIFIED IN THIS CASE.
>
> – {{{2}}}

Effect of Breach of Exclusion Order

Where a witness hears evidence of a previous witness in violation of an exclusion order, it is presumed there is prejudice for the purpose of a mistrial application.[8]

1. *R v Leitner*, 1998 CanLII 13871 (SK QB), 173 Sask R 269, *per* Dawson J, at para 14
   R v Hoyt, 1949 CanLII 391 (NB CA), 93 CCC 306 (N.B.S.C. App. Div.), *per* Richards CJ
   R v Dobberthien, 1974 CanLII 184 (SCC), [1975] 2 SCR 560, *per* Ritchie J
2. *Regina v O'Callaghan*, 1982 CanLII 2144 (ON SC), 35 OR (2d) 394, *per* Maloney J
3. *R v BLWD*, 2008 SKPC 56 (CanLII), 317 Sask R 247, *per* Kolenick J
4. Wigmore on Evidence, 3rd ed. (1940), vol. VI, at p. 361
5. *R v Dobberthien*, 1974 CanLII 184 (SCC), [1975] 2 SCR 560, *per* Ritchie J - overturned CA who said judge had discretion
   see also *Chandler v Horne (1842), 2 M. & Rob. 423, 174 E.R. 338* {{{2}}} (UK)
   Cobbett v Hudson (1852), 22 L.J.Q.B. 11 (UK), at p. 12
6. *R v Carefoot*, 1948 CanLII 34 (SCC), [1948] O.W.N. 281, [1948] 2 DLR 22, 90 CCC 331 (H.C.J.), *per* Kerwin J (5:0)
   Briggs , (1930), 22 Cr. App.R. 68 (UK)
   R v Wilson, 1973 CanLII 1529 (NSCA), 14 CCC (2d) 258 (N.S.S.C. App. Div.), *per* Coffin JA (3:0)
7. *Regina v O'Callaghan*, *supra* citing Wigmore on Evidence
8. *R v Dobberthein*, 1974 CanLII 184 (SCC), 18 CCC (2d) 449, *per* Ritchie J
   R v Donszelmann, 2014 ABQB 255 (CanLII), 583 AR 388, *per* Clackson J, at para 5

Testimonial Evidence

This page was last substantively updated or reviewed *January 2018*. (Rev. # 79483)

< Evidence < Testimonial Evidence

Introduction

The "truth-seeking process of a trial is predicated on the presentation of evidence in court" be it real evidence or testimony.[1]

The trier-of-fact directly hears testimony "so there is no concern that the evidence was recorded inaccurately". Direct evidence also allows for the trier of fact to have "robust tools for testing the truthfulness of evidence and assessing its value".[2] Assessment of truthfulness can be assessed by demeanour.[3] And through cross examination.[4]

Testimonial evidence, also known as *viva voce* evidence or oral evidence, is evidence given by a witness in the form answers to posed questions.

When a competent witness has taken the stand, he "is required to answer all relevant questions put to him".[5] There exist exceptions for questions invoking privileged information and certain self-incriminatory information. However, as a general rule, even incriminating questions must be answered.[6]

The "involuntary participation of non-involved persons in litigation is a longstanding tradition of the legal system".[7]

Every person "has a duty to testify to that which they have witnessed".[8]

1. *R v Bradshaw*, 2017 SCC 35 (CanLII), [2017] 1 SCR 865, *per* Karakatsanis J, at para 19
2. *Bradshaw*, *ibid.*, at para 19
3. *Bradshaw*, *ibid.*, at para 19
4. *Bradshaw*, *ibid.*, at para 19
5. *R v Noel*, 2002 SCC 67 (CanLII), [2002] 3 SCR 433, *per* Arbour J, at para 25
6. Section 5(1) of the Canada Evidence Act states "No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person."
7. *Northland Properties Ltd. v Equitable Trust Co*, 1992 CanLII 2360 (BC SC), 10 C.P.C. (3d) 245, *per* Fraser J at 254-5
8. *D.W. Matheson & Son Contracting Ltd. v Canada (Attorney General)*, 2000 NSCA 44 (CanLII), 585 APR 62, *per* Cromwell J, at para 83

Purpose of Testimonial Evidence

Testimonial evidence is the best way to ensure the most reliable and credible evidence is available for the trier of fact to consider.

Witnesses are encouraged to be honest, accurate, and complete by requiring them to give evidence under the requirements that:[1]

1. the witness give an oath or affirmation to their evidence;
2. their personal presence is necessary;
3. they will be subject to cross-examination

1. *R v Baldree*, 2012 ONCA 138 (CanLII), 280 CCC (3d) 191, *per* Feldman JA (2:1), at para 44 appealed to SCC

Calling Witnesses

The usual manner that a witness testify is by oral testimony in court (*viva voce* evidence) while the accused is present. (CCC s.650(1))

The witnesses' testimony must be relevant, material, and admissible. To see details on the scope of these requirements see Evidence.

Identifying witnesses and Using Pseudonyms

The Court has discretion to allow a witness to testify under a pseudonym only where a failure to do so would interfere with the administration of justice.[1] This includes where the witness has reason to fear for their life.[2]

1. *R v McKinnon*, 1982 ABCA 302 (CanLII), 39 AR 283, *per* Lieberman JA
   Attorney-General v Leveller Magazine Ltd [1979] 1 All E.R. 745 (H.L.) (UK)
   R v McArthur, 1984 CanLII 3478 (ONSC), 13 CCC (3d) 152, *per* Dupont J

2. *R v Gingras*, 1992 CanLII 2826 (AB CA), 120 AR 300 (CA), *per curiam*
   R v Mousseau, 2002 ABQB 210 (CanLII), 350 AR 90, *per* Moen J

Impermissible Reasons for Calling Witnesses

The Crown may not call a witness whose evidence does not advance their case, but it merely for the purpose of cross-examining to show them not to be credible.[1] Where such a witness is called, the judge should have provided limiting instructions explaining that absence collusion, a jury cannot draw any adverse inferences against the accused due to the negative finding of credibility against the witness.[2]

1. *R v Soobrian*, 1994 CanLII 8739 (ON CA), 21 OR (3d) 603, *per curiam*

2. *Soobrian*, *ibid.*
   R v Dayes, 2013 ONCA 614 (CanLII), 301 CCC (3d) 337, *per* LaForme JA, at para 32

Communicating with Witnesses During Testimony

Communication with Witness After Cross-examination But Before Re-Direct

There is variable positions on whether counsel can talk to a witness between cross-examination and re-examination. Generally leave of the court may be required first. [1]

1. *R v Montgomery*, 1998 CanLII 3014 (BC S.C.), 126 CCC (3d) 251, *per* Henderson J

Exclusion of Witnesses

- Orders to Exclude Witnesses from Court

Recalling Witnesses

The judge has discretion to permit that a witness be recalled to be cross-examined further. This can include re-calling the accused to be cross-examined further. However, this discretion should be "exercised very cautiously".[1]

1. *R v RL*, 2002 CanLII 49356 (ON CA), 55 WCB (2d) 4, *per curiam*, at para 6

Choice of Witnesses

Any party is entitled to call a witness who is competent to testify (See Competence and Compellability for details on competency of witnesses).

A party is also permitted call a witness that has already previously been called by the opposing party.[1]

A party cannot call a witness for the sole purpose of discrediting a witness who has made a previous inconsistent statement.[2]

Failure to Call a Witnesss

The failure to call a witness can be used to make an adverse inference where there is no plausible reason not to do so and it is well within the power of the party to do so. However, where the evidence is merely cumulative or inferior en it should not be taken into account.[3]

A failure to call a witness cannot be used to make a negative inference on the credibility of the accused.[4]

Crown Discretion to Call Witnesses

The Crown is under no obligation to subpeona or call witnesses for the benefit of the Defence. The defence are able to subpeona the witnesses themselves.[5]

Failure of Accused to Testify

The failure of an accused to testify cannot be used to infer guilt.[6] A weak prosecution case should not be strengthened in any way through the accuseds' failure to testify.[7]

However, where the Crown sets out a case that "cries out for an explanation", the failure to testify fails to provide any basis to infer anything else but guilt.[8]

1. *R v Cook*, 1960 CanLII 449 (AB CA), 31 WWR 148 (Alta. S.C.A.D.), *per* Ford CJA
   R v Baiton, 2001 SKQB 264 (CanLII), 208 Sask R 78, *per* Kovach J
   R v Sutton, 2002 NBQB 49 (CanLII), 638 APR 283, *per* Turnbull J
2. *R v Soobrian*, 1994 CanLII 8739 (ON CA), 21 OR (3d) 603, *per curiam*
   This relates mostly to crowns calling a witness apply under s. 9 CEA to cross-examine (see Examinations#Cross-examining a party's own witness (Adverse or Hostile Witnesses)
3. *R v Lapensee*, 2009 ONCA 646 (CanLII), 247 CCC (3d) 21, *per* O'Connor ACJ
   R v Bruce Power Inc, 2009 ONCA 573 (CanLII), 245 CCC (3d) 315, *per* Armstrong JA, at para 50 ("What I find particularly surprising is that the Inspector did not testify on the motion before the justice of the peace to explain the conduct of the prosecution. The obvious inference to be drawn is that he had no credible explanation.")
4. See Credibility#Failure to Call Witnesses
5. *Roulette (K.T.)*, 2015 MBCA 9 (CanLII), 320 CCC (3d) 498, *per* MacInnes JA, at para 123
   R v Caccamo, 1975 CanLII 11 (SCC), [1976] 1 SCR 786, *per* de Grandpré J (" At trial Crown counsel has full discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that

discretion unless it can be shown that the prosecutor has been influenced by some oblique motive")
See also Role of the Crown

6. *R v Oddleifson (J.N.)*, 2010 MBCA 44 (CanLII), 256 CCC (3d) 317, *per* Chartier JA
   R v LePage, 1995 CanLII 123 (SCC), [1995] 1 SCR 654, *per* Sopinka J, at para 29
7. *LePage*, *ibid.*, at para 29
   R v Johnson, 1993 CanLII 3376 (ON CA), (1993), 12 OR (3d) 340, *per* Arbour JA, at pp. 347-48 ("A weak prosecution's case cannot be strengthened by the failure of the accused to testify")
8. Oddleifson

Witnesses Refusing to Testify

Procedure where Witness Refuses to Testify
Witness refusing to be examined

545 (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence,

(a) refuses to be sworn,
(b) having been sworn, refuses to answer the questions that are put to him,
(c) fails to produce any writings that he is required to produce, or
(d) refuses to sign his deposition,

without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20 [*forms*], commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.

Further commitment

(2) Where a person to whom subsection (1) [*witness refusing to be examined*] applies is brought before the justice on the resumption of the adjourned inquiry and again refuses to do what is required of him, the justice may again adjourn the inquiry for a period not exceeding eight clear days and commit him to prison for the period of adjournment or any part thereof, and may adjourn the inquiry and commit the person to prison from time to time until the person consents to do what is required of him.

Saving

(3) Nothing in this section shall be deemed to prevent the justice from sending the case for trial on any other sufficient evidence taken by him.
R.S., c. C-34, s. 472.
[*annotation(s) added*]

– CCC

Section 545 does not permit a justice to make an order of contempt against a witness who refuses to testify at a preliminary inquiry.[1]

A witness charged with contempt of court for refusing to testify against gang members due to fear to safety can rely on the defence of duress. [2]

1. *R v Bubley*, 1976 ALTASCAD 138 (CanLII), 32 CCC (2d) 79, *per* Clement JA
2. *R v CMB*, 2010 MBQB 269 (CanLII), 260 Man R (2d) 152, *per* Greenberg J

see also Contempt of Court (Offence) and Duress

Evidence by Commission

Topics

- Competence and Compellability
- Refreshing Memory
- Testimonial Aids
  - Testimonial Aids for Young, Disabled or Vulnerable Witnesses (Screens and Video-links)
  - Interpreters
- Evidence by Commission
- Analyzing Testimony
- Remote Attendance

See Also

- Trial Process (Cases)
- Hearsay

Opening and Closing Address

This page was last substantively updated or reviewed *January 2018*. (Rev. # 79483)

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Opening Submissions

Crown Opening Submissions

The open address is to be used to introduce the parties, explain the process, and provide a general overview of the evidence that the party is calling.[1]

There is no basis in statute to permit the Crown to make an opening statement, however, it is a "long-established custom" that the Crown can set out a brief summary of the facts they intend to establish and the evidence that will be lead.[2]

Purpose of Crown Opening

The purpose of the Crown opening address is to provide an overview of the case so that the jury "may better follow the evidence and understand where the matter is leading".[3]

No Argument or Opinion

The opening is not an opportunity for argument, invectives or opinion.[4]

Opening Must be "Fair"

The primary issue of concern where the Crown has gone outside of his limitations is whether the accused was deprived of a fair trial.[5] This is evaluated in the entirety of the trial's context, including the existence of any judicial remarks.[6]

Explaining the Role of Crown

Before a jury, the Crown should not go into too much detail about the role and duties of the Crown in its opening.[7] Such comments invite "invidious comparison" with the role of defence counsel and may undermine their credibility before a jury. [8]

A Crown remark to a jury stating that the greatest "sin" is for the prosecution to convict an innocent person and how the system is designed not to prosecute the innocent produced a mistrial.[9]

1. *R v Mallory*, 2007 ONCA 46 (CanLII), 217 CCC (3d) 266, *per curiam*, at para 338 ("It is well established that the opening address is not the appropriate forum for argument, invective, or opinion. The Crown should use the opening address to introduce the parties, explain the process, and provide a general overview of the evidence that the Crown anticipates calling in support of its case")
   R v Patrick, 2007 CanLII 11724 (ON SC), *per* Dambrot J, at para 5 (error in detailing the role of crown remedied by jury warning)
2. *R v Pickton*, 2007 BCSC 61 (CanLII), 259 CCC (3d) 100, at para 4 ("By long-established custom, although not specifically prescribed by statute, the Crown is entitled at the outset of a jury trial to make an opening that sets out a brief summary of the facts upon which it is relying to establish its case, a summary of the evidence it expects to be able to lead, and a statement of how that evidence relates to the accused's alleged guilt.")
3. *Pickton*, *ibid.*, at para 4 ("The purpose of the opening is to provide an overview of the Crown's case to the jury so that it may better follow the evidence and understand where the matter is leading. Argument forms no part of it.")
4. *Mallory*, *supra*, at para 338
5. *Manasseri*, *supra*, at para 105
6. *Manasseri*, *supra*, at para 105
   R v AT, 2015 ONCA 65 (CanLII), 18 CR (7th) 420, *per* Benotto JA, at para 31
7. *Patrick*, *ibid.*
8. *R v Levert*, 2001 CanLII 8606 (ON CA), 159 CCC (3d) 71, *per* Rosenberg JA, at paras 30, 31
   See also *R v Boucher*, 1954 CanLII 3 (SCC), [1955] SCR 16, *per* Kerwin CJ - Crown improperly suggested that the crown only takes guilty people to trial
9. *R v Brown*, 2009 BCSC 1870 (CanLII), *per* Dickson J

Defence Opening Submissions

The defence is entitled to an opening address under s. 651(2). This takes place after the Crown closes its case.

> 651
> [*omitted (1)*]
>
> **Summing up by accused**
>
> (2) Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.
>
> [*omitted (3) and (4)*]
>
> R.S., c. C-34, s. 578.
>
> – CCC

There is discretion on the part of the Judge to permit the defence to do opening submissions immediately after the Crown's opening and before the calling of evidence, but it should be limited to "special or unusual circumstances".[1]

1. *Pickton*, *supra*, at para 6 ("There is a substantial body of authority which holds that there is a discretion vested in the trial judge to permit counsel for the accused to open to the jury immediately following the Crown, but that discretion is to be exercised only in special or unusual circumstances.")

Closing Submissions

Order of Submissions

Section 651 governs the order of the closing submissions:

> **Summing up by prosecutor**
>
> 651 (1) Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.
> [*omitted (2)*]
>
> **Accused's right of reply**

(3) Where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, but otherwise counsel for the prosecution is entitled to address the jury last.

Prosecutor's right of reply where more than one accused

(4) Where two or more accused are tried jointly and witnesses are examined for any of them, all the accused or their respective counsel are required to address the jury before it is addressed by the prosecutor.
R.S., c. C-34, s. 578.

– CCC

The accused argues first where defence evidence is called, otherwise the Crown argues first.

Section 651 does not violate the accused's right to full answer and defence.[1]

Should all the evidence called by the accused be ruled inadmissible, then the defence are entitled to address the jury last.[2]

1. *R v Rose*, 1998 CanLII 768 (SCC), [1998] 3 SCR 262, *per* Cory, Iacobucci and Bastarache JJA
2. *R v Hawke*, 1975 CanLII 672 (ON CA), 22 CCC (2d) 19, *per* Dubin JA

Substance of Submissions

Both counsel have a "fair degree of latitude" on their closings. They are each entitled to "advance his ... position forcefully and effectively", it is expected that there will be "a degree of rhetorical passion in that presentation." [1]

Violations of these requirements may sometimes result in a mistrial. However, the prejudices arising from this conduct can often be remedied by additional jury instructions.[2]

Ability of Judge to Restrict Submissions

A judge must allow counsel an opportunity to make closing submission in full.[3] Nevertheless, the judge can still comment on the evidence during the submissions and may attempt at focusing the argument on particular issues of concern. The judge cannot prevent counsel from making submissions on relevant issues.[4] A trial judge does not have to be silent during submissions and can voice concerns.[5] He is permitted to express a preliminary opinion on the evidence or the law during submissions.[6]

Submissions by counsel on issues before the court cannot be intentionally or inadvertently denied by the court. A failure would result in a new trial.[7]

Erroneous Submissions

Where counsel makes false or erroneous submissions in the address to a jury, the judge must give corrections in the jury instruction.[8]

No Giving Evidence

Counsel cannot give evidence during their closing submissions.[9] This includes giving explanations as to why the accused did not choose to testify.[10]

Recitation of the Law

It is generally not permitted for counsel to read and interpret the law for the jury in their closing arguments.[11]

Acceptance of Evidence

The party calling a witness does not need to assert that the trier of fact accept everything said by the witness wholesale. [12]

Correcting Errors

Crown counsel can ask that the trier reject evidence of a Crown witness in preference of other evidence heard. However, counsel cannot ask for the rejection of evidence in favour of a theory not in evidence.[13] Likewise, a party is not precluded from calling evidence that may contradict other witnesses called by the same party.[14]

A judge is required to correct with the jury any missteps of counsel in their closing irrespective of whether the issue was raised by either counsel.[15] One manner of curing the error in submissions to the jury is by "drawing the jurors' attention to the misstatements and emphasizing that they do not constitute evidence".[16] Only in the "clearest cases" should a party be granted "limited opportunity to reply".[17]

Defence Submissions

Referencing the Risk of Wrongful Convictions

A "passing reference" to the risk of wrongful conviction or miscarriages of justice is a legitimate argument in a jury address.[18] However, it it "does not help" the jurors in their task.[19] The counsel should not be permitted to "bludgeon" the jury with a "barrage" of reminders that mistakes can be made.[20] Juries afterall should be credited with common sense and intelligence.[21]

Repeating the point can amount to intimidation to the point of demanding an acquittal despite sufficient evidence of guilt.[22]

Submissions of Defence Counsel in a "cut-throat" Defence Case

In a case where two or more co-accused attempt to redirect blame onto the other, there will generally be an acceptance that an enthusiastic and forceful defence that accuses a co-accused of wrongdoing will be permitted.[23]

1. *R v Daly*, (1992), 57 OAC 70(*no CanLII links) , at p. 76
   R v Boudreau, 2012 ONCA 830 (CanLII), 104 WCB (2d) 862, *per curiam*, at para 15 onward see also *R v Mallory*, 2007 ONCA 46 (CanLII), 217 CCC (3d) 266, *per curiam*, at para 339
2. *Boudreau*, *supra*, *per curiam*, at para 20
3. *R v Al-Fartossy*, 2007 ABCA 427 (CanLII), 425 AR 336, *per* Martin JA, at para 25
4. *R v Hodson*, 2001 ABCA 111 (CanLII), 44 CR (5th) 71, *per* McClung JA, at paras 33 and 35
5. *R v WFM* (1995), 169 AR 222 (CA)(*no CanLII links) , at para 10

6. *R v Baccari*, 2011 ABCA 205 (CanLII), 527 WAC 301, *per curiam*, at para 24
   R v Johnson, 2010 ABCA 392 (CanLII), 265 CCC (3d) 443, *per curiam*, at para 14
7. *Dewey v Dawson-Moran*, 2011 ABCA 45 (CanLII), 502 AR 74, *per curiam* at 12
   R v Komarnicki, 2012 SKQB 140 (CanLII), 395 Sask R 248}, *per* Laing J
8. see *R v Romeo*, 1991 CanLII 113 (SCC), 62 CCC (3d) 1, *per* Lamer CJ, at para 95
   R v Rose, 1998 CanLII 768 (SCC), [1998] 3 SCR 262, *per* Cory, Iacobucci and Bastarache JJ, at paras 126 and 127
9. *R v Smith*, 1997 CanLII 832 (ON CA), 120 CCC (3d) 500, *per* Finlayson JA, at para 26
   R v Browne, 2017 ONSC 5796 (CanLII), *per* Coroza J, at para 58 ("...If...counsel has given evidence, a trial judge has a duty to correct the...transgression.")
10. *R v Tomlinson*, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA, at para 96 ("...counsel, whether prosecuting or defending, are not permitted to give evidence in their closing submissions: R v Smith (1997), 120 CCC (3d) 500, at para 26. This prohibition includes providing an explanation, not otherwise in evidence, for the failure of an accused to testify.")
11. *R v Drover*, 2000 NFCA 9 (CanLII), [2000] NJ No 36 (NLCA), *per curiam*, at para 16 ("... It would be highly inconvenient and calculated to mislead the jury if counsel on each side had the right to read from books the law as laid down in other cases, where the facts and issues were not the same. ...On the Judge, and on him alone, lies the responsibility for directing the jury in point of law, and, if he goes wrong, he can always be corrected. If the jury must take the law from him, what good can come from counsel reading and interpreting the law in any other way? It can have but one result, if it is of any weight - that would be to confuse the minds of the jury, and, therefore, should not be permitted.")
    R v Charest, 1990 CanLII 3425 (QC CA), 57 CCC (3d) 312, *per curiam*, at p. 330 ("...Applicable principles of law should be left for the judge to explain; when reference to the law is necessary for the purpose of making an argument, the law should be accurately stated.")
12. *R v Benji*, 2012 BCCA 55 (CanLII), 316 BCAC 132, *per* Rowles JA, at para 158
    R v Biniaris, 1998 CanLII 14986 (BCCA), 124 CCC (3d) 58, *per* Hall JA, at para 9
13. Walker at 157
14. *R v Biniaris*, 1998 CanLII 14986 (BCCA), 124 CCC (3d) 58, *per* Hall JA at 10 citing *Cariboo Observer Ltd. v Carson Truck Lines Ltd. and Tyrell*, 1961 CanLII 360 (BCCA), 37 WWW 209 (BCCA), 32 DLR (2d) 36, *per* Davey JA at 39
15. *Tomlinson*, *supra*, at para 100
    Rose, *supra*, at paras 63 and 126 to 127
    R v Archer, 2005 CanLII 36444 (ON CA), 202 CCC (3d) 60, *per* Doherty JA, at para 96
    R v AT, 2015 ONCA 65 (CanLII), 18 CR (7th) 420, *per* Benotto JA, at paras 29 to 30
    R v Tymchyshyn, 2016 MBCA 73 (CanLII), 338 CCC (3d) 425, *per* Cameron JA, at para 84
16. *Tymchyshyn*, *ibid.*, at para 84
17. *Tymchyshyn*, *ibid.*, at para 84
    Rose, *supra*, at paras 124 to 136
    R v Kociuk, 2011 MBCA 85 (CanLII), 278 CCC (3d) 1, *per* Chartier JA, at para 64
18. *R v Horan*, 2008 ONCA 589 (CanLII), 237 CCC (3d) 514, *per* Rosenberg JA, at para 69
19. *Horan*, *ibid.*, at para 69
20. *R v Spackman*, 2012 ONCA 905 (CanLII), 295 CCC (3d) 177, *per* Watt JA, at paras 238 to 239
21. *R v Trochym*, 2007 SCC 6 (CanLII), [2007] 1 SCR 239, *per* Deschamps J, at para 114
22. *R v Tomlinson*, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA, at para 99
    Horan, *supra*, at para 67
23. e.g. *R v Deol*, 2017 ONCA 221 (CanLII), 352 CCC (3d) 343, *per* Juriansz JA, at paras 42 to 46

Crown Closing Submissions

Closing Submissions of the Crown are a form of advocacy and so may include passionate rhetoric and forceful positions.[1]

The rhetoric and argument must be limited to the facts that are in evidence.[2]

Once the Crown has completed their evidence, it is not allowed to change its theory of the case because of the addition of defence evidence.[3]

The Crown cannot argue a position that is based on speculation and not supported by the facts.[4]

However, the Crown must: [5]

- "abstain from inflammatory rhetoric",
- abstain from "demeaning commentary and sarcasm",
- not "misstate the law",
- "not invite the jury to engage in speculation" [6]
- not "express personal opinions about either the evidence or the veracity of a witness" [7]

Crown counsel should not state their own personal opinion to the jury, misrepresent the evidence and use rhetorical excess that may affect the jury.[8]

1. *R v Manasseri*, 2016 ONCA 703 (CanLII), 344 CCC (3d) 281, *per* Watt JA, at paras 102 to 105
2. *Manasseri*, *ibid.*, at para 104
3. *R v G(SG)*, 1997 CanLII 311 (SCC), [1997] 2 SCR 716, *per* Cory J
4. *R v Boudreau*, 2012 ONCA 830 (CanLII), 104 WCB (2d) 862, *per curiam*, at para 16
5. *Boudreau*, *supra*, at para 16
   Mallory, *supra*
6. see *Mallory*, *supra*, at para 340
7. see *Mallory*, *supra*, at para 340
8. *R v Leaver*, 1998 CanLII 12205 (NB CA), [1998] N.B.J. No 238, *per* Ryan JA
   R v Finta, 1992 CanLII 2783 (ON CA), 73 CCC (3d) 65, aff'd 1994 CanLII 129 (SCC), [1994] 1 SCR 701}}, *per* Gonthier, Cory and Major JJ
   Boudreau, *supra*, *per curiam*, at para 16 ("...The Crown must not ... express personal opinions about either the evidence or the veracity of a witness...")

Use of Multimedia

The use of powerpoint slides should be done with caution. The judge may want to give limiting instructions where slides and accompanying images may potentially mislead the jury.[1]

1. e.g. *US v Burns*, 298 F.3d 523 (6th Cir. 2002) - judge did not err in giving limiting instructions on powerpoint slides that had pictures of large amounts of crack cocaine

   State v Robinson, 110 Wash App. 1040 (2002) - slides on arson case had depictions of flaming letters

Effect of Inappropriate Submissions

Inflammatory remarks during opening submissions may allow for a mistrial, particularly in the context of a jury trial.[1]

Unfairness from an improper jury address may be remedied by:[2]

1. "specific correcting reference to it in the charge to the jury" or
2. "if the trial judge is of the opinion that curative instructions alone will not suffice to remedy the damage, ... the prejudiced party may be granted a limited opportunity to reply."

The second remedy "may arise where the substantive legal theory of liability which the Crown has added or substituted in its closing has so dramatically changed that the accused could not reasonably have been expected to answer" it. Alternatively, it may be "appropriate to grant a reply where the accused is actually misled by the Crown as to the theory intended to be advanced."[3]

1. *Stewart v Speer*, 1953 CanLII 153 (ON CA), [1953] OR 502, *per* Hogg JA
   Landolfi v Fargione, 2006 CanLII 9692 (ON CA), 2006 CarswellOnt 1855, *per* Cronk JA
2. *R v Rose*, 1998 CanLII 768 (SCC), [1998] 3 SCR 262, *per* Cory, Iacobucci and Bastarache JJ.
3. *Rose*, *ibid.*, at para 136

Examinations

This page was last substantively updated or reviewed *March 2021*. (Rev. # 79483)

General Principles

All examinations of witnesses are expected to be done in open court.[1]

Summary Conviction Trials

> 802
> [*omitted (1)*]
>
> **Examination of witnesses**
>
> (2) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.
>
> **On oath**
>
> (3) Every witness at a trial in proceedings to which this Part applies shall be examined under oath.
> R.S., c. C-34, s. 737.
>
> – CCC

Objections

Where trial counsel does not object to inadmissible evidence, that failure cannot make inadmissible evidence admissible.[2]

Appellate Review

The judge's decision on how a witness should be examined is entitled to deference.[3]

1. *Re Krakat*, 1965 CanLII 358 (ON SC), 4 CCC 300, *per* Hughes J
2. *R v D(LE)*, 1989 CanLII 74 (SCC), [1989] 2 SCR 111, *per* Sopinka J at 126-27
   R v DCB, 1994 CanLII 6412 (MB CA), Man.R. (2d) 220, *per* Philp JA, at para 14
3. *R v Stewart*, 1976 CanLII 202 (SCC), [1977] 2 SCR 748at p. 751 to 752(*complete citation pending*)
   R v Le (TD), 2011 MBCA 83 (CanLII), 275 CCC (3d) 427 at para 254(*complete citation pending*)
   R v Okemow, 2019 MBCA 37 (CanLII), MJ No 92 at para 88(*complete citation pending*)

Topics

- Examinations-in-Chief
- Cross-Examinations
- Re-Direct Examinations
- Refreshing Memory

See Also

- Principled Exception to Hearsay
- Collateral Fact Rule
- Prior Consistent Statements
- Prior Inconsistent Statements
- Adverse and Hostile Witnesses
- Testimonial Evidence#Witnesses Refusing to Testify
- Competence and Compellability

Examinations-in-Chief

This page was last substantively updated or reviewed *January 2016*. (Rev. # 79483)

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General Principle

An examination-in-chief or direct examination is where the party calling a witness to give evidence asks the witness questions to elicit evidence.

Rule Against Leading Questions

A leading question is a question that suggests the desired answer.[1] In general, counsel cannot ask leading questions on of the witness that they call.[2] Leading questions are questions that clearly seek a particular answer (eg. "you saw the accused, didn't you?") or are questions that assume a foundation not

in evidence (eg. "what happened after the accused stabbed him?").[3]

Rationale

The reason for not allowing leading questions include:[4]

- bias of the witness in favour of the calling party
- the danger that the calling party will only bring out helpful information without any balance that could come from the witnesses own version[5]
- the possibility that the witness will merely agree with everything put to the witness by the calling party.[6]
- a witness who is nervous, not alert, confused or otherwise easily persuaded may accept the suggestion of a leading question without reflection.[7]

The leading question may "impose the questioner's will on the witness so as to elicit inaccurate information, absent an intention to do so on the part of the counsel or witness"[8]

The importance of not leading depends on the circumstances. The rule should be flexible at the least for the sake of expediency.[9]

Discretion in the "Interests of Justice"

A judge has discretion to allow any leading question where it is "necessary in the interests of justice".[10]

Exception

It is usually permissible to lead on a number of issues:

- introductory or non-controversial matters such as name, address, position, etc.[11]
- for the purpose of identifying persons or things[12]
- where "necessary to direct the witness to a particular matter or field of inquiry."[13]
- to allow one witness to contradict another regarding statements made by that other[14]
- where the witness is declared hostile;
- where the witness is defective based on age, education, language, mental capacity[15]
- where it is a complicated matter, at the judge's discretion[16]

A judge has discretion to allow leading where it is in the interest of justice.[17]

Consequence of Leading Questions

The answer to a leading question is not necessaries inadmissible but will carry very little or less weight, especially on critical issues.[18]

The weight given to an answer from a leading question will depend on "how leading the question was, the subject matter and other evidence before the Court." [19] It will often be that the inappropriateness of the question, and so the weight given to the answer, will be assessed in the light of whole circumstances of the case, after subsequent testimony of the witness.[20]

Objections

Objections should not be made to leading questions unless the question is "critical" to the case.[21]

The use of leading questions will be tolerated more when for the purpose of a "controlled examination" rather than where is becomes a "cross-examination for the purpose of discrediting or contradicting" the witness.[22]

1. *R v Rose*, 2001 CanLII 24079, 153 CCC (3d) 225, *per* Charron JA (3:0), at para 9 ("A leading question is one that suggests the answer.")
2. *Rose*, *ibid.*, at para 9 ("It is trite law that the party who calls a witness is generally not permitted to ask the witness leading questions.")
   cf. *R v Bhardwaj*, 2008 ABQB 504 (CanLII), 456 AR 313, *per* Lee J, at para 45 suggests that it only goes to weight ("There is no rule of law that the answer to a leading question must be given no weight, or that they cannot be asked.")
3. *Rose*, *supra*, at para 9
   R v W(EM), 2011 SCC 31 (CanLII), [2011] 2 SCR 542, *per* McLachlin CJ (6:1), at para 9
   Nicolls v Kemp (1915), 171 E.R. 408 per Lord Ellenborough ("If questions are asked, to which the answer yes or no would be conclusive, they would certainly be objectionable.")
4. *Rose*, *supra*, at para 9 ("The reason for the rule arises from a concern that the witness, who in many instances favours the party who calls him or her, will readily agree to the suggestions put in the form of a question rather than give his or her own answers to the questions.")
5. *Maves v Grand Truck Railways* (1913) 5 WWR 212 (ABCA), 6 Alta LR 396(*no CanLII links)
6. *Maves v Grant Truck Pacific Railway*, *ibid.*
   Connor v Brant (1914) 31 OLR 274(*no CanLII links)
   Sopkina, Law of Evidence in Canada at ss.16.33
   R v Clancey, [1992] O.J. No 3968 (Ont. Sup. Ct.)(*no CanLII links) , *per* Watt J (the witness "may be too disposed to assent to the proposition of counsel, rather than upon reflection or exertion of the witness' own and true memory")
7. Maves
8. MacWilliams Canadian Criminal Evidence 4th Edition p. 18:10
9. *Rose*, *supra*, at para 9 ("Of course, the degree of concern that may arise from the use of leading questions will depend on the particular circumstances and the rule is applied with some flexibility. For example, leading questions are routinely asked to elicit a witness' evidence on preliminary and non-contentious matters. This practice is adopted for the sake of expediency and generally gives rise to no concern. ... ")
10. *Rose*, *supra*, at para 9 ("...the trial judge has a general discretion to allow leading questions whenever it is considered necessary in the interests of justice...")
11. *Rose*, *supra*, at para 9 ("Leading questions are also permitted to the extent that they are necessary to direct the witness to a particular matter or field of inquiry.") *Maves v Grand Truck Railways(ABCA)*, *supra*, at 219
    R v Muise, 2013 NSCA 81 (CanLII), *per* Hamilton JA, at para 23
    R v Situ, 2005 ABCA 275 (CanLII), 200 CCC (3d) 9, *per curiam* (3:0), at para 9
    Cross on Evidence 3rd ed. (London: Butterworths 1967) p. 189
    Rose, *supra*, at para 9
12. Delisle, "Evidence: Principles and Problems" (7th Ed.), at p. 414, states at common law
13. *Rose*, *ibid.*, at para 9 ("Leading questions are also permitted to the extent that they are necessary to direct the witness to a particular matter or field of inquiry.")
    Muise, *supra*, at para 23
14. *Delisle*, *supra*
15. *Delisle*, *supra*
16. *Delisle*, *supra*.
17. Reference Re *R v Coffin*, 1956 CanLII 94 (SCC), [1956] SCR 191, p. 22
    Muise, *supra*, at para 23

18. *Moor v Moor* [1954] 2 All ER 458 (CA) (UK)
R v Williams, 66 CCC (2d) 234 (Ont. C.A.)(*no CanLII links) see p. 236 (“It is clear, however, that an answer elicited by a leading question is entitled to little, if any, weight.”)
R v Nicholson, 1998 ABCA 290 (CanLII), 129 CCC (3d) 198, *per curiam* (3:0)
R v Bhardwaj, 2008 ABQB 504 (CanLII), 456 AR 313, *per* Lee J, at para 45("...the answers to leading questions are admissible, although the trier-of-fact may give less weight to a witness’s answer elicited by a leading question. ... There is no rule of law that the answer to a leading question must be given no weight, or that they cannot be asked. The examiner in asking a leading question runs the risk that the answer will be given less weight than if elicited in a non-leading manner. ")
R v Gordon-Brietzke, 2012 ABPC 221 (CanLII), 547 AR 260, *per* Allen J, at paras 41 to 57
R v Parkes, [2005] OJ No 937(*no CanLII links) , at para 44
R v Cawthorne, 2015 CMAC 1 (CanLII), 7 CMAR 993, *per* Zinn JA, at para 62 ("Evidence obtained by a leading question is not inadmissible; rather, it is up to the trier of fact to consider whether the weight of the answer is negatively affected by the way in which it was produced")
S. Casey Hill, David M. Tanovich & Louis P. Strezos, McWilliams’ Canadian Criminal Evidence, 5th ed. (Toronto: Canada Law Book, 2013) (loose-leaf revision 2013-4), at 21-8 to 21-16
19. *R v Bhardwaj*, 2008 ABQB 504 (CanLII), 456 AR 313 (Alta. Q.B.), *per* Lee J, at para 45
MacWilliams Canadian Criminal Evidence 4th Edition, at pp. 18 - 16
20. MacWilliams Canadian Criminal Evidence 4th Edition, at pp. 18 - 16 (“The weight ... given ... is thus best assessed in light of the circumstances of the case. ...subsequent testimony from the witness, whether in chief or cross-examination, may make clear that the leading question had no improper impact on the answer elicited.”)
21. FJ. Wrottesley, Examination of Witnesses in Court, 3rd Ed., at p. 42
Cox, "Criminal Evidence Handbook", 2nd Ed, at p. 114
22. *R v Muise*, 2013 NSCA 81 (CanLII), *per* Hamilton JA (3:0), at para 27
R v Situ, 2005 ABCA 275 (CanLII), 200 CCC (3d) 9, *per curiam* (3:0), at para 12

Cross-Examinations

This page was last substantively updated or reviewed *August 2021*. (Rev. # 79483)

General Principles

The cross-examination is a "cornerstone of the adversarial trial process"[1], it is "a fundamental feature of a fair trial"[2], and is the "ultimate means of demonstrating truth and testing veracity".[3] However, while the right to cross-examination is broad, counsel are generally bound by the rules of relevancy and materiality.[4]

A witness may be cross-examined on any matter that may "impair his credibility".[5]

Purpose of Cross-Examination

It is generally understood that the purpose of cross-examination is to elicit evidence regarding:[6]

1. the credibility of the witness;
2. the facts to which he has deposed in chief, including the cross-examiner's version of them; and
3. the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose.

Cross-examination intends to "explore the evidence of the witness, exposing weaknesses, biases, and inaccuracies, and thereby assist in the truth finding process".[7]

Appellate Review

The admission of inadmissible evidence through improper cross-examination questions is a question of law and reviewable on a standard of correctness.[8]

A court reviewing a cross-examination must be able to distinguish between those questions that are merely improper from those that compromise trial fairness.[9]

1. *R v Hart*, 1999 NSCA 45 (CanLII), 135 CCC (3d) 377, *per* Cromwell JA, at para 8 ("The right to cross-examine is a cornerstone of the adversarial trial process. It is an important vehicle for the discovery of truth and is central to our understanding of fair procedure. However, even the most important rights have limits. As the Charter of Rights and Freedoms makes clear, our constitutionally guaranteed rights are fundamental, but they are not absolute.")
   R v Pires; Lising, 2005 SCC 66 (CanLII), [2005] 3 SCR 343, *per* Charron J, at para 3 (it is "of fundamental significance to the criminal trial process")
2. *R v Esau*, 2009 SKCA 31 (CanLII), 324 Sask R 95, *per* Cameron JA, at para 17
3. *R v Osolin*, 1993 CanLII 54 (SCC), [1993] 4 SCR 595, *per* Cory J, at pp. 663-65 [SCR] ("Thus it can be seen that the right to cross-examine has always been held to be of fundamental importance in a criminal trial. That right is now protected by ss. 7 and 11(d) of the Charter.")
   R v Shearing, 2002 SCC 58 (CanLII), [2002] 3 SCR 33, *per* Binnie J, at para 76 ("...the most effective tool he possessed to get at the truth was a full and pointed cross-examination.")
   R v Wallick (1990), 69 Man. R. (2d) 310 (CA) (*no CanLII links) ("Cross-examination is a most powerful weapon of the defence, particularly when the entire case turns on credibility of the witnesses. An accused in a criminal case has the right of cross-examination in the fullest and widest sense of the word as long as he does not abuse that right. Any improper interference with the right is an error which will result in the conviction being quashed.") - cited with approval in *Osolin*, *supra*
4. *R v Mitchell*, 2008 ONCA 757 (CanLII), 80 WCB (2d) 796, *per curiam*, at paras 17 to 19
5. *R v JB*, 2019 ONCA 591 (CanLII), 378 CCC (3d) 302, *per* Watt JA, at para 29 ("To begin, like any witness who testifies, an accused may be cross-examined on matters that may impair his credibility:...")
   R v Davison, DeRosie and MacArthur, 1974 CanLII 787 (ON CA), 20 CCC (2d) 424, *per* Martin JA at p. 441, leave to appeal refused, [1974] SCR viii
6. *R v OGK*, 1994 CanLII 8742 (BC CA), 28 CR (4th) 129, *per* Taylor JA, at para 14
7. *R v Sylvain*, 2014 ABCA 153 (CanLII), 310 CCC (3d) 1, *per curiam* (2:1), at para 95
8. *R v Mian*, 2012 ABCA 302 (CanLII), 292 CCC (3d) 346, *per curiam*
9. *R v AG*2015 ABCA 159(*no CanLII links) , at para 22

Scope of Cross Examination

The scope of questioning can be broad. It is recognized as "being protected by ss. 7 and 11(d)" of the Charter.[1]

This right is especially important in cases that turn on credibility.[2]

The right however is limited by the requirements of relevancy and materiality,[3] with relevancy being the main criteria.[4]

Disreputable Conduct

Witnesses, except for an accused, may be cross-examined on disreputable conduct so long as it relevant.[5]

It is not permissible for either party to ask any questions about the veracity of another witness.[6]

Form and Extent of Questioning

The cross-examiner is entitled to ask questions without letting the witness know the purpose of the questions, though is subject to the court's discretion and cannot be put in a way that would mislead the witness as to what is asked.[7]

It is permissible to use an encirclement technique wherein questions to exclude all alternative possibilities are asked and then not ask the desired possibility and allow the court to infer based on inference.[8]

The process of cross-examination is afforded "wide discretion" on what can be questioned on.[9]

Good Faith Basis

Suggestions can be put to the witness as long as there is a "good faith" basis for the question.[10] This is often a function of what is known by the lawyer at the time of the examination. So, for example, a defence lawyer examining an eye-witness in a case who was told by the accused that he did the offence cannot suggest to the witness that they are mistaken as to whom they identified. Similarly, in a case where the defence is alibi, the defence counsel cannot still attack the credibility of the witnesses establishing the offence as he does not have a basis to believe they are being untruthful.

The permissibility of the question is a "function" of: [11]

- "the information available to the cross-examiner";
- their "believe in its likely accuracy"; and
- the "purpose for which it is used".

Questions based on information known to counsel that may be inadmissible, incomplete or uncertain may be put to the witness. The examiner however cannot put questions that they know to be false or are reckless as to the falsity of the information.[12]

Questions are permitted that are in persuit of a hypothesis supported by reasonable inference, experience and intuition. Questions "caculated to mislead is ... improper and prohibited".[13]

Uncorroborated gossip, such as that found online, may not be sufficient to meet the "good faith" requirement before it can be cross-examined on.[14]

Collateral Matters

There is no obligation to cross examine only on topics germane to the allegations. Counsel may cross-examine on collateral topics.[15]

1. *R v Lyttle*, 2004 SCC 5 (CanLII), [2004] 1 SCR 193, *per* Major and Fish JJ (7:0), at para 43
   R v Osolin, 1993 CanLII 54 (SCC), [1993] 4 SCR 595, *per* Cory J, at pp. 663-65 [SCR] ("Thus it can be seen that the right to cross-examine has always been held to be of fundamental importance in a criminal trial. That right is now protected by ss. 7 and 11(d) of the Charter.")
2. *R v Anandmalik*, (1984), 6 OAC 143 (CA)(*no CanLII links)
   R v Giffin, [1988] AJ No 312(*no CanLII links)
   R v Wallick, (1990), 69 Man.R. (2d) 310(*no CanLII links)
3. *R v Mitchell*, 2008 ONCA 757 (CanLII), 80 WCB (2d) 796, *per curiam*, at paras 17 to 19
4. *Brownell v Brownell*, 1909 CanLII 21 (SCC), (1909) 42 SCR 368, *per* Anglin J
5. *R v Cullen*, 1989 CanLII 7241 (ON CA), 52 CCC (3d) 459, *per* Galligan JA
   R v Titus, 1983 CanLII 49 (SCC), [1983] 1 SCR 259, *per* Ritchie J
   R v Hoilett, 1999 CanLII 3740 (ON CA), , 4 CR (4th) 372, *per* Feldman JA
6. *R v Mian*, 2012 ABCA 302 (CanLII), 292 CCC (3d) 346, *per curiam*
7. *R v Haussecker*, 1998 ABPC 117 (CanLII), 233 AR 238, *per* Fradsham J, at paras 18 to 20
8. *Haussecker*, *ibid.*, at paras 21 to 22
9. *R v Lyttle*, 2004 SCC 5 (CanLII), [2004] 1 SCR 193, *per* Major and Fish JJ, at paras 41 to 45
   R v Sylvain, 2014 ABCA 153 (CanLII), 310 CCC (3d) 1, *per curiam* (2:1), at para 96
10. *Lyttle*, *supra*, at para 47 ("we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true, without being able to prove it otherwise than by cross-examination; nor is it uncommon for reticent witnesses to concede suggested facts — in the mistaken belief that they are already known to the cross-examiner and will therefore, in any event, emerge." [emphasis removed])
11. *Lyttle*, *supra*, at para 48 ("In this context, a “good faith basis” is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used.")
12. *Lyttle*, *supra*, at para 48 ("Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false.")
13. *Lyttle*, *supra*, at para 48 ("The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer’s role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.")
14. Paciocco, "The law of evidence in a technological age", at p. 222
15. *R v Burgar*, 2010 ABCA 318 (CanLII), 490 AR 241, *per curiam*

Duty to Cross Examine

Counsel has a duty to cross-examine a witness that he intends to suggest is not being truthful or misleading.[1]

A failure of counsel to cross-examine a witness will permit the trier-of-fact to conclude that the evidence is accurate.[2]

In a jury trial, the right to a fair trial will sometimes require that the accused's evidence be subject to cross-examination on material issues so that the trier-of-fact can properly assess whether to accept or reject the accused's evidence.[3] This does not create a free-standing obligation on the Crown to cross-examine on materials facts in cases generally.[4]

In fact, there is a valid view on cross-examination that where the defence amounts to a "straight denial of the charge or some necessary element of the charge, there is a school of thought that it is counterproductive to cross-examine extensively, thereby allowing the witness just to repeat his denial".[5] This rule of avoidance also applies to defences such as alibi, consent, identity, and flat-out denials.[6] There is no obligation to cross-examine on any of these topics.[7] It may also permit the judge to refuse counsel from calling evidence that contradicts the witness.[8]

Witnesses Called by Court

A witness who is called by the Court will typically be cross-examinable by both Crown and Defence.[9]

1. *R v OGK*, 1994 CanLII 8742 (BC CA), 28 CR (4th) 129, *per* Taylor JA
2. *R v Mandzuk*, 1945 CanLII 280 (BC CA), 85 CCC 158 (BCCA), *per* O'Halloran JA
   R v Miller, 1959 CanLII 466 (BC CA), 125 CCC 8 (BCCA), *per* O'Halloran JA
3. *R v II*, 2013 ABCA 2 (CanLII), 542 AR 52, *per* Berger J - in context of a jury trial
4. *R v Sylvain*, 2014 ABCA 153 (CanLII), 310 CCC (3d) 1, *per curiam* (2:1), at para 94
5. *Sylvain*, *ibid.*, at para 96
6. *Sylvain*, *ibid.*, at para 96
7. *Sylvain*, *ibid.*, at para 96
   R v Palmer, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, *per* McIntyre J, at pp. 780-2
8. *R v Speid*, 1988 CanLII 7060 (ON CA), 42 CCC (3d) 12, *per* Cory JA
   R v Dyck, 1969 CanLII 988 (BC CA), [1970] 2 CCC 283, *per* Robertson JA
   see also Rule in Browne v Dunn (below)
9. e.g. *R v Munro*, 2013 ONCJ 576 (CanLII), OJ No 5047, *per* De Filippis J - Court ordered psych expert for a dangerous offender application

Improper Questioning

The trial judge has a "duty to prevent pointless, irrelevant cross-examination".[1]

Generally, it is improper to do the following during cross examination:[2]

- unduly repeat cross-examination questions[3]
- question solely to harass or embarrass the witness[4]
- intentionally insult or abuse a witness[5]
- ask a question to elicit evidence that is not admissible [6]
- ask questions that elicit privileged information[7]
- aggressive questioning that crosses the line to abusive[8]
- ask the accused why the complainant would make up the accusation[9]
- ask a witness whether any another witness is lying[10]
- ask compound questions[11]
- any question where the "prejudicial effect outweighs their probative value".[12]

Cross-examination will enter into the realm of abusive when the examination focuses on aspects such as the witnesses general lifestyle, dress and history fulfilling fiscal responsibilities.[13]

There should be no attempts to take "random shots at a reputation imprudently exposes" or asking "groundless questions to waft an unwarranted innuendo" to the trier-of-fact.[14]

1. *R v Kelly*, 2015 ABCA 200 (CanLII), 325 CCC (3d) 136, *per curiam*, at para 5

2. *R v Lyttle*, 2004 SCC 5 (CanLII), [2004] 1 SCR 193, *per* Major and Fish JJ, at para 44 ("Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value. ")
3. *R v Bourassa*, 1991 CanLII 11734 (QC CA), 67 CCC (3d) 143, *per* Tourigny JA
   R v McLaughlin, 1974 CanLII 748 (ON CA), 15 CCC (2d) 562, *per* Evans JA
4. *R v Logiacco*, 1984 CanLII 3459 (ON CA), 11 CCC (3d) 374, *per* Cory JA
   R v Bradbury, 1973 CanLII 1442 (ON CA), 14 CCC (2d) 139 (ONCA), *per* Kelly JA
   R v Mahonin (1957), 119 CCC 319 (BSCS)(*no CanLII links)
   R v Prince (1945), 85 CCC 97, [1946] 1 DLR 659(*no CanLII links)
5. *R v Ma*, 1978 CanLII 2405 (BC CA), Ho and Lai (1978), 44 CCC (2d) 537, *per* Bull JA
   McLaughlin, *supra*
6. *R v Howard*, 1989 CanLII 99 (SCC), [1989] 1 SCR 1337, 48 CCC (3d) 38 at 46 (SCC), *per* Lamer J ("It is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, which is not and will not become part of the case as admissible evidence.")
7. *R v AJR*, 1994 CanLII 3447 (ON CA), 94 CCC (3d) 168, *per* Doherty JA
8. *AJR*, *ibid.*, at p. 176
   R v Brown & Murphy, 1982 ABCA 292 (CanLII), 1 CCC (3d) 107, *per* McClung JA (2:1)
9. *R v De Francesia*, 1995 CanLII 1609 (ON CA), 104 CCC (3d) 189, *per curiam*, at p. 193-194
10. *Brown & Murphy*, *supra*
11. *R v Gallie*, 2015 NSCA 50 (CanLII), 324 CCC (3d) 333, *per* Fichaud JA
12. *Lyttle*, *supra*, at para 44
13. e.g. see *R v Rose*, 2001 CanLII 24079 (ON CA), 153 CCC (3d) 225, *per* Charron JA
14. , *supra*, at para 51 (" A trial judge must balance the rights of an accused to receive a fair trial with the need to prevent unethical cross-examination. There will thus be instances where a trial judge will want to ensure that counsel is not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box."[quotation marks removed])

Cross-Examination by Self-Represented Accused

A self-presented accused is presumed to be entitled to cross-examine any witness called by the Crown. Section 486.3(1) entitles the Crown or the witness to apply for an order prohibiting the accused from "personally" cross-examining that witness. The section allows for a prohibition in relation to the following situations:

1. any charge where the witness is under the age of 18 years (*mandatory*) [s. 486.3(1)]
2. any charge of 264 [*criminal harassment*], 271 [sexual assault], 272 [sexual assault with a weapon/causing bodily harm] and 273 [*aggravated sexual assault*] (*mandatory*) [s. 486.3(2)]
3. any charge where it is necessary to "allow the giving of a full and candid account from the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice" (*discretionary*) [s. 486.3(3)]

Section 486.3 reads:

> **Accused not to cross-examine witness under 18**

486.3 (1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years, or on application of such a witness, order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Accused not to cross-examine complainant — certain offences

(2) In any proceedings against an accused in respect of an offence under any of sections 264 [*criminal harassment*], 271 [*sexual assault*], 272 [*sexual assault with a weapon or causing bodily harm*] and 273 [*aggravated sexual assault*], the judge or justice shall, on application of the prosecutor in respect of a witness who is a victim, or on application of such a witness, order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Other witnesses

(3) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness who is not entitled to make an application under subsection (1) [*accused not to cross-examine witness under 18*] or (2) [*accused not to cross-examine complainant — certain offences*], or on application of such a witness, order that the accused not personally cross-examine the witness if the judge or justice is of the opinion that the order would allow the giving of a full and candid account from the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice. If the order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Factors to be considered

(4) In determining whether to make an order under subsection (3) [*accused not to cross-examine complainant — other circ.*], the judge or justice shall consider

(a) the age of the witness;
(b) the witness' mental or physical disabilities, if any;
(c) the nature of the offence;
(d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(e) the nature of any relationship between the witness and the accused;
(f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
(g) any other factor that the judge or justice considers relevant.

Application

(4.1) An application referred to in any of subsections (1) to (3) [*testimony outside court room – requirements for eligibility*] 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.

No adverse inference

(5) No adverse inference may be drawn from the fact that counsel is, or is not, appointed under this section.
2005, c. 32, s. 15; 2015, c. 13, s. 16.
[*annotation(s) added*]

– CCC

Under 486.3(2), the Crown can seek to have the court appoint a lawyer to the accused for the purpose of conducting a cross-examination where the judge is "...of the opinion that, in order to obtain a full and candid account from the witness of the acts complained of, the accused should not personally cross-examine the witness." [1]

The initial onus lies on the crown to establish that the presumption in s.486.3 applies. This onus is on the balance of probabilities.[2] If established, it is on the accused to establish that the proper administration of justice requires that the presumption should not be followed.[3]

This section trumps the right to cross examine as the accused sees fit.[4]

Factors to be considered include the circumstances of the case, the nature of the relationship between the accused and the witness and the nature of the alleged criminal acts.[5] As well as the likelihood of the accused being aggressive and whether the questioning by the self-represented accused would be focused, rational, and relevant.[6]

The court has no jurisdictions to set the rate of remuneration for counsel.[7]

1. see also *R v Predie*, 2009 CanLII 33055 (ON SC), 2009 OJ No 2723, *per* Boswell J
   R v DJ, 2011 NSPC 3 (CanLII), NSJ No 262, *per* Derrick J
2. *R v Tehrankari*, 2008 CanLII 74557 (ON SC), [2008] OJ No 565, at para 19
3. See *R v DPG*, [2008] OJ No 767 (ONSC)(*no CanLII links)
4. *R v Jones*, 2011 NSPC 47 (CanLII), [2011] NSJ 262, *per* Derrick J
5. *R v Gendreau*, 2011 ABCA 256 (CanLII), *per curiam*
6. *Predie*, *supra*
7. *R v Dallaire*, 2010 ONSC 715 (CanLII), *per* Kane J - no power under s. 486.3(4) to set remuneration

General Limitations on Cross-Examination

The court has a discretionary power to limit cross-examination where repetitive, irrelevant, and unproductive. [1]

1. *R v Jardine*, 2011 BCSC 248 (CanLII), *per* MacKenzie J, at paras 18 to 20

Confrontation Rule (The Browne v Dunn Rule)

The confrontation rule, also known as the rule in *Brown v Dunn*, states that where a party is advancing a theory that contradicts the testimony of a particular witness being questioned, the counter-version must be put to the witness.[1] More specifically, the witness should have "an opportunity to address or explain the point upon which credibility is attacked." [2] The rule prevents a witness from being "ambushed".[3]

Flexible Application

Courts have not stuck strictly to the requirement of presenting the counter version in each and every case involving credibility, stating that it is not a hard and fast rule.[4] The examiner does not need to "slog through a witness's evidence-in-chief putting him on notice of every detail the defence does not accept".[5]

A more flexible approach has been to focus on whether the failure created an unfairness. [6]

Purpose

The rule intends to create fairness for witness who is being impeached, the counsel who called the witness being impeached, and the trier of fact. [7]

When Applied

It has been suggested that the rule should only apply to "matters of substance" and not "minor details".[8]

It is only the "nature of the proposed contradictory evidence and its significant aspects" that should be put to the witness.[9]

Nature of Confrontation

It is not necessary to confront witnesses with matters beyond their observations or knowledge for which they cannot testify to.[10]

Failure to Confront

Some courts have simply put the failure to confront the witness as a matter of weight given to the evidence.[11]

Nevertheless, failure to put the counter story to a particular witness can result in an adverse finding on the counter-story.[12]

Where the accused has not confronted the relevant Crown witnesses with the counter theory of events, the Crown will generally be given the option of recalling their witnesses to address the counter-story.[13]

Not Applicable to Accused Testimony

Where the accused testifies and refutes the Crown's evidence, the rule may not apply such that the Crown need not confront the accused's accused version of events. The accused would have been aware of the Crown evidence that came out in trial and would have been able to address it in their testimony.[14] However, this tactical choice not to confront will prohibit the Crown from making a full comparison between the witnesses versions and in a jury trial would require limiting instructions notifying the jury that the accused did not have "potential benefit" his credibility being tested.[15]

There is no obligation under the confrontation rule to require the Crown to cross-examine an accused on a bare denial of the allegations.[16]

Breach of Duty

The decision whether a breach is found is at "the discretion of the trial judge after taking into account the circumstances of the case".[17]

Factors

To determine a breach of the Brown v Dunn rule, a number of factors can be considered:[18]

- The seriousness of the breach;
- The context in which the breach occurred;
- The stage in the proceedings when an objection to the breach was raised;
- The response by counsel, if any, to the objection;
- Any request by counsel to re-open its case so that the witness whose evidence has been impugned can offer an explanation;
- The availability of the witness to be recalled; and
- In the case of a jury trial, whether a correcting instruction and explanation of the rule is sufficient or whether trial fairness has been so impaired that a motion for a mistrial should be entertained.

Jury Trials

The Crown must be cautious in arguing a breach of the Browne and Dunn rule to a jury in closing as it risk creating the false impression of a reversed burden of proof.[19]

Appellate Review

The question of whether the rule in Browne and Dunn applies is reviewed on a standard of correctness.[20] There is however deference to the “factual findings underpinning the trial judge’s conclusion”. [21]

1. *R v Sawatzky*, 2017 ABCA 179 (CanLII), *per curiam*, at paras 23 to 26
   R v Dyck, 1969 CanLII 988 (BC CA), [1970] 2 CCC 283 (BCCA), *per* Robertson JA
   R v Henderson, 1999 CanLII 2358 (ON CA), OR (3d) 628, *per* Labrosse JA, at p. 636
   Brown v Dunn (1893), 6 R. 67 (H.L.) (UK) 1893 CanLII 65 (FOREP)
2. *R v Il*, 2013 ABCA 2 (CanLII), 542 AR 52, *per* Berger J, at para 8citing McWilliams, Canadian Criminal Evidence, 4th ed. (Aurora: Canada Law Book, 2003), at p. 18-104
3. *R v Dexter*, 2013 ONCA 744 (CanLII), 313 OAC 226, *per* Weiler JA, at para 18
4. *R v Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, *per* McIntyre J at 781
5. *Dexter*, *supra*, at para 18
6. *R v Johnson*, 2010 ONCA 646 (CanLII), [2010] OJ No 4153, *per* Rouleau JA, at para 79: ("The rule is one of fairness, and is not absolute. ... Counsel should not necessarily be obliged to plod through a witness' evidence in-chief, putting him or her on notice of every detail that they do not accept. ... A pragmatic approach to the rule is most appropriate.")
   see also *R v Henderson*, 1999 CanLII 2358 (ON CA), OR (3d) 628, *per* Labrosse JA, at pp. 636-37
   R v Giroux, 2006 CanLII 10736 (ON CA), 207 CCC (3d) 512, *per* Blair JA, at para 42
   R v Lyttle, 2004 SCC 5 (CanLII), [2004] 1 SCR 193, *per* Major and Fish JJA, at para 65
   Palmer, *supra*, at p. 781 [SCR]
7. *R v Quansah*, 2015 ONCA 237 (CanLII), 323 CCC (3d) 191, *per* Watt JA, at para 77

8. *Giroux*, *supra*, at para 46 *R v Werkman*, 2007 ABCA 130 (CanLII), 219 CCC (3d) 406, *per curiam*, at para 7
R v McNeill, 2000 CanLII 4897 (ON CA), 144 CCC (3d) 551, *per* Moldaver JA, at para 45
9. *Quansah*, *supra*, at para 81
Dexter, *supra*, at para 18
R v Paris, 2000 CanLII 17031 (ON CA), 150 CCC (3d) 162, *per* Doherty JA, leave to appeal refused, at para 22
10. *Quansah*, *supra*, at para 83
11. *R v MacKinnon*, 1992 CanLII 488 (BC CA), 72 CCC (3d) 113, *per* Hollinrake JA
R v OGK, 1994 CanLII 8742 (BC CA), 28 CR (4th) 129, *per* Taylor JA
12. *R v Mete*, (1973), 3 WWR 709 (BCCA)(*no CanLII links)
R v Khuc, 2000 BCCA 20 (CanLII), 142 CCC (3d) 276, *per* McEachern JA
R v McNeill, 2000 CanLII 4897 , *per* Moldaver JA
R v Carter, 2005 BCCA 381 (CanLII), 199 CCC (3d) 74, *per* Thackray JA, at paras 54 to 60
R v Ali, 2009 BCCA 464 (CanLII), 277 BCAC 154, *per* Kirkpatrick JA
13. e.g. see comments in *R v Sparvier*, 2012 SKPC 67 (CanLII), 396 Sask R 15, *per* Hinds J, at para 31
14. *R v II*, 2013 ABCA 2 (CanLII), 542 AR 52, *per* Berger JA - Crown only cross-examined on collateral matters and not the substance of the incident
15. *II*, *ibid.*, at paras 20, 23
16. *R v Sylvain*, 2014 ABCA 153 (CanLII), 310 CCC (3d) 1, *per curiam*(2:1), at para 96
R v II, 2013 ABCA 2 (CanLII), 542 AR 52, *per* Berger J, at para 10
17. *Dexter*, *supra*, at para 20
Paris, *supra*, at paras 21 to 22
R v Giroux, 2006 CanLII 10736 (ON CA), 207 CCC (3d) 512, *per* Blair JA, leave to appeal refused, at para 42
Quansah, *supra*, at para 80
18. *Dexter*, *supra*, at para 20
Quansah, *supra*, at paras 84, , at paras 117: - considers (1) nature of the subject, (2) overall tenor of the cross-examination, (3) overall conduct of the defence
Paris, *supra*, at paras 23{{{3}}}
19. *R v Brown*, 2018 ONCA 1064 (CanLII), 361 CCC (3d) 510, *per* Epstein JA, at paras 15 to 18
20. *Nagy v BCAA Insurance Corporation*, 2020 BCCA 270 (CanLII)(*complete citation pending*), at para 23
R v Drydgen, 2013 BCCA 253 (CanLII), 338 BCAC 299, at para 22(*complete citation pending*)
21. *Hamman v Insurance Corporation of British Columbia*, 2020 BCCA 170 (CanLII), *per* Fitch J, at para 77 ("...deference is owed to the factual findings underpinning the trial judge's conclusion on whether or not the rule is engaged")
R v Lyttle, 2004 SCC 5 (CanLII), [2004] 1 SCR 193, *per* Major and Fish JJA, at para 65

Remedy

The timeliness of the objection is a factor to be considered to determine a proper remedy.[1]

A reviewing court must accord "substantial deference" to the trial judge on their use of discretion in deciding on a remedy.[2]

One available remedy is the possibility of recalling the witness.[3]

1. *R v Quansah*, 2015 ONCA 237 (CanLII), 323 CCC (3d) 191, *per* Watt JA, at paras 123 to 124
2. *Quansah*, *ibid.*, at para 118
3. *Quansah*, *ibid.*, at para 120

Cross-examining an Accused on a Prior Statement

The crown may withhold a statement of the accused until the defence's case at which time it can only be used where the statement is voluntary and only for the purpose of attacking credibility.[1] If the Crown is to hold back the statement for cross-examination it is necessary for voluntariness to be proven as part of the Crown's evidence, if there is no consent, or else the crown will be foreclosed from using the statement as it would require them to split their case.

The defence may introduce parts of the statement on rebuttal not used by the crown.[2]

1. *R v Hebert*, 1954 CanLII 48 (SCC), [1955] SCR 120
2. *R v Drake*, 1970 CanLII 577 (SK QB), 1 CCC (2d) 396 (SKQB), *per* MacPherson JA

Cross-examination by Defence Counsel

Defence counsel cannot cross-examine a witness to elicit statements made by the accused. Only the Crown is permitted to do so. [1]

1. *R v Simpson*, 1988 CanLII 89 (SCC), [1988] 1 SCR 3, ("a general rule, the statements of an accused person made outside court--subject to a finding of voluntariness where the statement is made to one in authority--are receivable in evidence against him but not for him. ..an accused person should not be free to make an unsworn statement ...into evidence through other witnesses and thus put his defence before the jury without being put on oath and being subjected ... to cross-examination.") *R v Rojas*, 2008 SCC 56 (CanLII), [2008] 3 SCR 111, *per* Charron J, at para 13 ("Generally, statements of accused made outside of Court are receivable in evidence against him, but not for him.")

Cross-Examination of the Accused

An appellate court should only intervene when the questioning is so improper that it "tends bring the administration of justice into disrepute"[1]

Any cross-examination by the Crown that would prejudice the accused's defences or bring the administration of justice into disrepute may render the trial unfair and the verdict reversible.[2]

Questions must always be considered in context, and certain improper questions may be proper in the right context.[3]

Collateral Instances of Honesty

The Crown may not cross-examine the accused on lies told by the accused to the police at unrelated instances.[4]

Correlation Between Arrest and End of Spree

It is improper to cross-examine an accused on any correlation between a break in a pattern of similar offences and the arrest of the accused.[5]

1. *AJR*, *supra*, at p. 176
   R v Fanjoy, 1985 CanLII 53 (SCC), [1985] 2 SCR 233, *per* McIntyre J
   R v Ruptash, 1982 ABCA 165 (CanLII), 68 CCC (2d) 182, *per curiam*, at p. 189, 36 AR 346 (CA)
2. *R v MAJ*, 2016 ONCA 725(*no CanLII links) , at para 26

3. e.g. *R v Steiert*, 2018 ABQB 211 (CanLII), *per* Read J, at paras 26 to 34 (e.g. difference between calling witness "bare faced liar" vs "dishonest")
4. *R v Lee*, 2005 CanLII 46628 (ON CA), 205 OAC 155, *per curiam*
5. *R v Musitano*, 1985 CanLII 1983 (ON CA), 24 CCC (3d) 65, *per curiam*

Accused's Criminal Record

Except where the accused places his character at issue, the Crown cannot cross-examine the witness on the accused of the prior criminal record at large. The crown can ask the accused of the date and place of conviction; the offence convicted; the sentence imposed. [1] The accused cannot be asked about the details of the accused's criminal record.[2]

Administrative pardons can be used for the purposes of cross-examination in trial.[3]

1. semble *R v Burgar*, 2010 ABCA 318 (CanLII), 490 AR 241, *per curiam*
2. *R v Schell*, 2000 CanLII 16917 (ON CA), 148 CCC (3d) 219, *per* Rosenberg JA(*complete citation pending*)
   Burgar, *supra*
3. *R v Gyles*, 2003 CanLII 49339 (ON SC), [2003] OJ No 1924, *per* Wein J, at paras 16 to 21

Honesty of Other Witnesses

Questions asking the witness to comment on the credibility of other witnesses is improper. That includes:

- asking the accused why the complainant would make up the accusation[1]
- asking the accused whether the complainant is lying or committing perjury[2]
- asking accused if police officer(s) are lying[3]
- asking to comment on the veracity of any other witness;[4]

While it is not permissible to ask an accused whether or why another witness is lying, it *is* permissible to put another set of facts from another witness and ask whether they are true or not.[5]

1. *R v Dedier*, 2012 ONSC 2889 (CanLII), *per* Trotter J (this is because asking a witness to comment on the veracity of another witness is unreliable evidence and it may mislead the trier of fact in putting the burden on the accused)
   R v LL, 2009 ONCA 413 (CanLII), [2009] OJ No 2029 (CA), *per* Simmons JA, at para 15
   R v Rose, 2001 CanLII 24079 (ON CA), 53 OR (3d) 417, *per* Charron JA, at para 27
   R v Bouhsass, 2002 CanLII 45109 (ON CA), 169 CCC (3d) 444, *per curiam*
2. *R v Yakeleya*, 1985 CanLII 3478 (ON CA), 20 CCC (3d) 193, *per* Martin JA - The main reason is that it may tend to shift the burden upon the accused to answer the question
   R v SW, 1994 CanLII 7208 (ON CA), 90 CCC (3d) 242, *per* Finlayson JA
   R v Jones, 1992 CanLII 2971 (QC CA), 74 CCC (3d) 377, *per* Proulx JA
   R v Rose, 2001 CanLII 24079 (ON CA), 53 OR (3d) 417, *per* Charron J, at para 27 ("Further, this court has held repeatedly that it is improper to call upon an accused to comment on the credibility of his accusers: ... Questions of this nature suggest that there is some onus on an accused person to provide a motive for the Crown witness' testimony and, as such, they undermine the presumption of innocence.") *R v Cole*, 1999 CanLII 4010 (ON CA), [1999] OJ No 1647 (CA), *per curiam*
   R v F(A), 1996 CanLII 10222 (ON CA), 30 OR (3d) 470, 1 CR (5th) 382 (CA), *per curiam*
   R v Masse, 2000 CanLII 5755 (ON CA), 134 OAC 79 (CA), *per curiam*
   R v Vandenberghe, 1995 CanLII 1439 (ON

CA), 96 CCC (3d) 371, *per curiam*
R v S(W), 1994 CanLII 7208 (ON CA), 18 OR (3d) 509, 90 CCC (3d) 242, *per* Finlayson JA

3. *R v Brown & Murphy*, 1982 ABCA 292 (CanLII), 1 CCC (3d) 107, *per* McClung JA aff'd [1985] 2 SCR 273, 1985 CanLII 3 (SCC), *per* McIntyre J
R v Markadonis v The King, 1935 CanLII 44 (SCC), [1935] SCR 657, *per* Duff CJ
4. *Markadonis*, *ibid.*
Rose, *supra*, at para 27
Brown, *supra*, at paras 15 to 23 (ABCA)
R v Henderson, 1999 CanLII 2358 (ON CA), [1999] OJ No 1216 (CA), *per* Labrosse JA, at para 15
R v Vandenberghe, 1995 CanLII 1439 (ON CA), [1995] OJ No 243 (CA), *per curiam*
5. *R v White*, 1999 CanLII 3695 (ON CA), 132 CCC (3d) 373, *per* Doherty JA, at para 14

Right to Silence

The crown cannot ask about the reasons behind the accused exercising the right to silence[1]

The Crown is prohibited from attacking the accused's credibility on the basis that the accused claimed they wanted to be "helpful" at the time of arrest but failed to notify the investigator of certain facts. Such questions violate their right to silence.[2] Any suggestion that the accused should not be trusted because he did not reveal anything prior to trial is impermissible.[3]

1. *R v Schell*, 2000 CanLII 16917 (ON CA), 148 CCC (3d) 219, *per* Rosenberg JA
2. *R v JS*, 2018 ONCA 39 (CanLII), 140 OR (3d) 539, *per* Roberts JA, at paras 50 to 66
3. *JS*, *ibid.*, at para 56

Trial Strategy

Why Evidence Not Called

It is improper to ask the accused to explain why certain evidence was not presented in the course of the defence's case as it implies a non-existent duty to adduce defence evidence and potentially implicate privileged defence strategy.[1]

Access to Disclosure

- question regarding the accused's access to the disclosure and suggest their version is crafted to avoid potential pitfalls[2]

It is generally inappropriate to attempt to impeach the accused's credibility on the basis of their access to the disclosure and the likelihood of them crafting their evidence to suit it.[3] However, this will be determined on a case-by-case basis.[4]

It is further impermissible to cross-examine the accused on their possession and review of the disclosure materials as it may undermine their right to receive them.[5]However, in some cases it is permissible such as to undermine a defence of alibi by arguing tailored evidence.[6]

There is a limited ability to cross-examine an accused person using their knowledge and access to disclosure.[7]

If the accused makes reference on direct to disclosure confirming his version of events, he may be cross-examined on his access to disclosure prior to trial.[8]

1. *R v Bouhsass*, 2002 CanLII 45109 (ON CA), 169 CCC (3d) 444, *per curiam*, at para 12
   R v Usereau, 2010 QCCA 894 (CanLII), 256 CCC (3d) 499, *per* Hilton JA
2. *Schell*, *ibid.* at 56
   R v Bouhsass, 2002 CanLII 45109 (ON CA), 169 CCC (3d) 444, *per curiam*
3. See "Improper questioning" above
   R v John, 2016 ONCA 615 (CanLII), 133 OR (3d) 360, *per* Sharpe JA, at to 60 para 58 to 60
   R v JS, 2018 ONCA 39 (CanLII), 140 OR (3d) 539, at para 60
   also *R v Bouhsass*, 2002 CanLII 45109 (ON CA), 169 CCC (3d) 444, *per curiam*
4. *R v Le (T.D.)*, 2011 MBCA 83 (CanLII), 275 CCC (3d) 427, *per* Scott CJ, at para 260
5. *White*, *supra*
6. *R v FEE*, 2011 ONCA 783 (CanLII), 282 CCC (3d) 552, *per* Watt JA, at para 71
   see also *R v Cavan*, 1999 CanLII 9309 (ON CA), 139 CCC (3d) 449, *per curiam*
7. e.g. *R v SDB*, 2012 SKCA 119 (CanLII), 405 Sask R 97, *per curiam*
8. *R v Thain*, 2009 ONCA 223 (CanLII), 243 CCC (3d) 230, *per* Sharpe JA, at paras 18 to 29

Other Rules Relating to Crown Cross-Examination

Specifically for the Crown in cross-examining the accused, it is improper to do any of the following:

- to call the accused a "barefaced liar";[1]
- to express personal views and editorial comments into the questions, including their belief that the witness is a "liar";[2]
- to make baseless and highly prejudicial suggestions to the accused[3]
- ask the accused to explain the failure to call certain witnesses, and to explain why his own evidence was not corroborated.[4]
- to mock and unfairly challenge the accused's adherence to his religious beliefs[5]

1. *Bouhsass*, *ibid.*
2. *Bouhsass*, *ibid.*
   Schell, *supra*, at para 53
3. *Bouhsass*, *ibid.*
4. *Bouhsass*, *ibid.*
5. *Bouhsass*, *ibid.*

Using Documents to Cross-Examine

A document cannot be made admissible simply by putting the document to the witness.[1] A document referred to by the opposing party does not make it admissible either.[2]

A document may be used for cross-examination without showing the witness.[3] Any document may be put to a witness without any proof thereof.[4]

The Crown may use computer logs to cross-examine the accused on credibility even where it relates to conduct that is not the subject-matter of the offence.[5]

See also: Documentary Evidence

1. *R v Paterson*, 1998 CanLII 14969 (BC CA), 122 CCC (3d) 254, *per curiam*, at para 113
   McWilliams, Canadian Criminal Evidence (3d ed.) at 6-9
2. *Paterson*, *supra*, at para 113
   R v Deacon, 1947 CanLII 38 (SCC), [1947] SCR 531, *per* Kerwin J
   R v Taylor, 1970 CanLII 1053 (MB CA), 1 CCC

(2d) 321, *per* Dickson JA (Man. C.A.), at p. 331
3. *Paterson*, *supra*, at para 113
4. *Paterson*, *supra*, at para 113
5. *R v Carlos*, 2016 ONCA 920 (CanLII), OJ No 6288, *per curiam*, at paras 2 to 3

Cross Examination of Non-Accused Persons

Character and Disposition

Generally a non-accused witness may be cross-examined on character traits and disposition that could go to their reliability and credibility, however, the reliability and credibility must be material to a trial issue.[1]

A witness who is not the accused may be cross-examined on outstanding charges, including the underlying conduct, regardless of whether it occurred before or after the incident at issue. It may be relevant to credibility and other issues such as self-defence.[2]

A non-accused witness may be cross-examined on conduct underlying a conviction. The only limitation is relevancy and propriety.[3]

The Crown may cross a witness on impartiality and whether they are attempting to assist their friend, the accused. [4]

A witness may be asked about whether he had any conversations with other witnesses during a break in the trial.[5]

A witness may be questioned generally about the "improper conduct by the witness" only so long as it has a bearing on the witnesses credibility with respect to his evidence.[6]

1. *R v John*, 2017 ONCA 622 (CanLII), 350 CCC (3d) 397, *per* Watt JA, at para 56
   R v Jerace, 2021 BCCA 94 (CanLII), *per* Hunter JA, at para 91
2. *R v Chartrand*, 2002 CanLII 6331 (ON CA), 170 CCC (3d) 97, *per* Cronk JA
3. *R v Miller*, 1998 CanLII 5115 (ON CA), 131 CCC (3d) 141, *per* Charron JA, at paras 23 to 41
4. *R v Wiebe*, 2006 CanLII 3955 (ON CA), 205 CCC (3d) 326, *per curiam*, at para 21
5. *R v Peazer*, 2005 CanLII 30057 (ON CA), 200 CCC (3d) 1, *per* Rosenberg JA, at paras 22, 23
6. *R v Upton*, 2008 NSSC 338 (CanLII), 239 CCC (3d) 409, *per* Beveridge J, at para 17

Sexual Assault Cases

It is recognized that cross-examination techniques of sexual assault complainants can tend to "put the complainant on trial rather than the accused". These approaches are "abusive and distort rather than enhance the search for truth." For that reason limits must be imposed on cross-examination.[1]

One limitation imposed on cross-examination is upon the privacy interests of the complainant.[2]

Cross-examinations cannot be for the purpose is directed to the "rape myths".[3]

Any limitation on cross-examination cannot "interfere with the right of the accused to a fair trial."[4]

1. *R v Shearing*, 2002 SCC 58 (CanLII), [2002] 3 SCR 33, *per* Binnie J, at para 76
   R v Osolin, 1993 CanLII 54 (SCC), [1993] 4 SCR 595, *per* Cory J, at pp. 669 and 671 ("complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system. ")
2. *Shearing*, *ibid.*, at para 76
3. *Osolin*, *supra*, at p. 671
4. *Osolin*, *supra*, at p. 669

Cross-Examination by Calling Party

- See Adverse and Hostile Witnesses

During a Preliminary Inquiry

An accused at a preliminary inquiry has "a right to full, detailed and careful cross-examination". Failure to be permitted to do so "is a failure to accord the accused an important right granted him by the provisions of the Criminal Code".[1]

See Also: Preliminary Inquiry

1. *Patterson v The Queen*, 1970 CanLII 180 (SCC), [1970] SCR 409, 2 CCC (2d) 227, *per* Judson J

See Also

- Prior Inconsistent Statements

Re-Direct Examinations

< Procedure and Practice < Trials

General Principles

Generally, once cross-examination is complete a witness cannot introduce new facts not covered in cross-examination except where permitted as "re-examination".[1]

Purpose of Re-Direct

The "purpose of re-examination is to enable the witness to explain and clarify relevant testimony which may have been weakened or obscured in cross-examination."[2]It is purpose is to rehabiliate and explain the evidence elicited in cross-examination.[3]

Valid Subjects of Re-Direct

A party calling a witness is entitled to re-examine the witness after cross-examination.[4] But the scope of the re-examination is limited to matters that arose in cross-examination.[5] Its purpose is to allow the witness to explain or qualify answers that were given in cross-examination.[6]

Those limited matters arising from cross-examination must be the purpose of (1) rehabilitating the witness from any damaging evidence brought up on cross-examination and (2) explaining any ambiguous or misleading information elicited on cross-examination.[7]

Form of Questions

The rule against leading questions still applies in re-examination.[8]

Improper Re-Direct

Re-examination may not be used to improperly bolster the credibility of the witness after impeaching credibility in cross-examination.[9]

The right to re-examine is not absolute but should be permitted where it is not repetitious and "genuinely arises from cross-examination".[10]

Use of Prior Statements in Re-Direct

The re-examination cannot be used to introduce a second inconsistent statement after a first inconsistent statement was introduced in cross.[11]

A Crown may play an entire statement back to the witness in re-examination and put in as an exhibit.[12]

Where recent fabrication arises in cross, the re-direct may be used to introduce a prior consistent statement of the witness.[13]

1. *R v Lavoie*, 2000 ABCA 318 (CanLII), 271 AR 321, *per curiam*, at para 46 citing The Law of Evidence in Canada ("The witness is not ordinarily allowed to supplement the examination-in-chief by introducing new facts which were not covered in cross-examination.")
2. *Lavoie*, *supra*, at para 46 citing The Law of Evidence in Canada, at p. 879
3. *R v Candir*, 2009 ONCA 915 (CanLII), 250 CCC (3d) 139, *per* Watt JA, at para 148 ("The purpose of re-examination is largely rehabilitative and explanatory.")
4. *R v Moore*, 1984 CanLII 3542, 15 CCC (3d) 543, *per* Martin JA
5. *R v Moore*, at 66 cited in *R v Evans*, 1993 CanLII 86 (SCC), [1993] 2 SCR 639, *per* Sopinka J at 36
6. *Evans*, *ibid.* ("The questions that can be asked of right on re-examination should focus on elements from the against-examination relating to new facts or issues raised during the examination and require explanations for asked questions and answers in cons-examination") citing Ewaschuk in Criminal Pleadings & Practice in Canada , 2 e ed (p 16.29 by 16.. 2510)
   Candir, *supra*, at para 148 ("... The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness. ...")
   R v Linklater, 2009 ONCA 172 (CanLII), 246 OAC 303, *per curiam*, at para 13
   Barboza-Pena c R, 2008 QCCA 1133 (CanLII), 58 CR (6th) 278, *per curiam*, at para 36

7. E.G. Ewaschuk in Criminal Pleadings and Practice Canada, 2d ed., in these words at p. 16.29, at para 16:2510 (Counsel is entitled to ask questions that "relate to matters arising out of the cross-examination which deal with new matters, or with matters raised in examination-in-chief which require explanation as to questions put and answers given in cross-examination.")
   Candir, *supra*, at para 148
8. *Moore*, *supra* at 66
   See Phipson on Evidence (13th Ed.), at p. 823-24; Wigmore on Evidence (3rd Ed.), vol. 6, at p. 567
9. *Moore*, *supra*
10. *R v Schell*, 2013 ABCA 4 (CanLII), 293 CCC (3d) 400, *per curiam* ("re-examination is permitted if it is not merely repetitious and if it genuinely arises from the cross-examination")
11. *R v Horsefall*, 1991 CanLII 5768 (BC CA), 70 CCC (3d) 569, *per* Goldie JA
12. *R v Patterson*, 2003 CanLII 30300 (ON CA), 174 CCC (3d) 193, *per* Gillese JA, at para 49
13. *R v Lavoie*, 2000 ABCA 318 (CanLII), 271 AR 321, *per curiam*
    see also Prior Consistent Statements

New Subjects Usually Not Allowed

The judge should generally not permit counsel to "introduce" on re-direct "new subjects" where the topic "should have been covered" in direct examination.[1]

Discretion to Permit "new facts" *not* arising from Cross-Examination

New facts can be permitted in re-examination at the discretion of the judge. [2] If permitted, the judge must also permit the opposing counsel the firt to cross-examine further.[3]

1. *R v Candir*, 2009 ONCA 915 (CanLII), 250 CCC (3d) 139, *per* Watt JA, at para 148 (After describing the rehabiliatory nature of re-direct, the judge stated that "[t]he examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness.")
2. *Moore*, *supra* at 66
   Candir, *supra*, at para 148 ("A trial judge has a discretion, however, to grant leave to the party calling a witness to introduce new subjects in re-examination, but must afford the opposing party the right of further cross-examination on the new facts")
3. *Candir*, *supra*, at para 148

Re-Direct vs Reply or Rebuttal

In contrast to re-direct, reply or rebuttal evidence is only permitted where the evidence was not reasonably anticipated.[1]

1. see *R v KT*, 2013 ONCA 257 (CanLII), 295 CCC (3d) 283, *per* Watt JA

see also Reply or Rebuttal evidence

See Also

- Reply or Rebuttal)

Rebuttal, Reply and Re-Opening a Case

General Principles

Where a party closes its case, the party retains a limited right to call more evidence. Reply (or Rebuttal) evidence mostly applies to the Crown authority to call specific evidence anytime after the closing of its case. Where the right to call reply evidence is granted, it is limited to top-specific matters that are permitted by the court.

By contrast, "re-opening" a case is a limited right that permits either counsel after closing their case to re-open it for the broad calling of additional direct evidence on a particular area that was not called in the case-in-chief but is of sufficient importance as to be called nonetheless. Where reply relates to responding to particular aspects of the opposing side's evidence, re-opening relates to omissions for which it is in the interests of justice to correct.

Note that rebuttal, reply, and re-opening is distinct from the authority to permit redirect of a particular witness. This situation is governed by a different test .[1]

1. see Re-Direct Examinations

Crown Reply or Rebuttal

Rule Against Splitting Crown Case

On closing of the Crown's case, the Crown is expected to have presented all relevant evidence available. The judge should not allow Crown to "split" it's case and present any part of its case after the defence.[1]

Purpose of Rebuttal

The evidence is limited only to matters that were raised in the defence evidence.[2]

The Crown should not be permitted to simply present sufficient evidence to avoid a directed verdict for and then be permitted to present the entirety of the remainder of the case with the benefit of defence evidence.[3]

Anticipation of Relevancy

Evidence that is "clearly relevant to the issues and within the possession of the Crown" cannot properly be called in rebuttal. The Crown cannot "lie in wait" to trap the accused.[4]

Traditionally, if the Crown evidence could have been reasonably anticipated as being relevant during the Crown's case then it should have been called then and should not be permitted to be called in rebuttal.[5] That being said, it is also said that it is not necessary for the Crown to "lead all possibl[y] relevant evidence". It would otherwise "prolong and potentially confuse the trier of fact" as the evidence "may or may not be relevant".[6] It is not necessary that the Crown lead "any evidence" that it has to counter a possible defence.[7] Put differently, the Crown does not have to engage in guessing what the defence may be and call evidence to respond to guess-work.

As such, where Crown remains unaware of the testimony that will be called in defence evidence, their discovery of new information may permit them to call reply evidence.[8]

The analysis will be different where it is a jury trial and the splitting of the case may overly magnify the importance of the new evidence.[9]

When Permitted

The Crown should be permitted to call reply evidence when:[10]

- The defence has raised some new matter or defence with which the Crown had no opportunity to deal and that the Crown could not reasonably have anticipated; or
- "some matter that emerged during the Crown's case has taken on added significance as a result of evidence adduced in the defence case".

Surrebuttal

The trial judge may permit surrebuttal evidence to sure the accused has a fair trial.[11]

1. *R v Melnichuk*, 1997 CanLII 383 (SCC), [1997] 1 SCR 602, *per* Sopinka J
2. *R v Kuyan*, 1988 CanLII 7114 (ON CA), (1988) 43 CCC (3d) 339, *per* Griffiths JA
3. *R v KT*, 2013 ONCA 257 (CanLII), 295 CCC (3d) 283, *per* Watt JA, at para 42 ("The rule governing the order of proof in the context of a criminal trial prevents unfair surprise, prejudice, and confusion that could result if the Crown were allowed to split its case. Were it not for this rule, the Crown could put in part of its evidence in its case-in-chief, enough to survive a motion for a directed verdict, allow the defence to play through with its case, then add further evidence to bolster the case presented in-chief")
4. *R v Drake*, 1970 CanLII 577 (SK QB), 1 CCC (2d) 396, *per* MacPherson JA ("There is a well-known principle that evidence which is clearly relevant to the issues and within the possession of the Crown should be advanced by the Crown as part of its case, and such evidence cannot properly be admitted after the evidence of the defence by way of rebuttal. In other words, the law regards it as unfair for the Crown to lie in wait and to permit the accused to trap himself.") *R v Chaulk*, 1990 CanLII 34 (SCC), [1990] 3 SCR 1303 at p. 1364 (SCR)
5. *R v Perry*, 1977 CanLII 2096, 36 CCC (2d) 209, *per* Dubin JA
6. *R v Mellor*, 2020 ONSC 4820 (CanLII), *per* Dennison J, at para 53
7. *R v W(A)*, 1991 CanLII 7125 (ON CA), 3 OR (3d) 171, *per* Doherty JA at para 32
   R v Campbell, 1977 CanLII 1191 (ON CA), 38 CCC (2d) 6, 17 OR (2d) 673 (CA), *per* Martin JA
   R v Stevenson, 1990 CanLII 2594 (ON CA), 58 CCC (3d) 464, [1990] OJ No 1657 (CA), *per* Morden JA
8. e.g. *Mellor*, *supra*, at para 53
9. *Mellor*, *supra*, at para 65
   R v Sanderson, 2017 ONCA 470 (CanLII), 349 CCC (3d) 129, *per* Pepall JA, at para 44
10. *KT*, *ibid.*, at para 43 ("But the rule about the order of proof erects no absolute bar to the introduction of further evidence by the Crown after the defence has closed. The Crown may be permitted to call evidence in reply after completion of the defence case where ...[1] the defence has raised some new matter or defence with which the Crown had no opportunity to deal and that the Crown could not reasonably have anticipated; or...[2] some matter that emerged during the Crown's case has taken on added significance as a result of evidence adduced in the defence case.")
11. *Mellor*, *supra*, at para 67

See Also

- Reopening the Case

Role of Trial Judge

This page was last substantively updated or reviewed *July 2021*. (Rev. # 79483)

General Principles

An accused person is entitled to a Constitutional right to an impartial trier-of-fact.[1]

A trial judge has a duty to ensure that the trial is fair and there are no miscarriage of justice.[2]

The trial judge is more than just an umpire but "is not to enter the arena and appear to take on the role of an advocate".[3]

Adversarial System

Our criminal justice system is on that is "essentially adversarial" where the Crown presents evidence of guilt and the accused points out weaknesses in the evidence and presents contrary evidence. The trier of fact is a neutral arbiter of the dispute.[4] For this reason, it is improper for the judge to usurp the role of counsel in an inquisitorial manner.[5]

The role of the judge in an adversarial process is to "listen to the testimony, assess all the evidence, make assessments of credibility and findings of fact, apply the law to the facts and make an ultimate determination on the merits, keeping in mind throughout the applicable burdens of proof."[6] The judge is also expected to "ensure the proceedings are conducted fairly, properly and according to law, which include the rules governing procedure."[7]

Presumed to Know the Law

Trial judges are presumed to know the elementary principles of law.[8] It is not necessary that a judge cite the leading authorities, it is only necessary that the legal principles be applied properly.[9]

Inherent Jurisdiction

The court's inherent jurisdiction is limited by its role within the system of separate branches of government.[10]

Duty to Raise Issues

A trial judge has a duty to "conduct [a] trial judicially quite apart from the lapses of counsel".[11] This may include a duty to conduct a voir dire on issues such as voluntariness absent the request of counsel.[12]

Duty of Restraint

A judge has a duty of restraint during their court work as well as in their personal life.[13] It is a guarantee of judicial independence or impartiality.[14]

Judges are required to be "shielded from tumult and controversy that may taint the perception of impartiality".[15]

Duty of Technological Competency

It has been suggested that courts and counsel have a duty of "technological competency".[16]

ex mero motu

The doctrine of "ex mero motu" ("of one's own accord") has traditionally permitted a judge to intervene on its own motion in proceedings by making rules or issuing orders so as to prevent an injustice.[17] This authority has been used to amend charges to conform with the evidence.[18]

History

Currently, Justices of superior courts are required to retire at the age of 75. Prior to a 1960 amendment to the British North America Act, superior court justices had lifetime tenure.

1. See s. 11(d) of the Charter which is the right "...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;"
   See also *R v Valente*, 1985 CanLII 25 (SCC), [1985] 2 SCR 673, (1985), 23 CCC (3d) 193, *per* Le Dain J
   Judicial Immunity
2. see *R v Harris*, 2009 SKCA 96 (CanLII), 331 Sask R 283, *per* Richards JA, at para 28
   R v Amell, 2013 SKCA 48 (CanLII), 414 Sask R 152, *per* Lane JA, at para 25
3. *R v Stucky*, 2009 ONCA 151 (CanLII), 240 CCC (3d) 141, *per* Weiler and Gillese JJA, at paras 69 to 72
   R v Griffith, 2013 ONCA 510 (CanLII), 309 OAC 159, *per* Rosenberg JA, at para 25
4. *R v Osolin*, 1993 CanLII 54 (SCC), [1993] 4 SCR 595, *per* McLachlin J (in dissent), at para ?
5. *R v Corbett*, 2009 ABQB 619 (CanLII), 485 AR 349, *per* Ross J, at para 46
6. *Despres v MacDonald Crane Service Ltd. et al*, 2018 NBCA 13 (CanLII), *per* Richard JA, at para 67
7. *Despres*, *ibid.*, at para 67
8. *R v Burns*, 1994 CanLII 127 (SCC), [1994] 1 SCR 656, *per* McLachlin J
9. R v Al-Rawi, 2021 NSCA 86 per Bourgeois JA at para 92
10. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (CanLII), [2013] 3 SCR 3, *per* Karakatsanis J, at paras 28, 30, 38
11. *R v Piamonte*, 2017 ONSC 2666 (CanLII), *per* Johnston J, at para 9
    R v Sweezey, 1974 CanLII 1427 (ON CA), 20 CCC (2d) 400 (OCA), *per* Martin JA
12. *Piamonte*, *ibid.*, at para 9
    See also Voluntariness
13. *Ruffo v Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 SCR 267, *per* Gonthier J
14. *Ruffo*, *ibid.*
15. *Ruffo*, *ibid.*
16. *WORSOFF v MTCC 1168*, 2021 ONSC 6493 (CanLII), *per* Myers J, at para 32
17. *R v Powell*, 1965 CanLII 671 (BC CA), 4 CCC 349, *per* Bull JA (2:1)
    R v Spilchen, 2021 NSSC 131 (CanLII), *per* Coady J
18. *Spilchen*, *ibid. Powell*, *ibid.*
    R v Clark, 1974 ALTASCAD 59 (CanLII), 19 CCC 445, *per* Clehent JA

Right of Parties to be Heard

There is a fundamental tenant that all parties affected by a decision shall be given an opportunity to be heard by the court before the court makes a ruling. This is the principle of *audi alteram partem* .[1] The right to be heard also provides a person "the right to know the case to be met".[2]

The judge has an obligation to allow each party who may be affected by a ruling to be permitted to respond to the case against them.[3]

A failure to afford each side to present argument before a judgment is a denial of that right will violate procedural fairness and is fatal.[4]

The right is not unqualified. A declaration of a party as a "vexatious litigant" has the effect of removing this right. Accordingly, it is only used sparingly.[5]

Related to this principle is the common law rule that "a person cannot be deprived of his liberty or property without notice."[6]

Refusal to consider an evidentiary objection is an improper refusal to assume jurisdiction that affects trial fairness.[7]

1. *R v Gustavson*, 2005 BCCA 32 (CanLII), 193 CCC (3d) 545, *per* Prowse JA at 64
   See also *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 (CanLII), [2002] 1 SCR 249, *per* Arbour J, at para 75
   Canadian Union of Public Employees, Local 301 v Montreal (City), 1997 CanLII 386 (SCC), [1997] 1 SCR 793, *per* L'Heureux-Dubé J, at para 73 - refereed to as the rule that "no man be condemned unheard"
2. *Devon Canada Corp. v Alberta (Energy and Utilities Board)*, 2003 ABCA 167 (CanLII), AJ No 622, *per* McFadyen JA, at para 19
3. *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), [2007] 1 SCR 350, *per* McLachlin CJ, at para 53 ("a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case")
4. *R v Berry*, 2014 ABQB 379 (CanLII), *per* Ross J, at para 7
   R v Graham, 2007 ABCA 153 (CanLII), 404 AR 300, *per* Ritter JA, at paras 11 to 12
   Fraser v Fraser, 1994 ABCA 275 (CanLII), (1994) 157 AR 98 (CA), *per curiam*, at para 10
5. *Kallaba v Bylykbashi*, 2006 CanLII 3953 (ON CA), 207 OAC 60, *per* Cronk and Juriansz JA, at para 31
6. *R v Marton*, 2016 ONSC 2269 (CanLII), *per* Cronk and Juriansz JJA, at para 25
   R v Buchholz, 1958 CanLII 435 (MB CA), 121 CCC 293, *per* Adamson CJ, at para 8
7. *R v Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 SCR 1421, *per* Sopinka J at 1449 citing *R v Dersch*, 1987 CanLII 155 (BC CA), 36 CCC (3d) 435, *per* Esson JA

Timing of Interrim Rulings

Where a party seeks exclusion of evidence it is for the trial judge to "decide what procedure should be followed".[1]

With "rare exceptions", a judge is "empowered to reserve on any application until the end of the case".[2] This would include application to quash an indictment.[3]

The judge has discretion to defer rulings on the basis that:[4]

1. "criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own" and
2. it "discourages adjudication of constitutional issues without a factual foundation."

An exception for deferment of rulings are where the "interests of justice necessitate an immediate decision".[5] This will include where "the trial court itself is implicated in a constitutional violation" or where "substantial on-going constitutional violations require immediate attention".[6] As well, situations where an"apparently meritorious Charter challenge of the law under which the accused is charged which is not dependent on facts to be elicited during the trial" should be exceptions.[7] This is especially true where the trial is expected to be of considerable duration.[8]

1. *R v Hamill*, 1984 CanLII 39 (BCCA), [1984] 6 WWR 530, *per* Esson JA
2. *R v DeSousa*, 1992 CanLII 80 (SCC), [1992] 2 SCR 944, *per* Sopinka J
3. *DeSousa*, *ibid.* ("He or she is not obliged, therefore, to rule on a motion to quash for invalidity of the indictment until the end of the case after the evidence has been heard.")
4. *DeSousa*, *ibid.*
5. *DeSousa*, *ibid.*
6. *DeSousa*, *ibid.*
7. *DeSousa*, *ibid.*
8. *DeSousa*, *ibid.*

Rules of Court

Under s. 482(1) and (2), a superior court and provincial have the power to make rules governing criminal proceedings.

Under s. 482.1, the courts also have the power the makes rules with respect to case management.[1]

1. See also Case Management

Hearing Evidence at Trial

Must Consider All Admissible Evidence

A trial judge must consider all evidence relating to the issue of innocence or guilt.[1] Failure to do so is an error of law.[2]

However, there is no requirement that the judge "record all or any specific part of the process of deliberation on the facts".[3] A failure to record facts does not give rise to an error unless the judge's reasons demonstrate that not all the facts were considered.[4]

When considering evidence on a multi-count indictment, the judge just give *separate* consideration to a verdict on each count.[5]

Using Personal Experience

No judge is expected to be a "tabula rasa".[6]

A judge should only be deciding cases on the evidence adduced in the courtroom.[7]

A judge cannot act based only on personal knowledge and familiarity of a matter without more.[8]

Exposure to Inadmissible Evidence

Judges are regularly required to decide on whether it is properly admissible or not and disregard inadmissible evidence they are exposed to. It will not generally create an apprehension of bias. [9]

Considering Theories of Counsel

Subject to "due process concerns", there is no prohibition on the trial judge making findings of guilt on a theory that has not been advanced by the Crown.[10]

1. *R v Morin*, 1992 CanLII 40 (SCC), [1992] 3 SCR 286, *per* Sopinka J at 296 (SCR)
R v DLW, 2013 BCSC 1327 (CanLII), BCJ No

1620, *per* Romilly J, at para 3
2. *Morin*, *supra*, at p. 296 (SCR)
3. *Morin*, *supra*, at p. 296
R v Walle, 2012 SCC 41 (CanLII), [2012] 2 SCR 438, *per* Moldaver J, at para 46
4. *Morin*, *supra*, at p. 296
Walle, *supra*, at para 46
5. *R v Howe*, 2005 CanLII 253 (ON CA), 192 CCC (3d) 480, *per* Doherty JA, at para 44
6. *R v JM*, 2021 ONCA 150 (CanLII), 154 OR (3d) 401, *per* Brown JA, at para 48
7. , *supra*, at para 51
8. *R v Potts*, 1982 CanLII 1751 (ON CA), 66 CCC (2d) 219, *per* Thorton JA at p. 204
JM, *supra*, at para 51
9. *R v SS*, 2005 CanLII 791 (ON CA), *per curiam*, at para 3
R v Novak, 1995 CanLII 2024 (BC CA), 27 WCB (2d) 295, *per* Prowse JA, at para 8
See Reasonable Apprehension of Bias
10. *R v Dagenais*, 2018 ONCA 63 (CanLII), *per* McCombs JA (ad hoc), at para 55 ("It is well-established that, subject to due process concerns, a conviction may be founded on a theory of liability that has not been advanced by the Crown, provided that theory is available on the evidence")
R v Pickton, 2010 SCC 32 (CanLII), [2010] 2 SCR 198, *per* Charron J, at para 19
R v Khawaja, 2010 ONCA 862 (CanLII), 273 CCC (3d) 415, *per curiam*, at paras 143 to 145
R v Ranger, 2003 CanLII 32900 (ON CA), 178 CCC (3d) 375, *per* Charron JA, at paras 34 to 35
R v Pawluk, 2017 ONCA 863 (CanLII), *per* Paciocco JA

Control over Trial Process

A criminal trial court to "control its process" is a fundamental value of the criminal justice system".[1] A judge has "considerable" powers to intervene in a criminal trial to manage the proceedings.[2]

A judge is authorized to make orders "necessary to ensure an orderly trial, without which the administration of justice risks being ...thrown into disrepute".[3]

Superior Court

A Superior Court Justice has the inherent jurisdiction to eliminate any procedural unfairness that arises during a trial.[4]

The Superior court has inherent jurisdiction to control the disclosure process of a matter before the provincial court.[5]

Provincial Court

The "procedural directions contained in the Code are of necessity exhaustive". The powers of a provincial court judge are "entirely statutory."[6] However, "the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a ‘doctrine of jurisdiction by necessary implication’ when determining the powers of a statutory tribunal.” [7]

The inherent powers of a superior court judge to control the court process is said to be equally available to provincial court judges either expressly by statute or by necessary implication.[8]

Consequently, a provincial court judge has implied jurisdiction to "vary one of its own orders in order to correct clerical mistakes or errors arising from an accidental slip or omission or in order to properly reflect the intention of the court"[9]

Reconsidering Judgements

Generally, a "court has a limited power to reconsider and vary its judgment disposing of the case as long as the court is not functus."[10]

Exclusion of Evidence

There is a limited power of a trial judge to exclude evidence in order to ensure trial fairness where other remedies are not sufficient. However, it is considered an "unusual exercise" of the trial management power. [11]

Prohibition Orders on Defence Conducting their Defence

A judge may limit the examination or cross-examination of witnesses or the right to call defence witness only where it is justified in "clear and compelling circumstances".[12]

Directing Crown Counsel

A trial judge should never direct Crown as to whom they must call to give evidence.[13]

1. *R v Romanowicz*, 1999 CanLII 1315 (ON CA), 138 CCC (3d) 225, *per curiam*, at para 56
2. *R v Auclair*, 2013 QCCA 671 (CanLII), 302 CCC (3d) 365, *per curiam*, at para 55
3. *Auclair*, *ibid.*, at para 55
4. *R v Rose*, 1998 CanLII 768 (SCC), [1998] 3 SCR 262, *per* Cory, Iacobucci and Bastarache JJ
5. *DP v Wagg*, 2004 CanLII 39048 (ON CA), 71 OR (3d) 229, *per* Rosenberg JA
   see Disclosure
6. *R v Doyle*, 1976 CanLII 11 (SCC), [1977] 1 SCR 597, *per* Ritchie J
7. *R v Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 SCR 331, *per* Rothstein J, at para 19
8. *Doyle*, *supra* ("Whatever inherent powers may be possessed by a superior court judge in controlling the process of his own Court, it is my opinion that the powers and functions of a magistrate acting under the *Criminal Code* are circumscribed by the provisions of that statute and must be found to have been thereby conferred either expressly or by necessary implication.")
9. see *R v Rhingo*, 1997 CanLII 418 (ON CA), [1997] OJ No 1110, *per* Charron JA
   R v Robichaud, 2012 NBCA 87 (CanLII), [2012] NBJ No 175 (CA), *per* Bell JA
10. *R v Adams*, 1995 CanLII 56 (SCC), [1995] 4 SCR 707, *per* Sopinka J, at para 29
11. *R v Spackman*, 2012 ONCA 905 (CanLII), 295 CCC (3d) 177, *per* Watt JA
12. *R v Colpitts*, 2017 NSSC 22 (CanLII), *per* Coady J, at para 18
    R v Schneider, 2004 NSCA 99 (CanLII), 188 CCC (3d) 137, *per* Cromwell JA
13. *R v Cook*, 1997 CanLII 392 (SCC), [1997] 1 SCR 1113, *per* L'Heureux-Dubé J, at para 56 ("...nor do I think that a trial judge should ever order the Crown to produce a witness. If the Crown wished to adopt such a procedure in a given case, however, this would, of course, be within the legitimate exercise of its discretionary authority.")

Judicial Intervention

- Judicial Intervention During Trial

Limiting Evidence

The judge is required to listen to evidence that "advances the work of the court". He or she cannot be required to listen to irrelevant or pointless evidence.[1] The judge may even disallow the submission of non-relevant evidence.[2]

The judge has an obligation to track the admission of evidence to ensure that the record is restricted to what is admissible, and also that it is only used for the purpose for which it was admitted.[3]

The judge has the jurisdiction to edit the evidence, including written statements and oral testimony, as it is given. The judge may edit out portions of the evidence that is prejudicial or otherwise irrelevant or immaterial only so long as it does not distort the probative evidence.[4]

1. *R v Malmo-Levin*, 2003 SCC 74 (CanLII), [2003] 3 SCR 571, *per* Gonthier and Binnie JJ
2. *R v Schneider*, 2004 NSCA 99 (CanLII), 188 CCC (3d) 137, *per curiam*
3. *R v Morrisey*, 1995 CanLII 3498 (ON CA), 22 OR (3d) 514, *per* Doherty JA
   R v Smith, 2011 ONCA 564 (CanLII), 274 CCC (3d) 34, *per* Epstein JA, at para 59
4. *R v Dubois*, 1986 CanLII 4683 (ON CA), 27 CCC (3d) 325, *per* Morden JA
   R v Toten, 1993 CanLII 3427 (ON CA), 14 OR (3d) 225, *per* Doherty JA

Reserving Questions for Decision

Trial continuous

645
[*omitted (1), (2) and (3)*]

Questions reserved for decision

(4) A judge, in any case tried without a jury, may reserve final decision on any question raised at the trial, or any matter raised further to a pre-hearing conference, and the decision, when given, shall be deemed to have been given at the trial.

Questions reserved for decision in a trial with a jury

(5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) [*manner of drawing cards*] or (3.1) [*power to order calling out names on cards*] and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.
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

Exclusion Public from Hearing

- Excluding People From Court

Fact Finding

Self-Represented Accused

see Right to Self-Representation

Sitting Position of Accused

- Accused in Court

Independent Research of the Judge

A judge should not enter "into the fray" by doing self-directed research that puts them in a role of being "advocate, witness and judge".[1]

A judge can only rely on social studies, literature or scientific reports after they have been tested by the parties.[2]

It is not inappropriate to use academic articles merely to outline the generally understood features of evidence already reflected in the commentary and practice, adnd are not outside the general knowledge of judges.[3]

1. *R v Bornyk*, 2015 BCCA 28 (CanLII), 320 CCC (3d) 393, *per* Saunders JA (3:0) - judge did separate research on finger print evidence and performed own analysis
   R v BMS, 2016 NSCA 35 (CanLII), *per curiam* (3:0)
2. *BMS*, *ibid.*, at para 17
   R v SDP, 1995 CanLII 8923 (ON CA), 98 CCC (3d) 83, at paras 33, 36
   Cronk v Canadian General Insurance Co, 1995 CanLII 814 (ON CA), , 85 OAC 54, *per* Lacourciere JA, at paras 47, 49 to 51
   R v Désaulniers, 1994 CanLII 5909 (QC CA), 93 CCC (3d) 371, *per* Tourigny JA, at paras 21, 23-24, 26-27
3. *R v Hernandez-Lopez*, 2020 BCCA 12 (CanLII), 384 CCC (3d) 119, *per* Groberman JA
   R v JM, 2021 ONCA 150 (CanLII), 154 OR (3d) 401, *per* Brown JA, at paras 75 to 76

Judge Bound to Proceedings

> **Any justice may act before and after trial**
>
> 790 (1) Nothing in this Act or any other law shall be deemed to require a justice before whom proceedings are commenced or who issues process before or after the trial to be the justice or one of the justices before whom the trial is held.
>
> **Two or more justices**

(2) Where two or more justices have jurisdiction with respect to proceedings, they shall be present and act together at the trial, but one justice may thereafter do anything that is required or is authorized to be done in connection with the proceedings.
(3) and (4) [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 172]
R.S., 1985, c. C-46, s. 790; R.S., 1985, c. 27 (1st Supp.), s. 172.

– CCC

Loss of Judge During Proceedings

- Loss of Judge During Proceedings

Doctrine of Functus Officio

- Functus Officio

Communications with Counsel Out of Court

Ex parte communications (i.e. communications in absence of one of the parties) concerning an ongoing proceedings should be avoided. It is a rule that relates to the "public perception of fairness within the administration of justice". [1] It also preserves "confidence of the public in the impartiality of the judiciary and thereby in the administration of justice".[2]

Ex parte communications between judge and counsel concerning a case will "almost invariably raise a reasonable apprehension of bias".[3]

1. *R v Deleary*, 2007 CanLII 71720 (ON SC), 246 CCC (3d) 382, *per* Templeton J, at para 22
2. *R v Jones*, 1996 CanLII 8006 (ON SC), 107 CCC (3d) 517, *per* Then J
3. *Jones and Deleary*, *ibid.*

Duty to Make a Record

Under Part XX of the Code, there is a duty upon the court to keep a record of every arraignment and all proceedings after the arraignment.

Record of Proceedings
How recorded

624 (1) It is sufficient, in making up the record of a conviction or acquittal on an indictment, to copy the indictment and the plea that was pleaded, without a formal caption or heading.

Record of proceedings

(2) The court shall keep a record of every arraignment and of proceedings subsequent to arraignment.
R.S., c. C-34, s. 552.

– CCC

Endorsements on the Information

Where an election is made to supreme court, either judge alone or judge and jury, the court must endorse the information showing the "nature of the election" and whether anyone requested a preliminary inquiry.[1]

Where an election is made to provincial court before a provincial court judge, the court must endorse the information with that election.[2]

1. s. 536(4.1)

2. s. 536(3)

Maintaining Order

Preserving order in court

484 Every judge or provincial court judge has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.

R.S., 1985, c. C-46, s. 484; R.S., 1985, c. 27 (1st Supp.), s. 203.

– CCC

This section permits a judge to make an order of contempt for:

- persistent refusal of accused to stand on entry of the presiding judge.[1]
- the use of recording devices in the court against the order of the judge.[2]
- the high degree of intoxication of the accused appearing at trial[3]

This section *cannot* be used to order the mode of dress of counsel.[4]

Ordering Sheriff to Detain Accused

Flowing from the trial management powers, the trial judge as a right and responsibility to control proceedings and control the conduct of those before them. This includes directing the sheriffs to detain, handcuff or otherwise interfere with the accused's liberty where necessary.[5]

1. *R v Heer*, 1982 CanLII 786 (BC SC), 68 CCC (2d) 333, *per* Andrews J, at para 17
   Re Hawkins, 53 WWR 406, 53 DLR (2d) 453, [1966] 3 CCC 43 (sub nom. *R v Hume; Ex parte Hawkins*, 1965 CanLII 655 (BC SC), 3 CCC 43, *per* Branca J
2. *R v Barker (Burke)*, 1980 ABCA 75 (CanLII), 53 CCC (2d) 322, *per* Morrow JA (3:0)
3. *Heer*, *supra*
4. *Heer*, *supra*, at para 17
   Samson; Bardon v Carver Prov. J., 1974 CanLII 1292 (NS SC), (1974), 14 NSR (2d) 592, 29 CRNS 129, (sub nom. Re Samson and R.) 18 CCC (2d) 552, 50 DLR (3d) 365, *per* Hart J
5. *R v Millar*, 2019 BCCA 298 (CanLII), [2020] 1 CTC 182, *per* Fitch JA, at paras 68 to 70

Misc Powers

The judge does not have the power to order that counsel not communicate with a witness who is not in the middle of testimony. The rules of contempt of court and Professional Conduct are the only limitations on counsel's right to speak with witnesses and clients in court.[1]

Execution of Orders

Under s. 3.1 of the Code, any order made by any type of judge will be effective immediately unless otherwise stated:

> **Effect of judicial acts**
>
> 3.1 (1) Unless otherwise provided or ordered, anything done by a court, justice or judge is effective from the moment it is done, whether or not it is reduced to writing.
>
> **Clerk of the court**
>
> (2) Unless otherwise provided or ordered, if anything is done from the bench by a court, justice or judge and it is reduced to writing, the clerk of the court may sign the writing.
>
> 2002, c. 13, s. 2; 2019, c. 25, s. 3
>
> – CCC

1. *R v Arsenault*, 115 CCC 400 (NBCA)(*no CanLII links)

View

- Demonstrative Evidence#View

Superior Court Inherent Jurisdiction

All Courts that are created by s. 96 of the Constitution Act, 1867 are vested with "inherent jurisdiction" to make orders on matters that are not necessarily authorized by statute.[1]

The doctrine is of an "amorphous nature".[2] And can be used in "an apparently inexhaustible variety of circumstances and may be exercised in different ways".[3]

The doctrine is available as a "residual source of powers" that is available to a judge "whenever it is just or equitable to do so", which includes:[4]

- ensuring "the observance of due process of law";
- preventing "improper vexation or oppression";
- "do justice between the parties" and
- securing "a fair trial" between the parties.

It can be used to "supplement under-inclusive legislation or to otherwise fill gaps in appropriate circumstances".[5]

This jurisdiction may allow for the superior court to order the funding of costs associated with a matter before the provincial court where the following criteria are met:[6]

1. the litigation would be unable to proceed if the order were not made;
2. the claim to be adjudicated is prima facie meritorious;
3. the issues raised transcend the individual interest of the particular litigant, are of public importance, and have not been resolved in previous cases.

In considering these criteria, the justice must be satisifed that the matter is "sufficiently special that it would be contrary to the interests of justice to deny the advance costs application".[7]

Limitations

The doctrine may be limited by statute. It cannot be used in such a way that it contravenes any statutory provision.[8]

It is also limited by "institutional roles and capacities that emerge out of our constitutional framework and values".[9]

It generally should be exercised "sparingly and with caution", such as where "inferior tribunals are powerless to act act and it is essential to avoid an injustice that action be taken."[10]

Examples of Application

A publication ban was ordered by inherent jurisdiction.[11] A publication ban can also be removed by inherent jurisdiction.[12]

A superior court has limited inherent powers to reconsider its own orders, except where the legislation otherwise prohibits reconsideration.[13]

1. *R v Caron*, 2011 SCC 5 (CanLII), [2011] 1 SCR 78, *per* Binnie J (8:1), at para 21 (These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner".) *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (CanLII), [2013] 3 SCR 3, *per* Karakatsanis J (5:4), at para 18
2. *Ontario v CLAO*, *supra*, at para 22
3. *Caron*, *supra*, at para 29
4. *Ontario v CLAO*, *supra*, at para 20 *Parsons v Ontario*, 2015 ONCA 158 (CanLII), 64 CPC (7th) 227, 381 DLR (4th) 667, *per* Lauwers JA
5. *CR v Children's Aid Society of Hamilton*, 2004 CanLII 34407 (ONSC), 70 OR (3d) 618, *per* Czutrin J, at para 29
6. *Caron*, *supra*, at para 39
7. *Caron*, *supra*, at para 39
8. *Parsons*, *supra*, at para 71 *Ontario v CLAO*, *supra*, at para 23
9. *Parsons*, *supra*, at paras 72 to 73 *Ontario v CLAO*, *supra*, at para 24
10. *Caron*, *supra*, at para 30
11. *R v Church of Scientology of Toronto*, 1986 CarswellOnt 925 (S.C.)(*no CanLII links)
12. *R v Ireland*, 2005 CanLII 45583 (ON SC), 203 CCC (3d) 443, *per* Del Frate J
13. *R v Adams*, 1995 CanLII 56 (SCC), [1995] 4 SCR 707, *per* Sopinka J, at para 28 - in context of reconsidering a publication ban under s. 486

Doctrine of Mootness

Under the doctrine of "mootness" suggests that a court may decline to decide a case that "raises merely a hypothetical or abstract question" that "will not have the effect of resolving some controversy which affects or may affect the rights of the parties".[1]

1. *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342, *per* Sopinka J, at para 15 *R v Smith*, 2004 SCC 14 (CanLII), [2004] 1 SCR 385, *per* Binnie J

Civility and Professionalism

Tone of Reasons

The reasons for judgement should be "restrained and appropriate, clinical in tone and minimalist in approach".[1]

Sleeping

A judge found to be sleeping during trial will affect trial fairness and warrant a retrial.[2]

1. *Canada v Olumide*, 2017 FCA 42 (CanLII), [2018] 2 FCR 328, *per* Stratas JA, at para 39
2. *Cesan v The Queen*, (2008) 83 ALJR 43 (Australia High Court)

Validity of Orders

Validity of Forms (Part XXVIII)

> **Forms**
>
> 849 (1) The forms set out in this Part [*Pt. XXVIII – Miscellaneous (s. 841 to 849)*], varied to suit the case, or forms to the like effect are deemed to be good, valid and sufficient in the circumstances for which they are provided.
>
> **Seal not required**
>
> (2) No justice is required to attach or affix a seal to any writing or process that he or she is authorized to issue and in respect of which a form is provided by this Part [*Pt. XXVIII – Miscellaneous (s. 841 to 849)*].
>
> **Official languages**
>
> (3) Any pre-printed portions of a form set out in this Part, varied to suit the case, or of a form to the like effect shall be printed in both official languages.
> 2002, c. 13, s. 84.
> [*annotation(s) added*]
>
> – CCC

Judicial Decisions

When drafting a decision, judges are expected to articulate the contested elements of the offence and give each element "dedicated attention" in their analysis.[1]

Rulings and Orders

The decision to exercise discretion and require the reading of charges despite waiver, is not an order but is a ruling that can be reviewed on certiorari.[2]

1. *R v Bradley*, 2020 ONCA 206 (CanLII), *per curiam*, at para 9 ("It is always appreciated when trial judges articulate the contested elements of the offence and give each dedicated attention, but it is not an error to fail to do so where it is apparent that the required conclusions were made. That is the case here.")
2. *R v AA*, 2000 CanLII 22813 (ON SC), 150 CCC (3d) 564, *per* Hill J, at para 9 aff'd 170 CCC (3d) 449

Relationship with the Legislatures

A judge must act as a "constitutionally mandated referee".[1]

It is not courts that limit legislatures, rather it is the constitution that limits them by means of judicial interpretation.[2]

It is the role of the legislature to assume the "responsibility of law reform".[3]

1. *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 (CanLII), [2004] 3 SCR 381, *per* Binnie J, at para 105
2. *Vriend v Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493, *per* Cory J, at para 56 ("...it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures.")
3. *Watkins v. Olafson*, 1989 CanLII 36 (SCC), [1989] 2 SCR 750, *per* McLachlin J at 583-4 (DLR) ("Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.")

Judicial Neutrality and Bias

- Judicial Neutrality and Bias

Sufficiency of Reasons for Judgement

- Sufficiency of Reasons

Misc Authority of Youth Court Justice

- Miscellaneous Authority of a Youth Court Justice

Misc Other Authorities

Provincial Court Judges

> **Officials with powers of two justices**
>
> 483 Every judge or provincial court judge authorized by the law of the province in which he is appointed to do anything that is required to be done by two or more justices may do alone anything that this Act or any other Act of Parliament authorizes two or more justices to do.
> R.S., 1985, c. C-46, s. 483; R.S., 1985, c. 27 (1st Supp.), s. 203.
>
> – CCC

Maintaining Records

Application of Parts XVI, XVIII, XX and XXIII

572 The provisions of Part XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], the provisions of Part XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] relating to transmission of the record by a provincial court judge where he holds a preliminary inquiry, and the provisions of Parts XX [*Pt. XX – Procedure in Jury Trials and General Provisions (s. 574 to 672)*] and XXIII [*Pt. XXIII – Sentencing (s. 716 to 751.1)*], in so far as they are not inconsistent with this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], apply, with such modifications as the circumstances require, to proceedings under this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*].
R.S., 1985, c. C-46, s. 572; R.S., 1985, c. 27 (1st Supp.), s. 203.
[*annotation(s) added*]

– CCC

Under Part XX relating to jury trials:

Taking evidence

646 On the trial of an accused for an indictable offence, the evidence of the witnesses for the prosecutor and the accused and the addresses of the prosecutor and the accused or counsel for the accused by way of summing up shall be taken in accordance with the provisions of Part XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*], other than subsections 540(7) to (9) [*adducing hearsay and other credible and trustworthy evidence*], relating to the taking of evidence at preliminary inquiries.
R.S., 1985, c. C-46, s. 646; 2002, c. 13, s. 59.
[*annotation(s) added*]

– CCC

See Also

- Judicial Notice
- Trial Verdicts
- Juries
- Criminal Code and Related Definitions#Judges

Other Parties

- Role of the Accused
- Role of the Defence Counsel
- Role of the Victim and Third Parties
- Role of Law Enforcement
- Role of the Crown

Loss of Judge During Proceedings

This page was last substantively updated or reviewed *January 2021*. (Rev. # 79483)

< Procedure and Practice < Trials

General Principles

At common law, once a judge receives an information he remains seized with the charge until its conclusion unless it is waived by the judge to another judge.[1]

Section 667.1 was enacted to override the common law and permit other judge's from hearing matters up until the point where they have commenced to hear any evidence.[2]

Section 667.1 states:

> **Jurisdiction**
>
> 669.1 (1) Where any judge, court or provincial court judge by whom or which the plea of the accused or defendant to an offence was taken has not commenced to hear evidence, any judge, court or provincial court judge having jurisdiction to try the accused or defendant has jurisdiction for the purpose of the hearing and adjudication.
>
> **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., 1985, c. 27 (1st Supp.), s. 137.

– CCC

Once a judge begins hearing evidence and makes a ruling on it, the judge becomes seized with the matter and no other judge can take over.[3]

Guilty Plea

Once the facts of the case are read to the judge to determine whether to accept the plea, the judge becomes seized with the case.[4]

Absent an exception under s. 667.2, once the judge adjudicates the acceptance of a guilty plea, then the judge is seized with the matter.[5]

1. *R v Cataract*, 1994 CanLII 4616 (SK CA), 93 CCC (3d) 483, *per* Bayda CJ ("At common law, a justice or magistrate who received an information or complaint was possessed (seized) with jurisdiction over the charge unless he expressly waived his jurisdiction to another judicial official.")
2. See Cataract
   By virtue of s. 795 the provision applies to summary offences
3. *R v Curtis*, 1991 CanLII 11732 (ONSC), 66 CCC (3d) 156, *per* Ewanshuk J
4. *Cataract*, *supra*
5. *Cataract*, *supra*

Loss of Trial Judge While Seized

Where a judge falls ill, they remain seized with the matter unless there is unreasonable delay that results.[1]

Where judge illness is the cause for delay, the Crown has a responsibility to consider whether to apply to have the seized judge replaced.[2]

When a preliminary inquiry judge becomes unable to continue, s. 547.1 directs the following options:

Inability of justice to continue

547.1 Where a justice acting under this Part has commenced to take evidence and dies or is unable to continue for any reason, another justice may

> (a) continue taking the evidence at the point at which the interruption in the taking of the evidence occurred, where the evidence was recorded pursuant to section 540 [*taking evidence by preliminary inquiry judge*] and is available; or
> (b) commence taking the evidence as if no evidence had been taken, where no evidence was recorded pursuant to section 540 [*taking evidence by preliminary inquiry judge*] or where the evidence is not available.

R.S., 1985, c. 27 (1st Supp.), s. 100.
[*annotation(s) added*]

Continuation of proceedings

669.2 (1) Subject to this section, where an accused or a defendant is being tried by

(a) a judge or provincial court judge,
(b) a justice or other person who is, or is a member of, a summary conviction court, or
(c) a court composed of a judge and jury,

as the case may be, and the judge, provincial court judge, justice or other person dies or is for any reason unable to continue, the proceedings may be continued before another judge, provincial court judge, justice or other person, as the case may be, who has jurisdiction to try the accused or defendant.

Where adjudication is made

(2) Where a verdict was rendered by a jury or an adjudication was made by a judge, provincial court judge, justice or other person before whom the trial was commenced, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, impose the punishment or make the order that is authorized by law in the circumstances.

Where no adjudication is made

(3) Subject to subsections (4) [*continuation if judge or justice dies – If no adjudication made (jury trials)*] and (5) [*continuation if judge or justice dies – continuing with jury trial*], where the trial was commenced but no adjudication was made or verdict rendered, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, commence the trial again as if no evidence had been taken.

Where no adjudication is made - jury trials

(4) Where a trial that is before a court composed of a judge and a jury was commenced but no adjudication was made or verdict rendered, the judge before whom the proceedings are continued may, without further election by an accused,

(a) continue the trial; or
(b) commence the trial again as if no evidence had been taken.

Where trial continued

(5) Where a trial is continued under paragraph (4)(a) [*x*], any evidence that was adduced before a judge referred to in paragraph (1)(c) [*continuation if judge or justice dies – jury trial*] is deemed to have been adduced before the judge before whom the trial is continued but, where the prosecutor and the accused so agree, any part of that

> evidence may be adduced again before the judge before whom the trial is continued. R.S., 1985, c. 27 (1st Supp.), s. 137; 1994, c. 44, s. 65; 2011, c. 16, s. 15.
> [*annotation(s) added*]
>
> – CCC

"Unable to Continue"

It is an open list of circumstances that are captured within the meaning of reasons for being "unable to continue" within the meaning of s. 669.2.[3] It can include "illness", "absence" or "appointment".[4] An "appointment" can include appointment to the court of appeal.[5]

Transcript Evidence or Agreed Statement of Fact

Depending on the circumstances, it is permissible to continue a trial with a new judge under s. 669.2 by admitting a transcript of the previous trial by consent.[6] However, there will be circumstances where it is necessary for the judge to hear and see the evidence such as where there is contradictory evidence between the complainant and accused. In such cases, the court should not rely on transcripts even with the consent of parties.[7]

"as if no evidence... has been taken"

The requirement to recommence as if no evidence has been taken only applies to a trial without a jury.[8] Only a judge acting with a jury has the ability to "complete the trial" within the meaning of s. 669.2(3).[9]

1. *R v Brown*, 2012 ONSC 822 (CanLII), *per* Hockin J
2. *R v MacDougall*, 1998 CanLII 763 (SCC), [1998] 3 SCR 45, *per* McLachlin J
3. *R v Le(TD)*, 2011 MBCA 83 (CanLII), 275 CCC (3d) 427, *per* Scott CJ, at para 25
   R v Leduc, 2003 CanLII 52161 (ON CA), 176 CCC (3d) 321, *per* Laskin JA, at para 66
4. *Le(TD)*, *ibid.*, at para 25
   Leduc, *ibid.*, at para 66
5. *Le(TD)*, *ibid.*, at para 29
6. *R v AA*, 2012 ONSC 3270 (CanLII), *per* Kane J, at para 78 ("A trial judge may, depending on the circumstances, proceed with a criminal trial on evidence introduced on consent, including transcripts from a previous trial or an agreed statement of evidence. Section 669.2(3) does not prohibit that.")
7. *AA*, *ibid.*, at para 83 ("The trial judge commented that he would not be able to see and hear the testimony in determining the credibility issue. He asked and obtained consent of counsel to this limitation. That consent, which should not have been given by either counsel on these facts, does not resolve the issue whether the court should have conducted this trial without testimony.")
   Gauthier c. R., 2020 QCCA 751 (CanLII), *per* Pelletier JA, at paras 58 to 59
8. *Gauthier*, *ibid.*, at paras 55 to 56
9. *Gauthier*, *supra*, at para 64

Appointment to Different Court

> **Jurisdiction when appointment to another court**

669.3 Where a court composed of a judge and a jury, a judge or a provincial court judge is conducting a trial and the judge or provincial court judge is appointed to another court, he or she continues to have jurisdiction in respect of the trial until its completion.
1994, c. 44, s. 66.

– CCC

Appointment to the Court of Appeal

There appears to be no established protocol to deal with matters before a trial judge who is appointed to the Court Appeal.[1]

1. *R v Le(TD)*, 2011 MBCA 83 (CanLII), 275 CCC (3d) 427, *per* Scott CJ, at para 26 ("A review of cases where judges have been appointed to higher courts indicates that there is no established procedure in such circumstances")

Juries

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79483)

< Procedure and Practice < Trials < Juries

General Principles

The Canadian jury system has been described as one of the "most familiar symbol and manifestation of the Rule of Law in this country".[1]

The jury brings to the system the "values and insights of ordinary citizens" as well as their "common sense".[2]

A jury's task is not to "reconstruct what happened" but rather to determine if the burden of proof sufficient to make out a conviction has been met.[3]

Courts must ensure that nothing is put before a jury in the form of evidence or argument that would play on any emotions or unfair reasoning, including inflamatory remarks.[4]

1. *R v Barton*, 2017 ABCA 216 (CanLII), 354 CCC (3d) 245, *per curiam*, at para 1, rev'd on other grounds 2019 SCC 33
2. *R v Cabrera*, 2019 ABCA 184 (CanLII), 442 DLR (4th) 368, *per* Fraser CJ (2:1), at para 1
3. *R v Pittiman*, 2006 SCC 9 (CanLII), [2006] 1 SCR 381(V), *per* Charron J (5:0)
4. *R v Roberts*, 1973 CanLII 1487 (ON CA), CCC (2d) 368, *per* Jessup JA, at p. 370 ("It has been said on many occasions that the paramount duty of the Crown prosecutor is to see that justice is done, not to strive for a conviction. Certainly, he ought to refrain from language which is likely to inflame the jury and to divert the jury's attention from the real issue that they have to decide.")
R v Vallieres, 1969 CanLII 1000 (QC CA), [1970] 4 CCC 69, *per* Hyde JA, at p. 82 ("[I]n a trial before a jury, no evidence can be presented, and no statement may be made by

counsel for the Crown, which might induce a jury to base a conviction upon psychological or passionate grounds which might affect the most objective and just treatment of the accused, in accordance with cold reason...")

Right to a Jury Trial

Section 11(f) of the Charter provides certain rights to trial by jury:

> 11. Any person charged with an offence has the right ...
>
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
>
> – CCRF

An offence with a maximum penalty of 5 years less a day cannot be considered a "more severe punishment" due to the existence of some "collateral negative consequences" to the period of incarceration.[1]

Where an offence violates s. 11(f) the appropriate remedy would not be an entitlement to a jury trial, but rather a "reading down" of the offence maximum penalties.[2]

Similarly, s. 471 provides a presumption of a right to a jury in all indictable offences:

> **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

Jurors bring their own life experience's to their task.[3]

A prospective juror is presumed capable of "setting aside their views and prejudices and acting impartially between the prosecution and the accused upon proper instruction by the trial judge on their duties."[4]

Members of the jury are to come to a unanimous conclusion on the verdict. They do not have to agree on the means or path to that verdict.[5]

1. *R v Peers*, 2015 ABCA 407 (CanLII), 330 CCC (3d) 175, *per curiam* (2:1), at para 15 - the court qualifies by suggesting collateral punishment such as "corporal punishment,

banishment from the community, forced labour, or revocation of citizenship" may be enough. (aff'd at 2017 SCC 13 (CanLII), *per curiam*)
2. *Peers*, *ibid.*, at para 19
3. See *R v Pan*, 2001 SCC 42 (CanLII), 330 CCC (3d) 175, *per* Arbour J (9:0), at para 61
4. *R v Find*, 2001 SCC 32 (CanLII), [2001] 1 SCR 863, *per* McLachlin CJ, at para 26
5. *R v Thatcher*, 1987 CanLII 53 (SCC), [1987] 1 SCR 652, *per* Dickson CJ

Specific Offences

Offences under s. 469, including first or second degree murder, shall be tried by judge and 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 .
>
> **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

Topics

- Jury Selection
  - Juror Eligibility
  - Right to a Representative Jury
  - Selecting Jurors From Panel
    - Selecting Additional and Alternate Jurors
  - Challenge to Jury Panel

- Peremptory Challenge
- Challenge for Cause

- Jury Procedure
- Jury Instructions
  - Jury Deliberations
- Discharging a Juror
- Special Issues Relating to Jurors

See Also

- See Guilty Plea in Jury Trials
- Defence Election

Juror Eligibility

< Procedure and Practice < Trials < Juries < Jury Selection

General Principles

Under s. 626, a "qualified" juror is defined as a person who "according to ... the laws of a province" is qualified and who is "summoned as a juror" in accordance with the governing provincial law:

> **Qualification of jurors**
>
> 626 (1) A person who is qualified as a juror according to, and summoned as a juror in accordance with, the laws of a province is qualified to serve as a juror in criminal proceedings in that province.
>
> **No disqualification based on sex**
>
> (2) Notwithstanding any law of a province referred to in subsection (1) [*qualification of jurors*], no person may be disqualified, exempted or excused from serving as a juror in criminal proceedings on the grounds of his or her sex.
> R.S., 1985, c. C-46, s. 626; R.S., 1985, c. 27 (1st Supp.), s. 128.
> [*annotation(s) added*]
>
> – CCC

Provincial Rules

Each province will have a Juries Act, or equivalent which sets out the eligibility and the process for summoning them to court.[1]

1. NL: Jury Act, 1991, c 16
   NB: Jury Act, RSNB 2016, c 103
   NS: Juries Act, SNS 1998, c 16
   ON: Juries Act, RSO 1990, c J.3
   MB: Jury Act, CCSM c J30
   SK: Jury Act, SS 1998 c J-4.2
   AB: Jury Act, RSA 2000, c J-3
   BC: Jury Act, RSBC 1996, c 242
   NWT: Jury Act, RSNWT 1998, c J-2
   PEI: Jury Act, RSPEI 1998, c J-5.1

Jury Selection

< Procedure and Practice < Trials < Juries < Jury Selection

General Principles

Every person charged with a crime has a right to a fair trial before an impartial tribunal. This right includes the right to an impartial jury.[1]

The right to a jury is protected by s. 1(d) which guarantees the right to be tried by an "independent and impartial tribunal" and s. 11(f) which guarantees the right to a jury that is "impartial and representative".[2]

A jury selected to decide a case as the trier-of-fact is formally known as a "petit jury". It usually consists of 12 persons. The petit jury is selected at random from a "jury panel" who is a group of several hundred people selected from the "jury roll".[3]

Any legal errors in jury selection will require a new trial.[4] This includes errors of law by the judge or unreasonable exercise of discretion in managing the selection process.[5]

1. *R v Sherratt*, 1991 CanLII 86 (SCC), [1991] 1 SCR 509, *per* L'Heureux-Dube J, at para 57
   R v Douse, 2009 CanLII 34990 (ON SC), 246 CCC (3d) 227, *per* Durno J, at para 40
2. *Sherratt*, *supra*, at para 35
3. *R v Pan*, 2014 ONSC 1393 (CanLII), *per* Boswell J, at paras 34 to 37
4. *R v Barrow*, 1987 CanLII 11 (SCC), [1987] 2 SCR 694, *per curiam*, at p. 714
5. *R v Barnes*, 1999 CanLII 3782 (ON CA), 138 CCC (3d) 500, *per* Moldaver JA, at para 30

Topics

Selecting Jurors From Panel

This page was last substantively updated or reviewed *August 2021*. (Rev. # 79483)

General Principles

A jury panel consists of all persons summoned to attend court for the purpose of being evaluated as a potential member of a jury that will hear a trial.

The process of selecting jurors typically begins with the trial judge canvasing to panel for those with exemptions that would exclude them from participating in the jury trial.

Exemptions

The exemption process has two phases. First, there is the *general exemptions* wherein the judge considers all requests for exemption based on personal circumstances, including ineligibility based on profession, criminal record, lack of citizenship, or undue hardship. Second, there is the *specific exemptions* wherein the judge can exempt persons due to personal connection with parties or witnesses in the proceedings.

Procedure

The selection process is governed by each province's *Juries Act* in addition to s. 631 to 644 of the Code.[1]

Jury List and Jury Panel

The "jury roll" (or "jury list") is prepared either by the sheriff's office or the regional Court's prothonotary based on persons resident in a certain geographical region.[2] From the List a jury panel is randomly created.[3]

Selection Judge Not Necessarily Trial Judge

The judge presiding over a trial does not necessarily have to be the same judge who presides over the selection:

> **Presiding judge**
>
> 626.1 The judge before whom an accused is tried may be either the judge who presided over matters pertaining to the selection of a jury before the commencement of a trial or another judge of the same court.
> 2002, c. 13, s. 51.
>
> – CCC

Background Check on Jury Members

The Crown may ask police to do a criminal record check on potential jurors. However, any information that the Crown learns must be disclosed to the defence.[4]

1. e.g. *R v Pan*, 2014 ONSC 1393 (CanLII), *per* Boswell J, at para 30
   Jury Act, RSBC 1996, c 242
   Juries Act, SNS 1998, c 16
   Jury Act, 1991, SNL 1991, c 16
   Jury Act, RSNB 2016, c 103
   Jury Act, RSA 2000, c J-3
   The Jury Act, 1998, SS 1998, c J-4.2
   Juries Act, RSO 1990, c J.3
   Jury Act, RSNWT (Nu) 1988, c J-2
   Jury Act, RSPEI 1988, c J-5.1
   Jury Act, RSY 2002, c 129
2. *Pan*, *ibid.*, at para 30
3. *Pan*, *ibid.*, at para 34
4. *R v Yumnu*, 2012 SCC 73 (CanLII), [2012] 3 SCR 777, *per* Moldaver J

Exemptions

General Exemptions

The list of general exemptions are found in the Juries Act. They will typically include:

- those who hold political positions such as members of parliament, provincial legislature or senators.
- justice system participants including judges, lawyer, court staff and police officers.

Specific Exemptions

Persons related to or associated with persons participating in the proceedings, including accused, counsel, judge or witnesses.

Selecting Jurors From the Panel

> **Names of jurors on cards**
>
> 631 (1) The name of each juror on a panel of jurors that has been returned, his number on the panel and his address shall be written on a separate card, and all the cards shall, as far as possible, be of equal size.
>
> **To be placed in box**
>
> (2) The sheriff or other officer who returns the panel shall deliver the cards referred to in subsection (1) [*manner of placing juror names on cards*] to the clerk of the court who shall cause them to be placed together in a box to be provided for the purpose and to be thoroughly shaken together.
> [*omitted (2.1) and (2.2)*]
>
> **Cards to be drawn by clerk of court**
>
> (3) If the array of jurors is not challenged or the array of jurors is challenged but the judge does not direct a new panel to be returned, the clerk of the court shall, in open court, draw out one after another the cards referred to in subsection (1) [*manner of placing juror names on cards*], call out the number on each card as it is drawn and confirm with the person who responds that he or she is the person whose name

appears on the card drawn, until the number of persons who have answered is, in the opinion of the judge, sufficient to provide a full jury and any alternate jurors ordered by the judge after allowing for orders to excuse, challenges and directions to stand by.

Exception

(3.1) The court, or a judge of the court, before which the jury trial is to be held may, if the court or judge is satisfied that it is necessary for the proper administration of justice, order the clerk of the court to call out the name and the number on each card.

Juror and other persons to be sworn

(4) The clerk of the court shall swear each member of the jury, and any alternate jurors, in the order in which his or her card was drawn and shall swear any other person providing technical, personal, interpretative or other support services to a juror with a physical disability.

Drawing additional cards if necessary

(5) If the number of persons who answer under subsection (3) [*manner of drawing cards*] or (3.1) [*power to order calling out names on cards*] is not sufficient to provide a full jury and the number of alternate jurors ordered by the judge, the clerk of the court shall proceed in accordance with subsections (3) [*manner of drawing cards*], (3.1) [*power to order calling out names on cards*] and (4) [*power to swear in jury and support persons*] until 12 jurors — or 13 or 14 jurors, as the case may be, if the judge makes an order under subsection (2.2) [*power to swear more than 12 jurors*] — and any alternate jurors are sworn.
[*omitted (6)*]
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.
[*annotation(s) added*]

– CCC

Section 2 defines "clerk of the court".

Section 631(6) imposes a ban on publication of information that tends to identify jurors.[1]

1. see Statutory Publication Ban on Court Proceedings

Excusing Jurors During Selection

Excusing jurors

632. The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) [*manner of drawing cards*] or (3.1) [*power to order calling out*

names on cards] or any challenge has been made in relation to the juror, for reasons of

> (a) personal interest in the matter to be tried;
> (b) relationship with the judge presiding over the jury selection process, the judge before whom the accused is to be tried, the prosecutor, the accused, the counsel for the accused or a prospective witness; or
> (c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

R.S., 1985, c. C-46, s. 632; 1992, c. 41, s. 2; 2001, c. 32, s. 39; 2002, c. 13, s. 53. [*annotation(s) added*]

– CCC

The judge must vet the jury for hardship exemptions before beginning with peremptory challenges or challenges for cause. To do otherwise effectively reduces the number of challenges that each side may have.[1]

A judge may exclude a potential juror on the basis that they are not vaccinated from COVID-19.[2]

1. *R v Douglas*, 2002 CanLII 38799 (ON CA), 170 CCC (3d) 126, *per* Moldaver JA
2. *R v Frampton*, 2021 ONSC 5733 (CanLII), *per* Phillips J

Summoning Potential Jurors When Panel is Exhausted

Where the Panel is Exhausted

Summoning other jurors when panel exhausted

642 (1) If a full jury and any alternate jurors considered advisable cannot be provided notwithstanding that the relevant provisions of this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] have been complied with, the court may, at the request of the prosecutor, order the sheriff or other proper officer to summon without delay as many persons, whether qualified jurors or not, as the court directs for the purpose of providing a full jury and alternate jurors.

Orally

(2) Jurors may be summoned under subsection (1) [*summoning other jurors when panel exhausted – authority*] by word of mouth, if necessary.

Adding names to panel

(3) The names of the persons who are summoned under this section shall be added to the general panel for the purposes of the trial, and the same proceedings shall be taken with respect to calling and challenging those persons, excusing them and

directing them to stand by as are provided in this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] with respect to the persons named in the original panel.
R.S., 1985, c. C-46, s. 642; 1992, c. 41, s. 4; 2002, c. 13, s. 56.
[*annotation(s) added*]

– CCC

Selecting Additional and Alternate Jurors

< Procedure and Practice < Trials < Juries

General Principles

It is generally accepted that only 12 jurors can decide a case. However, more than 12 jurors can hear a case.

631
[*omitted (1) and (2)*]

Alternate jurors

(2.1) If the judge considers it advisable in the interests of justice to have one or two alternate jurors, the judge shall so order before the clerk of the court draws out the cards under subsection (3) [*manner of drawing cards*] or (3.1) [*power to order calling out names on cards*].

Additional jurors

(2.2) If the judge considers it advisable in the interests of justice, he or she may order that 13 or 14 jurors, instead of 12, be sworn in accordance with this Part [*Pt. XX – Procedure in Jury Trials and General Provisions (s. 574 to 672)*] before the clerk of the court draws out the cards under subsection (3) [*manner of drawing cards*] or (3.1) [*power to order calling out names on cards*].
[*omitted (3), (3.1), (4), (5) and (6)*]
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.
[*annotation(s) added*]

– CCC

Trying of issues of indictment by jury

652.1 (1) After the charge to the jury, the jury shall retire to try the issues of the indictment.

Reduction of number of jurors to 12

(2) However, if there are more than 12 jurors remaining, the judge shall identify the 12 jurors who are to retire to consider the verdict by having the number of each juror written on a card that is of equal size, by causing the cards to be placed together in a box that is to be thoroughly shaken together and by drawing one card if 13 jurors remain or two cards if 14 jurors remain. The judge shall then discharge any juror whose number is drawn.
2011, c. 16, s. 13.

– CCC

Selection of Alternate Jurors

Substitution of alternate jurors

642.1 (1) Alternate jurors shall attend at the commencement of the presentation of the evidence on the merits and, if there is not a full jury present, shall replace any absent juror, in the order in which their cards were drawn under subsection 631(3) [*manner of drawing cards*].

Excusing of alternate jurors

(2) An alternate juror who is not required as a substitute shall be excused.
2002, c. 13, s. 57; 2011, c. 16, s. 11.
[*annotation(s) added*]

– CCC

Right to a Representative Jury

< Procedure and Practice < Trials < Juries < Jury Selection

General Principles

The right to a "representative jury" is found within s. 11(d) [*right to fair and public trial*] and 11(f) [*right to trial by jury*] of the Charter.[1]

"Representativeness" relates to the "process used to compile the jury roll" (ie. the list of persons from whom the jury is selected).[2]

Juries are to consist of "a representative cross-section of Canadian society". [3] The must be "honestly and fairly chosen".[4] As such, an accused has no right to a jury roll of a "particular composition", including particular number of members of a certain race or ethnicity.[5]

1. *R v Kokopenace*, 2015 SCC 28 (CanLII), [2015] 2 SCR 398, *per* Moldaver J, at para 47
2. *Kokopenace*, *ibid.*, at para 40
3. *R v Ironeagle*, 2012 SKQB 324 (CanLII), 403 Sask R 90, *per* Gerein J, at para 5
   Kokopenace, *supra*, at para 39
   R v Sherratt, 1991 CanLII 86 (SCC), [1991] 1 SCR 509, *per* L'Heureux-Dubé J, at p. 524
4. *Kokopenace*, *supra*, at para 39
   Sherratt, *supra*, at p. 524
5. *Kokopenace*, *supra*, at para 39
   R v Church of Scientology, 1997 CanLII 16226 (ON CA), 33 OR (3d) 65, *per* Rosenberg JA, at pp. 120-21 ("[w]hat is required is a process that provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury's verdict, and contributes to the community's support for the criminal justice system")
   R v Laws, 1998 CanLII 7157 (ON CA), 41 OR (3d) 499, *per curiam*, at pp. 517-18
   R v Kent, 1986 CanLII 4745 (MB CA), 27 CCC (3d) 405, *per* Twaddle JA and Matas JA, at p. 421 ("An accused has no right to demand that members of his race be included on the jury. To so interpret the Charter would run counter to Canada's multicultural and multiracial heritage and the right of every person to serve as a juror")
   R v Bradley (No. 2) (1973), 23 CRNS 39 (ON SC)(*no CanLII links) , at pp. 40-41
   Ironeagle, *supra*, at para 5

Selection Process

The jury selection process relies on the randomness of selection to achieve a fair sampling of jurors.[1] Additional efforts to change the make-up of the jury may be considered inappropriate.[2]

Representativeness is an entitlement that is essential at the "polling" and "panel" level of jury selection, but not so at the final stage of the final selection of the members of the jury.[3]

A representative jury is important as it "contributes to a sense of confidence that the jury will be fair and impartial".[4] A representative jury has the effect of bringing a diversity of backgrounds and experiences, in addition to cultural sensitivities.[5]

Certain characteristics such as the type of employer the person has are immaterial and have no bearing on the right to representativeness.[6]

A representative jury roll is achieved by ensuring that:

1. the "draw[s] from a broad cross-section of society" in order to capture as many eligible persons as possible.[7]
2. the jurors are selected from the role in a random fashion.[8]

3. the delivery of notices to those who have been randomly selected to attend court to be considered as someone who will sit on the jury.[9]

1. *R v Kokopenace*, 2015 SCC 28 (CanLII), [2015] 2 SCR 398, *per* Moldaver J, at para 88
   R v Rice, 2016 QCCS 4507 (CanLII), *per* Brunton J, at para 13
2. *Rice*, *ibid.*, at para 13
3. *R v Pan*, 2014 ONSC 1393 (CanLII), *per* Boswell J, at paras 34 to 37
4. *Pan*, *supra*, at para 31
   Kokopenace, *supra* (ONCA), at para 26
5. *Pan*, *supra*, at para 31
   R v Church of Scientology of Toronto, 1997 CanLII 16226 (ON CA), [1997] OJ No 1548, *per* Rosenberg JA, at para 151
6. *Pan*, *supra*, at para 54
7. *Kokopenace*, *supra*, at para 41
8. *Kokopenace*, *supra*, at para 42
9. *Kokopenace*, *supra*, at para 45

See Also

- Challenge to Jury Panel

Peremptory Challenge (Prior to September 19, 2019)

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General Principles

Section 269 of Bill C-75 Repealed s. 634 on September 19, 2019 removing pre-emptory challenges
NOTE: *R v Chouhan*, 2021 SCC 26 (CanLII) found that the provisions were retrospective and applies to proceeding commenced before the amendment date of September 19, 2019

Peremptory challenges refer to the ability for each party to veto a selected juror without the obligation of giving reasons for it.

> **Peremptory challenges**
>
> 634 (1) A juror may be challenged peremptorily whether or not the juror has been challenged for cause pursuant to section 638 [*challenge for cause – grounds*].
>
> **Maximum number**
>
> (2) Subject to subsections (2.1) to (4) , the prosecutor and the accused are each entitled to
>
> (a) twenty peremptory challenges, where the accused is charged with high treason or first degree murder;
> (b) twelve peremptory challenges, where the accused is charged with an offence, other than an offence mentioned in paragraph (a), for which the accused may be sentenced to imprisonment for a term exceeding five years; or

(c) four peremptory challenges, where the accused is charged with an offence that is not referred to in paragraph (a) or (b).

If 13 or 14 jurors

(2.01) If the judge orders under subsection 631(2.2) [*power to swear more than 12 jurors*] that 13 or 14 jurors be sworn in accordance with this Part, the total number of peremptory challenges that the prosecutor and the accused are each entitled to is increased by one in the case of 13 jurors or two in the case of 14 jurors.

If alternate jurors

(2.1) If the judge makes an order for alternate jurors, the total number of peremptory challenges that the prosecutor and the accused are each entitled to is increased by one for each alternate juror.

Supplemental peremptory challenges

(2.2) For the purposes of replacing jurors under subsection 644(1.1) [*select replacement juror after discharge*], the prosecutor and the accused are each entitled to one peremptory challenge for each juror to be replaced.

Where there are multiple counts

(3) Where two or more counts in an indictment are to be tried together, the prosecutor and the accused are each entitled only to the number of peremptory challenges provided in respect of the count for which the greatest number of peremptory challenges is available.

Where there are joint trials

(4) Where two or more accused are to be tried together,

(a) each accused is entitled to the number of peremptory challenges to which the accused would be entitled if tried alone; and
(b) the prosecutor is entitled to the total number of peremptory challenges available to all the accused.

R.S., 1985, c. C-46, s. 634; 1992, c. 41, s. 2; 2002, c. 13, s. 54; 2008, c. 18, s. 25; 2011, c. 16, s. 8.
[*annotation(s) added*]

– CCC

The number of challenges will vary on the type of charge before court. Under s. 634(2), the standard number of challenges consist of:

Number of Peremptory Challenges	Offence(s)	Code
20	high treason or first degree murder	s. 634(2)(a)
12	offences with a maximum penalty greater than 5 years[1]	s. 634(2)(b)
4	all Jury eligible offences with a penalty of 5 years or less[2]	s. 634(2)(c)

Abuse of Process

An attempt by the Crown to strategically stand-aside all male jury candidates can be held as valid and not an abuse of process.[3]

Discretion to Give Additional Preemptions

A judge has no discretion to award any side additional peremptions due to a selected juror needing to be replaced during the selection process.[4]

Constitutionality

The limitation of 12 jurors for a trial on second-degree murder does not violate s. 7 of the Charter due to inequality with the number of peremptions available on a first degree murder trial.[5]

Retrospectivity

The removal of 634 is not strictly procedural and so applies only prospectively.[6]

The right to peremptory challenges remains vested in those cases where, before the date of amendment, the accused is charged with an exclusive jurisdiction offence, a direct indictment has been filed, or where there is an election for trial by judge and jury.[7]

1. see also Offences by Penalty
2. List of Straight Indictable Offences
   List of Hybrid Offences
3. see *R v Pizzacalla (CA)*, 1991 CanLII 7070 (ON CA), 69 CCC (3d) 115, *per* Morden ACJ
4. *R v Brown*, 2005 CanLII 3939 (ON CA), 194 CCC (3d) 76, *per* Simmons JA
5. *R v Oliver*, 2005 CanLII 3582 (ON CA), 194 CCC (3d) 92, *per* Doherty JA
6. *R v Chouhan*, 2020 ONCA 40 (CanLII), 384 CCC (3d) 215, *per* Watt JA
7. *Chouhan*, *ibid.*

Jury Vetting by Crown or Defence

Background checks can be done by the police to ensure eligibility under the Criminal Code and provincial jury Acts. If information is found such as a criminal record, it must be disclosed to the defence.[1]

There is a limited ability for the police to give opinion on jury selection that does not need to be disclosed due to the lack of reliability of the opinion and underlying information such as community reputation.[2]

Defence must disclose any information they know that may indicate a juror is partial or ineligible.[3]

1. *R v Yumnu*, 2012 SCC 73 (CanLII), [2012] 3 SCR 777, *per* Moldaver J
   R v Emms, 2012 SCC 74 (CanLII), [2012] 3 SCR 810, *per* Moldaver J
   R v Davey, 2012 SCC 75 (CanLII), [2012] 3 SCR 828, *per* Karakatsanis J
2. *Yumnu*, *supra*
   Emms, *supra*
   Davey, *supra*

3. *Yumnu*, *supra*, at paras 66 to 67

Challenge for Cause

< Procedure and Practice < Trials < Juries

General Principles

Presumption of Impartiality

Jurors are presumed by their oaths to be impartial judges.[1]

However, where the potential bias is clear and obvious, or where it can be shown that there is a reason to suspect that members of a jury may possess bias that cannot be set aside, then the jury can be screened by a challenge for cause.[2]

1. *R v Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128, *per* McLachlin J, at para 13
   R v Spence, 2005 SCC 71 (CanLII), [2005] 3 SCR 458, *per* Binnie J, at paras 21 to 22
   R v AK, 1999 CanLII 3793 (ON CA), DLR (4th) 665, *per* Charron JA, at para 52

2. *R v Find*, 2001 SCC 32 (CanLII), [2001] 1 SCR 863, *per* McLachlin CJ, at para 26
   R v Sherratt, 1991 CanLII 86 (SCC), [1991] 1 SCR 509, *per* L'Heureux-Dubé, at paras 41 and 44
   R v Douse, 2009 CanLII 34990 (ON SC), 246 CCC (3d) 227, *per* Durno J, at para 40

Grounds to Challenge

Section 638 provides both Crown and defence counsel to make a challenge for cause on the basis of several available grounds:

> **Challenge for cause**
>
> 638 (1) A prosecutor or an accused is entitled to any number of challenges on the ground that
>
> > (a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;
> > (b) a juror is not impartial;
> > (c) a juror has been convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect;
> > (d) a juror is not a Canadian citizen;
> > (e) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under section 627 [*support for juror with physical disability*], is physically unable to perform properly the duties of a juror; or
> > (f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best

> give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 [*language of accused*] to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.
>
> **No other ground**
>
> (2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1) [*challenge for cause – enumerated grounds*].
>
> (3) and (4) [Repealed, 1997, c. 18, s. 74]
>
> (5) [Repealed, R.S., 1985, c. 31 (4th Supp.), s. 96]
>
> R.S., 1985, c. C-46, s. 638; R.S., 1985, c. 27 (1st Supp.), s. 132, c. 31 (4th Supp.), s. 96; 1997, c. 18, s. 74; 1998, c. 9, s. 6; 2019, c. 25, s. 271.
> [*annotation(s) added*]
>
> – CCC

There must be an "evidentiary foundation" for any claim of challenge for cause.[1]

The judge has wide discretion to supervise the challenge.[2] Including when to exclude the jury panel.[3]

There is not a fixed rule that a jury panel should be excluded during a challenge for cause.[4]

1. *R v Rowe*, 2006 CanLII 14235 (ON CA), 208 CCC (3d) 412, *per* MacFarland JA (3:0)
2. *R v Hubbert*, 1975 CanLII 53 (ON CA), 11 OR (2d) 464, *per curiam*, at p. 291
   R v Sherratt, 1991 CanLII 86 (SCC), [1991] 1 SCR 509, *per* L'Heureux-Dubé J, at p. 527 (SCR)
   R v Williams, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128, *per* McLachlin J, at paras 13 and 55
3. *R v Moore-McFarlane*, 2001 CanLII 6363 (ON CA), OR (3d) 737, *per* Charron JA, at para 85
4. *Moore-McFarlane*, *ibid.*, at para 85

Challenge for Bias

Under section 638(1)(b), a party may challenge a juror "for cause", alleging that the juror may not be indifferent.[1] The test is whether there is "a 'realistic potential' that the jury pool may contain people who are not impartial in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused ..."[2]

The purpose of challenge for cause is to screen out potential biases in juries.[3]

The fundamental issue on challenges for cause is whether the accused can receive a fair trial pursuant to s. 11(d) of the Charter.[4]

The party challenging cause must establish that:[5]

1. a widespread bias exists in the community; and
2. some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.

There are the "attitudinal" and "behavioural" components to partiality.[6]

There is a presumption that jurors are capable of setting aside their views and biases in favour of impartiality between Crown and the accused and compliance with the trial judge's instructions. [7]

The decision to permit a challenge for cause is discretionary, but when in doubt the judge should "err on the side of permitting challenges".[8]

Challenges will normally be directed at all potential jurors but may be targeted at specific jurors.[9]

Evidence

The basis of challenge can be established by way of expert testimony regarding the bias alleged.[10]

1. section 638(1)(b) states "A prosecutor or an accused is entitled to any number of challenges on the ground that ...(b) a juror is not indifferent between the Queen and the accused")
2. *R v Find*, 2001 SCC 32 (CanLII), [2001] 1 SCR 863, *per* McLachlin CJ, at para 31
3. *R v Sherratt*, 1991 CanLII 86 (SCC), [1991] 1 SCR 509, *per* L'Heureux-Dubé J, at p. 533
4. *R v Bennight*, 2012 BCCA 190 (CanLII), 320 BCAC 195, *per* Bennett JA at 42
5. *Find*, *supra*, at para 32
6. *Find*, *supra*, at para 32
7. *Find*, *supra*, at para 26
8. *Find*, *supra*, at para 45
9. *R v Daigle*, 2007 QCCA 1344 (CanLII), 229 CCC (3d) 540, *per* Hilton JA
10. e.g. see *R v Douse*, 2009 CanLII 34990 (ON SC), 246 CCC (3d) 227, *per* Durno J

Background Checks of Potential Jurors

The Crown has a limited ability to make police background checks into each prospective juror for the purpose of challenges under s. 638(1)(c). Where it is done so, the results must be disclosed to the defence.[1]

The practice of doing background checks on potential jurors outside of the purpose of determine juror eligibility is prohibited.[2]

1. *R v Yumnu*, 2012 SCC 73 (CanLII), [2012] 3 SCR 777, *per* Moldaver J
2. *R v Oland*, 2018 NBQB 258 (CanLII), at para 7 (" In no uncertain terms the Supreme Court of Canada condemned the practice of using police databases to conduct inquiries of potential jurors outside legitimate permissible checks for criminal records to determine juror eligibility. ")

Questioning

The questions should be “relevant, succinct and fair” and avoid invading "the privacy of prospective jurors in an attempt to probe personal feelings, opinions, and beliefs".[1] The questions must remain "within the bounds of a legitimate inquiry into the impartiality of potential jurors".[2]

The ability to challenge opinions is limited. Often the questions are narrow enough only to be answered yes or no.[3]

It is solely the judge who determines the form of the question given the circumstances of the case.[4]

1. *R v Hubbert*, 1975 CanLII 53 (ON CA), 29 CCC (2d) 279, *per curiam*, at pp. 289-90 (CA), affirmed and adopted 1977 CanLII 15 (SCC), [1977] 2 SCR 267, *per* Laskin CJ (9:0)
   R v Dhillon, 2001 BCCA 555 (CanLII), 158 CCC (3d) 353, *per* Low JA (3:0), at para 53
   R v Williams, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128, *per* McLachlin J (9:0), at para 53
   R v Bulatci, 2012 NWTCA 6 (CanLII), 285 CCC (3d) 382, *per* Slatter JA
2. *R v Gayle*, 2001 CanLII 4447 (ON CA), 154 CCC (3d) 221, *per* Sharpe JA (3:0), at para 22
3. e.g. *R v Sandham*, 2009 CanLII 22574 (ON SC), 248 CCC (3d) 46, *per* Heeney J, at para 3
   R v MM, [2003] OJ No 5962(*no CanLII links) , at para 24 affirmed on other grounds 2007 ONCA 329 (CanLII) 220 CCC (3d) 74, {{{3}}}, *per* Blair JA (3:0)
4. *Gayle*, *supra*

Process

It is not appropriate to group jurors on the basis of race as it violates the requirement of random selection under s. 631.[1]

There are two methods of selecting jurors on a challenge for cause. First, there is the "dynamic triers" method and then there is the "dynamic triers" method of selection.

An accused does not have a right to have a jury including members of a particular race, ethnicity or background.[2]

1. *R v Brown*, 2006 CanLII 42683 (ON CA), 215 CCC (3d) 330, *per* Rosenberg JA (3:0)
2. *R v Gayle*, 2001 CanLII 4447 (ON CA), 154 CCC (3d) 221, *per* Sharpe JA (3:0)
   R v Amos, 2007 ONCA 672 (CanLII), 161 CRR (2d) 363, *per curiam* (3:0)
   R v Bitternose, 2009 SKCA 54 (CanLII), 244 CCC (3d) 218, *per* Wilkinson JA (3:0)

Procedure

An intention to challenge for cause may require written notice:

> **Challenge in writing**
>
> 639 (1) Where a challenge is made on a ground mentioned in section 638 [*challenge for cause – grounds*], the court may, in its discretion, require the party that challenges to put the challenge in writing.
>
> **Form**
>
> (2) A challenge may be in Form 41 [*forms*].
>
> **Denial**

(3) A challenge may be denied by the other party to the proceedings on the ground that it is not true.
R.S., c. C-34, s. 568.
[*annotation(s) added*]

– CCC

An intention to a challenge of the array may also require notice:

Challenging the jury panel

629 (1) The accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.

In writing

(2) A challenge under subsection (1) [*challenging the jury panel – grounds*] shall be in writing and shall state that the person who returned the panel was partial or fraudulent or that he wilfully misconducted himself, as the case may be.

Form

(3) A challenge under this section may be in Form 40 [*forms*].
R.S., 1985, c. C-46, s. 629; R.S., 1985, c. 27 (1st Supp.), s. 130.
[*annotation(s) added*]

– CCC

Ordering of Challenges

Order of challenges

635 (1) The accused shall be called on before the prosecutor is called on to declare whether the accused challenges the first juror for cause, and after that the prosecutor and the accused shall be called on alternately, in respect of each of the remaining jurors, to first make such a declaration.

Where there are joint trials

(2) Subsection (1) [*ordering of challenges for cause*] applies where two or more accused are to be tried together, but all of the accused shall exercise the challenges of the defence in turn, in the order in which their names appear in the indictment or in any other order agreed on by them,

(a) in respect of the first juror, before the prosecutor; and
(b) in respect of each of the remaining jurors, either before or after the prosecutor, in accordance with subsection (1) [*ordering of challenges for cause*].

R.S., 1985, c. C-46, s. 635; R.S., 1985, c. 2 (1st Supp.), s. 2; 1992, c. 41, s. 2; 2019, c. 25, s. 270.
[*annotation(s) added*]

– CCC

Determination of Challenge for Cause

Determination of challenge for cause

640 (1) If a challenge is made on a ground mentioned in section 638 [*challenge for cause – grounds*], the judge shall determine whether the alleged ground is true or not and, if the judge is satisfied that it is true, the juror shall not be sworn.

Exclusion order

(2) On the application of the accused or prosecutor or on the judge's own motion, the judge may order the exclusion of all jurors, sworn and unsworn, from the court room until it is determined whether the ground of challenge is true if the judge is of the opinion that the order is necessary to preserve the impartiality of the jurors.

R.S., 1985, c. C-46, s. 640; 2008, c. 18, s. 26; 2011, c. 16, s. 9; 2019, c. 25, s. 272.

– CCC

Subjects of Challenge

Race-based Challenge

Challenge for racial bias requires that the applicant "establish that there is widespread bias in the community and that some prospective jurors may not be capable of setting aside their bias."[1] The recognized prejudice against visible minorities is widespread enough that a challenge for cause will be

established in most cases.[2]

Given the difficulty of presenting evidence of racial prejudice within a community, a judge may infer it based on evidence of national or provincial wide prejudice.[3]

Variations of race-based challenges have not always been accepted.[4]

There is broad acceptance that where the warranted to engage in a challenge for cause on the basis of race, the following question (from *Parks*) is permissible:[5]

> "Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is ... black... and the deceased is a white man?"

1. *R v Kematch*, 2008 MBQB 260 (CanLII), 244 Man R (2d) 223, *per* Simonsen J, at para 8
2. *R v Parks*, 1993 CanLII 3383 (ON CA), 84 CCC (3d) 353, *per* Doherty JA (3:0) - suggests it is established in "virtually every case"
3. *Kematch*, *supra*, at para 8
4. e.g. see *R v Spence*, 2005 SCC 71 (CanLII), [2005] 3 SCR 458, *per* Binnie J (7:0), - bias towards complainant who was white in an inter-racial relationship
   R v Hummel, 2002 YKCA 6 (CanLII), 166 CCC (3d) 30, *per* Donald JA (3:0), - rejected challenge on bias that a white woman would be less likely to consent to sex with an aboriginal accused
5. *Spence*, *supra*, at para 1

Gang-relation

Where an offence is gang-related and that relation creates a "reasonable risk of bias", jurors may be challenged. [1] Where it is adjunct to racial bias it will more likely be relevant to jury selection.[2]

1. *R v BDS*, 2014 MBQB 42 (CanLII), *per* Schulman J, at para 5
2. *BDS*, *ibid.*, at para 5

Other Subjects

Challenge on the basis of national origin has been largely rejected.[1]

There have been a few requests for challenge on the basis of bias towards those suffering from mental illness such as schizophrenia or psychosis.[2]

1. *R v Shchavinsky*, 2000 CanLII 16877 (ON CA), 148 CCC (3d) 400, *per* MacPherson JA (3:0)
2. *R v Bennight*, 2012 BCCA 190 (CanLII), 320 BCAC 195, *per* Bennett JA (3:0)

Challenge for Cause (Prior to September 19, 2019)

- Challenge for Cause (Prior to September 19, 2019)

Challenge for Cause (Prior to September 19, 2019)

< Procedure and Practice < Trials < Juries

General Principles

Unaccounted Juror

> ~~**Objection that name not on panel**~~
>
> ~~640 (1) Where the ground of a challenge is that the name of a juror does not appear on the panel, the issue shall be tried by the judge on the voir dire by the inspection of the panel, and such other evidence as the judge thinks fit to receive.~~
> [*omitted (2), (2.1), (2.2), (3) and (4)*]
> [repealed 2019, c. 25, s. 272 on September 19, 2019]
>
> – CCC

Result of Challenge

> 640
> [*omitted (1), (2), (2.1) and (2.2)*]
>
> ~~**If challenge not sustained, or if sustained**~~
>
> ~~(3) Where the finding, pursuant to subsection (1), (2) or (2.2) is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.~~
>
> ~~**Disagreement of triers**~~
>
> ~~(4) Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the ground of challenge is true are unable to agree, the court may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true.~~
> ~~R.S., 1985, c. C-46, s. 640; 2008, c. 18, s. 26; 2011, c. 16, s. 9.~~ [repealed 2019, c. 25, s. 272 on September 19, 2019]
>
> – CCC

Dynamic Triers

> 640
> [*omitted (1)*]
>
> ~~**Other grounds**~~
>
> ~~(2) If the ground of a challenge is one that is not mentioned in subsection (1) and no order has been made under subsection (2.1), the two jurors who were last sworn — or, if no jurors have been sworn, two persons present who are appointed by the court for the purpose — shall be sworn to determine whether the ground of challenge is true.~~
> [*omitted (2.1), (2.2), (3) and (4)*]
>
> [repealed 2019, c. 25, s. 272 on September 19, 2019] R.S., 1985, c. C-46, s. 640; 2008, c. 18, s. 26; 2011, c. 16, s. 9.
>
> – CCC

The dynamic method of selecting jurors is intended to ensure "that the responsibility for determining the challenge for cause is shared by all jurors but the last juror selected".[1]

The changing of triers with each selection is mandatory.[2]

1. *R v WV*, 2007 ONCA 546 (CanLII), OJ No 3247, *per* Sharpe JA (3:0), at para 26
2. *WV*, *ibid.*

Static Triers

The process involving static triers was added to the Code in 2008.[1]

Section 640(2.1) and (2.2) were added:[2]

> 640
> [*omitted (1) and (2)*]
> ~~(2.1) If the challenge is for cause and if the ground of the challenge is one that is not mentioned in subsection (1), on the application of the accused, the court may order the exclusion of all jurors — sworn and unsworn — from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.~~
> ~~(2.2) If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for~~

> ~~that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until twelve jurors and any alternate jurors are sworn.~~ [repealed 2019, c. 25, s. 272 on September 19, 2019]
> [*omitted (3) and (4)*]
> R.S., 1985, c. C-46, s. 640; 2008, c. 18, s. 26; 2011, c. 16, s. 9.
>
> – CCC

The accused may apply under s. 640(2.1) to have two triers select all members of the jury. They themselves cannot become members of the jury.[3]

Sections 640(2),(2.1) and (2.2) do not remove the judge's inherent jurisdiction to exclude jurors from the courtroom during the challenge for cause.[4]

1. *R v White*, 2009 CanLII 42049 (ON SC), OJ No 3348, *per* Sproat J, at para 8
   R v Douse, 2009 CanLII 34990 (ON SC), 246 CCC (3d) 227, *per* Durno J, at para 18
2. see *R v Swite*, 2011 BCCA 54 (CanLII), 268 CCC (3d) 184, *per* Prowse JA (3:0), at para 23
3. *Douse*, *supra*, at paras 18 to 20
4. *R v Huard*, 2009 CanLII 39058 (ON SC), 247 CCC (3d) 526, *per* Thomas J, at para 21

Improper Use of Static Triers

The proper use static triers may mean that the jury was not properly constituted and therefor the verdicts must be quashed.[1]

1. *R v Mansingh*, 2017 ONCA 68 (CanLII), 136 WCB (2d) 16, at paras 6 to 12

Instructing Triers

The instructions to the trier should contain the following elements:[1]

1. the triers are to decide if the potential juror is impartial,
2. the decision is on the balance of probabilities;
3. the decision must be by both triers,
4. they may retire to the jury room or discuss it where they are; and
5. if the triers cannot agree within a reasonable time they are to say so.

The judge must also give the triers an "adequate understanding of the nature of their task and the procedure they were to follow".[2]

Instructions will be adequate where when "viewed in their entirety, the instructions provided [the triers] with an adequate understanding of the nature of their task and the procedure they were to follow in order to select an impartial jury".[3]

When dealing with dynamic triers it is necessary to repeat the instructions to each and every one of them.[4]

1. *R v Cardinal*, 2005 ABCA 303 (CanLII), 200 CCC (3d) 323, *per curiam* (3:0), at para 17
2. *R v Brown*, 2005 CanLII 3939 (ON CA), 194 CCC (3d) 76, *per* Simmons JA (3:0), at paras 29 to 32
3. *R v Rowe*, 2006 CanLII 14235 (ON CA), 208 CCC (3d) 412, *per* MacFarland JA, at para 81
4. *R v Li*, 2004 CanLII 18634, 183 CCC (3d) 48, *per* Borins JA

Decisions of Triers

There is no right for counsel to make submissions to the triers, but may do so at the discretion of the judge.[1]

The decision of a trier can be based not only on the answers to the questions but also on the demeanour and reactions of the potential juror.[2]

Generally, a judge should interfere with the trier's process by making their decision for them on any prospective juror.[3]

However, s. 640(4) permits the judge to dismiss triers who cannot agree and then empanel replacements. Such disagreement also permits the judge to dismiss the juror.[4]

Where a trier expresses uncertainty on the choice of a prospective juror, the judge may in some cases, be able to dismiss the prospective juror.[5]

The triers do not need to make a decision on a particular prospective juror who the defence counsel has already decided is acceptable.[6] However, once questioning starts, the opposing side cannot simply "admit" the challenge, thus rejecting the prospective juror, as in effect the opposing side would have in effect unlimited pre-emptory challenges.[7]

1. *R v Moore-McFarlane*, 2001 CanLII 6363 (ON CA), 160 CCC (3d) 493, *per* Charron JA
2. *R v Brown*, 2005 CanLII 3939 (ON CA), 194 CCC (3d) 76, *per* Simmons JA (3:0)
   R v Rawlins, [2007] OJ No 4344 (CA)(*no CanLII links)
3. *R v Cardinal*, 2005 ABCA 303 (CanLII), 200 CCC (3d) 323, *per curiam* (3:0)
4. *Gayle*, *supra*
5. *Cardinal*, *supra* - trier stated he "did not know"
6. *R v Bulatci*, 2012 NWTCA 6 (CanLII), 285 CCC (3d) 382, *per* Slatter JA
   R v Katoch, 2009 ONCA 621 (CanLII), 246 CCC (3d) 423, *per* Rosenberg JA (3:0)
7. *Katoch*, *ibid.*, at para 48

See Also

- Challenge for Cause

Challenge to Jury Panel

General Principles

Under s. 629, either party may challenge the jury panel or array from which jurors from which jurors are selected.

Under the heading of "challenging the array", s. 629 states:

> **Challenging the jury panel**
>
> 629 (1) The accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.
>
> **In writing**
>
> (2) A challenge under subsection (1) [*challenging the jury panel – grounds*] shall be in writing and shall state that the person who returned the panel was partial or fraudulent or that he wilfully misconducted himself, as the case may be.
>
> **Form**
>
> (3) A challenge under this section may be in Form 40 [*forms*].
> R.S., 1985, c. C-46, s. 629; R.S., 1985, c. 27 (1st Supp.), s. 130.
> [*annotation(s) added*]
>
> – CCC

> **Trying ground of challenge**
>
> 630. Where a challenge is made under section 629 [*challenging the jury panel*], the judge shall determine whether the alleged ground of challenge is true or not, and where he is satisfied that the alleged ground of challenge is true, he shall direct a new panel to be returned.
> R.S., c. C-34, s. 559.
> [*annotation(s) added*]
>
> – CCC

Jury Partiality

Issues of partiality will usually take the form of problems with the demographics of the array of potential jurors.

Where the selecting potential jurors intentionally excludes aboriginals, it may be found to be partial.[1]

There is no Charter right that entitles an accused person to a jury that consists either entirely or proportionately of the same race as the accused.[2] Nevertheless, systemic biases in the method of selection against certain races may result in partiality.[3]

The public's confidence in the administration of justice relies on the impartiality of a jury.[4]

Jurors are expected to apply their "entire life's experiences to the task of judging".[5]

It is not only important that a juror be impartial but also *seen* to be impartial.[6]

Evidence of Juror Partiality

Where a judge is made sufficiently aware of jury conduct that may have an appearance of preference, they have an obligation to conduct an inquiry into the matter and determine whether the juror can continue.[7] Failure to conduct the inquiry is an error of law.[8]

A sufficient inquiry must include a questioning of the particular juror.[9]

A reviewing judge should not engage in speculation as to the reasons that the jury reached its verdict.[10]

Even where a juror has been a victim of crime, they are still considered to be capable of being impartial.[11]

The justice system must be sensitive to the personal lives and privacy of jurors.[12] Consequently, the process does not permit pre-questioning of jurors.[13]

1. *R v Butler*, 1984 CanLII 500 (BC SC), 63 CCC (3d) 243, 3 CR (4th) 174, *per* Esson JA
2. *R v Kent*, 1986 CanLII 4745 (MB CA), Man. R. (2d) 160, (1986) 27 CCC (3d) 405, *per* Monnin CJ
   R v Fowler, 2005 BCSC 1874 (CanLII), 211 CCC (3d) 401, *per* Neilson J
   R v Teerhuis-Moar, 2007 MBQB 165 (CanLII), 223 CCC (3d) 74, *per* Monnin CJ
3. See *Fowler*, *supra*
   and *Terrhuis-Moar*, *supra*
4. *R v Barrow*, 1987 CanLII 11 (SCC), 38 CCC (3d) 193, *per* Dickson CJ, at p. 206 ("The accused, the Crown and the public at large all have the right to be sure that the jury is impartial and the trial fair, on this depends public confidence in the administration of justice.")
5. *R v Pan*, 2001 SCC 42 (CanLII), [2001] 2 SCR 344, *per* Arbour J, at para 61
   R v Poon, 2012 SKCA 76 (CanLII), 1 WWR 22, *per* Jackson JA, at para 16

6. *R v Budai*, 2001 BCCA 349 (CanLII), 154 CCC (3d) 289, *per* Cumming JA and Mackenzie JA
Andrews, Farrant & Kerr (1984), 13 CCC (2d) 207 (BCCA)(*no CanLII links) ("In this case the judge had received reports which made it imperative that he satisfy himself whether the juror was not only impartial, but could be seen to be impartial")
R v Tsoumas, 1973 CanLII 1541, 11 CCC (2d) 344, *per* Martin JA
7. *Andrews*, *supra* (after receiving reports of a juror smiling at the accused the judge "had no alternative when he received those reports but to conduct an inquiry to ascertain if the juror in question could properly continue to act as such.")
Budai, *supra*, at para 58
8. *Budai*, *supra*, at para 58
9. *Budai*, *supra*, at para 59
10. *Budai*, *supra*, at para 61
11. *R v Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128, *per* McLachlin J, at para 13
R v Spence, 2005 SCC 71 (CanLII), [2005] 3 SCR 458, *per* Binnie J, at paras 21 to 22
R v K(A), 1999 CanLII 3793 (ON CA), 176 DLR (4th) 665, *per* Charron JA, at para 52, leave to appeal denied *Poon*, *supra*, at para 16
12. *Williams*, *supra*, at paras 51 to 53
Poon, *supra*, at para 16
13. *Williams*, *supra*, at para 13
R v Find, 2001 SCC 32 (CanLII), [2001] 1 SCR 863, *per* McLachlin CJ, at para 26

See Also

- Right to a Representative Jury

Jury Procedure

This page was last substantively updated or reviewed *October 2020*. (Rev. # 79483)

< Procedure and Practice < Trials < Juries

General Principles

After the jury instructions are given the jury "shall retire" to deliberate on the trial:

> **Trying of issues of indictment by jury**
>
> 652.1 (1) After the charge to the jury, the jury shall retire to try the issues of the indictment.
>
> **Reduction of number of jurors to 12**
>
> (2) However, if there are more than 12 jurors remaining, the judge shall identify the 12 jurors who are to retire to consider the verdict by having the number of each juror written on a card that is of equal size, by causing the cards to be placed together in a box that is to be thoroughly shaken together and by drawing one card if 13 jurors remain or two cards if 14 jurors remain. The judge shall then discharge any juror whose number is drawn.
> 2011, c. 16, s. 13.
>
> – CCC

Empanelling a Jury

Who shall be the jury

643 (1) The 12, 13 or 14 jurors who are sworn in accordance with this Part [*Pt. XX – Procedure in Jury Trials and General Provisions (s. 574 to 672)*] and present at the commencement of the presentation of the evidence on the merits shall be the jury to hear the evidence on the merits.

Names of jurors

(1.1) The name of each juror, including alternate jurors, who is sworn shall be kept apart until the juror is excused or the jury gives its verdict or is discharged, at which time the name shall be returned to the box as often as occasion arises, as long as an issue remains to be tried before a jury.

Same jury may try another issue by consent

(2) The court may try an issue with the same jury in whole or in part that previously tried or was drawn to try another issue, without the jurors being sworn again, but if the prosecutor or the accused objects to any of the jurors or the court excuses any of the jurors, the court shall order those persons to withdraw and shall direct that the required number of cards to make up a full jury be drawn and, subject to the provisions of this Part [*Pt. XX – Procedure in Jury Trials and General Provisions (s. 574 to 672)*] relating to challenges, orders to excuse and directions to stand by, the persons whose cards are drawn shall be sworn.

Sections directory

(3) Failure to comply with the directions of this section or section 631 [*procedure for jury cards*], 635 [*ordering of challenges for cause – general*] or 641 [*calling persons for jury after pool is depleted*] does not affect the validity of a proceeding.
R.S., 1985, c. C-46, s. 643; 1992, c. 41, s. 5; 2001, c. 32, s. 42; 2002, c. 13, s. 58; 2011, c. 16, s. 12.
[*annotation(s) added*]

– CCC

Jury Separation During Trial

Separation of jurors

647 (1) The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.

Keeping in charge

(2) Where permission to separate under subsection (1) [*jurors may separate until deliberation*] cannot be given or is not given, the jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.

Non-compliance with subsection (2)

(3) Failure to comply with subsection (2) [*when separation not allowed outside communication not permitted*] does not affect the validity of the proceedings.

Empanelling new jury in certain cases

(4) Where the fact that there has been a failure to comply with this section or section 648 [*restriction on publication of trial proceedings without jury present and breach offence*] is discovered before the verdict of the jury is returned, the judge may, if he considers that the failure to comply might lead to a miscarriage of justice, discharge the jury and

(a) direct that the accused be tried with a new jury during the same session or sittings of the court; or
(b) postpone the trial on such terms as justice may require.

Refreshment and accommodation

(5) The judge shall direct the sheriff to provide the jurors who are sworn with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict.
R.S., c. C-34, s. 576; 1972, c. 13, s. 48.
[*annotation(s) added*]

– CCC

Sequestration

The judge has discretion to determine when to sequester the jury.[1]

1. *Demeter v R*, 1977 CanLII 25 (SCC), [1978] 1 SCR 538, *per* Martland J

Privacy of the Jury

Publication Ban

Section 648 prohibits anyone from publishing, broadcasting, or transmitting any part of a trial that occurs outside of the presence of the jury.[1]

> **Restriction on publication**
>
> 648 (1) After permission to separate is given to members of a jury under subsection 647(1) [*jurors may separate until deliberation*], no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.
>
> **Offence**
>
> (2) Every one who fails to comply with subsection (1) [*restriction on publication of trial proceedings without jury present*] is guilty of an offence punishable on summary conviction.
> (3) [Repealed, 2005, c. 32, s. 21]
> R.S., 1985, c. C-46, s. 648; 2005, c. 32, s. 21.
> [*annotation(s) added*]
>
> – CCC

1. See also Public and Media Restrictions

Support Persons

Section 649 prohibits any person providing support services to a disabled juror from disclosing any information obtained from the jury while outside of the court.[1]

Jury secrecy does not prevent the admission of fresh evidence including annotations found on transcripts located in the jury room.[2]

1. There is an exception for where the information is sought for the purposes of an investigation into an offence under 139 or where it is disclosed in open court.
2. *R v Richard*, 2013 MBCA 10 (CanLII), 299 Man R (2d) 1, *per* Cameron JA

Communication with Jurors

Communications between the jury and the court or counsel must be with the presence of the accused.[1]

It is improper for the trial judge to have "private conversations" with potential jurors during selection that is within the earshot of accused counsel but not accused.[2]

Communication between the jury and all the parties in court should not occur through an intermediary such as a sheriff.[3]

Secrecy of jury deliberations is an essential part of the right to trial by jury under s. 11(f).[4]

1. See s. 650 - requires the accused present during trial
2. *R v Kakegamic*, 2010 ONCA 903 (CanLII), 265 CCC (3d) 420, *per* Doherty JA
3. *R v Bagadiong*, 2013 BCCA 538 (CanLII), *per* Hall JA - judge asked sheriff to make inquiry of jury to explain their note
4. see *R v Pan; R v Sawyer*, 2001 SCC 42 (CanLII), [2001] 2 SCR 344, *per* Arbour J

Jury Note-taking

Where the trial judge permits a jury asks to take notes while reviewing evidence, a caution may be needed reminding the jury that it is not the member with the most detailed notes that should be relied upon but rather each jury member must rely on their own memory.[1]

1. e.g. *R v Habib*, 2000 CanLII 16824 (ON CA), 147 CCC (3d) 555, at para 5

Deadlocked Jury

Jury Compensation

Jury compensation is typically set out by the provincial Juries Act.[1]

The Court's inherent jurisdiction over the trial process permits the Judge to enhance the statutory amount.[2]

1. e.g. Juries Act, RSO 1990, c J.3
2. *R v Huard*, 2009 CanLII 15442 (ONSC), 243 CCC (3d) 496, *per* Thomas J

Deliberation and Verdict

Juries deliberate every day that they are "retired" to make a decision the case.[1] This also permits them to seek the assistance of the court in tasks such as reading back evidence.[2]

While the jury is deliberating they must not separate.[3] An officer of the court must keep charge of the jury while together to ensure they do not communicate with anyone outside of the jury without the judge's consent.[4]

Juries can render a verdict any day of the week. The fact that it is a Sunday or a Holiday does not affect the trial process.[5]

Under s. 670, a judgement will not be stayed or reverse solely for the reason of "any irregularity in the summoning or impaneling of the jury" or the "reason that a person who served on the jury was not returned as a juror by a sheriff or other officer." The section states:

Formal Defects in Jury Process
Judgment not to be stayed on certain grounds

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

(a) by reason of any irregularity in the summoning or empanelling of the jury; or
(b) for the reason that a person who served on the jury was not returned as a juror by a sheriff or other officer.

R.S., c. C-34, s. 598.

– CCC

Under s. 671, a verdict cannot be quashed or impeached only by reason that there was an omission to follow the procedure of "qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, or the drafting of panels from the jury lists". The section states:

Directions respecting jury or jurors directory

671 No omission to observe the directions contained in any Act with respect to the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists or the drafting of panels from the jury lists is a ground for impeaching or quashing a verdict rendered in criminal proceedings.
R.S., c. C-34, s. 599.

– CCC

A jury is entitled to receive any type of aid that "assists them in dealing with the evidence reasonably, intelligently and expeditiously." [6]

A jury may take copies of a slideshow presented in closing by counsel where it is useful and reliable.[7]

1. see *R v Baillie*, 1991 CanLII 5760 (BC CA), 66 CCC (3d) 274, *per* Taggart JA
   s. 654
2. see *Baillie*, *ibid.*
3. see s. 647(1) ("The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.")
4. see s. 647(2) ("Where permission to separate under subsection (1) cannot be given or is not given, the jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.")
5. see s. 654
6. See *R v Bengert*, 1980 CanLII 321 (BCCA), [1980] BCJ No 721, *per curiam*, at para 160 (BCCA)
7. *R v Pan*, 2014 ONSC 6055 (CanLII), *per* Boswell J
   see also Real Evidence

Inconsistent Verdict

A jury gives an inconsistent verdict when it finds the accused guilty and not guilty for the same conduct.[1]

An inconsistent verdict can be set aside where it is found to be unreasonable.[2]

The Crown may rebut an apparent inconsistency on the grounds of legal error in the instructions. The burden is "heavy" and is on the Crown. The court must be satisfied "to a high degree of certainty" that there was an error and the error:[3]

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

If these requirements are established then the verdicts are not *actually* inconsistent.[4]

1. *R v RV*, 2021 SCC 10 (CanLII), *per* Moldaver J (7:2), at para 1
2. *RV*, *ibid.*, at para 28
3. *RV*, *ibid.*, at para 33
4. *RV*, *ibid.*, at para 34

Determined Facts After a Jury Trial

Information accepted

724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

Jury

(2) Where the court is composed of a judge and jury, the court

> (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
> (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

Disputed facts

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

> (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

[*omitted (b), (c), (d) and (e)*]
R.S., 1985, c. C-46, s. 724; 1995, c. 22, s. 6.

– CCC

A judge is "bound by the express an implied factual implications of the jury's verdict".[1]

Where the facts are uncertain, the judge is "entitled to make his or her own determination of the facts, so long as that view is consistent with the jury's verdict".[2]

The judge must not accept any evidence that is only consistent with a verdict that was rejected by the jury.[3]

The primary principles the court must follow to determine facts subsequent to a jury trial:[4]

1. The sentencing judge must determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict.
2. The sentencing judge is bound by the express and implied factual implications of the jury's verdict, and must accept as proven all facts express or implied that are essential to the jury's verdict.
3. The sentencing judge must not accept as fact any evidence consistent only with a verdict rejected by the jury.
4. When the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical processes of the jury, but should come to his or her own independent determination of the relevant facts.
5. Aggravating facts must be established beyond a reasonable doubt. Other facts must be established on a balance of probabilities.
6. The sentencing judge should therefore find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

It is not necessary for the judge to derive a complete theory of the incident from the verdict. He is "required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand"[5]

1. *R v Brown*, 1991 CanLII 73 (SCC), [1991] 2 SCR 518, *per* Stevenson J at p. 523 (SCR)
   R v KDM, 2017 ONCA 510 (CanLII), *per* Benotto JA, at para 42
2. *KDM*, *ibid.*, at para 42
   Brown, *supra*
   R v Roncaioli, 2011 ONCA 378 (CanLII), 271 CCC (3d) 385, *per* Laskin JA
3. *R v Ferguson*, 2008 SCC 6 (CanLII), [2008] 1 SCR 96, *per* McLachlin CJ, at para 17
   R v Nelson, 2014 ONCA 853 (CanLII), 318 CCC (3d) 476, at paras 55 to 59
   KDM, *supra*, at para 42
4. Based on *R v Brisson*, 2009 BCSC 1606 (CanLII), BCJ No 2322, *per* Joyce J, at para 5, summarizing the principles in *Ferguson*, *supra*, at paras 17 to 18
5. *Ferguson*, *supra*, at paras 15 to 18

Historial Procedural Powers Remain

Saving powers of court

672 Nothing in this Act alters, abridges or affects any power or authority that a court or judge had immediately before April 1, 1955, or any practice or form that existed immediately before April 1, 1955, with respect to trials by jury, jury process, juries or jurors, except where the power or authority, practice or form is expressly altered by or is inconsistent with this Act.
R.S., c. C-34, s. 600.

– CCC

Jury Instructions

This page was last substantively updated or reviewed *July 2021*. (Rev. # 79483)

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General Principles

Judges are afforded some flexibility in the language they use in a jury instruction.[1]

The trial judge will typically instruct the jury on these topics:[2]

1. instruction on the relevant legal issues, including the charges faced by the accused;
2. an explanation of the theories of each side;
3. a review of the salient facts which support the theories and case of each side;
4. a review of the evidence relating to the law;
5. a direction informing the jury they are the masters of the facts and it is for them to make the factual determinations;
6. instruction about the burden of proof and presumption of innocence;
7. the possible verdicts open to the jury; and
8. the requirements of unanimity for reaching a verdict.

Objectives of Instructions

The purpose of a jury charge is to "educate the decision-maker so that it will make an informed decision, not to tell the decision-make what decision to make".[3]

An instructing judge "must set out in plan and understandable terms the law that the jury must apply when assessing the facts".[4]

It is through the "instructions that the jury must appreciate the value and effect of the evidence in the context of the legal issues."[5]

The "final instructions must leave the jury with a clear understanding of the factual issues to be resolved, the legal principles governing the factual issues, the evidence adduced at trial, the position of the parties and the evidence relevant to the positions of the parties on those issues".[6]

The instructing judge is responsible for "review of the evidence and ... to relate the evidence to the position of the defence"[7]

Instructions are not to be reviewed "to determine the extent to which they adhere to or depart from some particular approach or specific formula". Rather, they must be examined "against their ability to fulfill the purpose for which those instructions are provided."[8]

Fair and Neutral Instructions

An accused person is "entitled to a properly, not perfectly, instructed jury".[9]

A jury charge must be "even-handed" and the instructions "fair and balanced." At no time should sides be taken or editorial comments made.[10]

The charge should not be a "partisan broadcast".[11]

Presumed Ability and Sophistication of Jury

Our jury system is "predicated on the proposition that jurors follow a trial judge's limiting instructions".[12]

When reviewing the quality of instructions the judge "must not proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence".[13]

Review of Evidence

Except in rare circumstances, the "trial judge must review the substantial parts of the evidence and give the jury the position of the defence so that the jury can appreciate the value and effect of the evidence"[14]

Review of evidence should include not simply summary of witness evidence but also available exhibits.[15]

Inappropriate Direction to Jury

The trial judge should not share his evidence notes to the jury even if both counsel find it acceptable.[16]

A judge may never direct the jury to find an element proven in light of the evidence at trial. Such a decision is always a determination of the jury. This error cannot be cured by s. 686(1)(b)(iii).[17]

Decision Trees

A decision tree given to the jury by the instructing judge does not constitute part of the instructions. It is a deliberative aid.[18]

The use of annotations on the decision tree to indicate the burden and standard of proof has been suggested as being "helpful".[19]

Presumptions

It is presumed that juries act reasonably in their verdict, are able to absorb the "gist" of the judge's instructions, and are able to follow them.[20]

Appellate Review

In appellate review of instructions, the issue is whether "in the context of the whole charge" whether there is a "reasonable possibility that the trial judge*s erroneous instructions may have misled the jury into improperly applying the [legal standard]"*.[21]

Evidence misleading the jury can come for sources including the matters bought up in post-charge instructions and questions from the jury.[22]

A new trial is not warranted unless there is a "realistic possibility" that the instructions, within the context of the charges as a whole and the positions of the parties, may have misled the jury.[23]

Model Instructions

Model jury instructions are meant to be a sample from which adjustments can be made to craft appropriate jury insturctions for a particular case.[24]

Failure to Object

A failure to object to a jury charge "affords some evidence" to suggest that the charge was not unfair, incomplete or unbalanced.[25] The evidence will especially persuasive where "counsel has had ample opportunity to review draft of proposed instructions and ample time to offer suggestions for inclusions, deletions and improvements". [26]

1. *R v Elder*, 2015 ABCA 126 (CanLII), 599 AR 385, *per curiam* (3:0), at para 13
   R v Araya, 2015 SCC 11 (CanLII), [2015] 1 SCR 581, *per* Rothstein J (5:0), at para 3
   R v Avetysan, 2000 SCC 56 (CanLII), [2000] 2 SCR 745, *per* Major J (4:1), at para 9
2. *R v Daley*, 2007 SCC 53 (CanLII), [2007] 3 SCR 523, *per* Bastarache J (5:4), at para 29
3. *R v Bradley*, 2015 ONCA 738 (CanLII), *per* Watt JA, at para 184
4. *R v Daley*, 2007 SCC 53 (CanLII), [2007] 3 SCR 523, *per* Bastarache J (5:4), at para 32
5. *R v Karaibrahimovic*, 2002 ABCA 102 (CanLII), 164 CCC (3d) 431, *per* Fraser CJ, at para 33
6. *R v PJB*, 2012 ONCA 730 (CanLII), 97 CR (6th) 195, *per* Watt JA (3:0), at para 42
   R v Melvin, 2016 NSCA 52 (CanLII), NSJ No 239, *per* Farrar JA (3:0), at para 31
7. *Melvin*, *supra*, at para 31
   PJB, *supra*, at para 43
8. *R v Tomlinson*, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA (3:0), at para 150
   R v Jacquard, 1997 CanLII 374 (SCC), [1997] 1 SCR 314, *per* Lamer CJ (4:3), at paras 32 and 41
   MacKinnon, *supra*, at para 27
9. *PJB*, *supra*, at para 41
   Jacquard, *supra*, at paras 1 to 2, 62
10. *R v Largie*, 2010 ONCA 548 (CanLII), [2010] OJ No 3384 (ONCA), *per* Watt JA (3:0)
11. *Bradley*, *supra*, at para 184
12. *R v White*, 2011 SCC 13 (CanLII), [2011] 1 SCR 433, *per* Rothstein J, at para 56 ("Our jury system is predicated on the conviction that jurors are intelligent and reasonable fact-finders. It is contrary to this fundamental premise to assume that properly instructed jurors will weigh the evidence unreasonably or draw irrational and speculative conclusions from relevant evidence.")
    R v Corbett, 1988 CanLII 80 (SCC), [1988] 1 SCR 670, *per* Dickson CJ, at p. 692 (SCR) ("it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense")
    R v Farouk, 2019 ONCA 662 (CanLII), *per* , at para 50 ("I would note in this regard that our jury system is predicated on the proposition that jurors follow a trial judge's limiting instructions")
13. *R v Lane and Ross*, 1969 CanLII 545 (ONSC), [1970] 1 CCC 196, *per* Addy J
14. *Melvin*, *ibid.*, at para 31 *PJB*, *supra*, at para 44
15. Eg see *Melvin*, *supra*, at paras 39 to 40
16. *R v Bouchard*, 2013 ONCA 791 (CanLII), 305 CCC (3d) 240, *per* Doherty JA (2:1)

17. *R v Tehrankari*, 2012 ONCA 718 (CanLII), 298 OAC 252, *per* Weiler JA (3:0)
18. *Bradley*, *supra*, at para 142
19. *R v Spaniver*, 2006 SKCA 139 (CanLII), 215 CCC (3d) 555, *per* Richards JA (3:0), at para 41
20. *R v Gallie*, 2015 NSCA 50 (CanLII), 324 CCC (3d) 333, *per* Fichaud JA, at para 38
    R v Corbett, 1988 CanLII 80 (SCC), [1988] 1 SCR 670, *per* Dickson CJ, at paras 41 to 48
    R v Elkins, 1995 CanLII 3510 (ON CA), [1995] OJ No 3228 (CA), *per* Doherty JA (3:0), at para 27
    R v Suzack, 2000 CanLII 5630 (ON CA), [2000] OJ No 100 (CA), *per* Doherty JA, at para 128
    R v Carrière, 2001 CanLII 8609 (ON CA), [2001] OJ No 4157 (CA), *per* Doherty JA (3:0), at para 42
    R v Ward, 2011 NSCA 78 (CanLII), 975 APR 216, *per* Saunders JA, at paras 37 to 39, leave denied
    R v Greenwood, 2014 NSCA 80 (CanLII), *per* Fichaud JA, at para 143
21. *R v Brydon*, 1995 CanLII 48 (SCC), 101 CCC (3d) 481, *per* Lamer CJ, at paras 21 and 25 - in context of the legal standard of proof beyond a reasonable doubt.
22. *Gallie*, *supra*, at para 60
23. *R v Leroux*, 2008 ABCA 9 (CanLII), 422 AR 383, *per curiam* (3:0), at para 27 citing *R v Heil*, 2005 ABCA 397 (CanLII), 202 CCC (3d) 515, *per* Russell JA (3:0)
24. e.g. *R v McNeil*, 2006 CanLII 33663 (ON CA), 84 OR (3d) 125, *per* Doherty JA (3:0), at para 21
    R v Rowe, 2011 ONCA 753 (CanLII), 281 CCC (3d) 42, *per* Doherty JA (3:0), at para 62
25. *Bradley*, *supra*, at para 186
    R v Huard, 2013 ONCA 650 (CanLII), 302 CCC (3d) 469, *per* Watt JA (3:0), at para 74
    Jacquard, *supra*, at paras 35 to 37
26. *Bradley*, *supra*, at para 186
    Huard, *supra*, at para 74

Components of a Jury Instruction

A recommended instruction should generally include some basic components such as:[1]

- an explanation on the presumption of innocence;
- an explanation of the burden of proof; and
- an explanation of how to assess credibility and reliability of witnesses' testimony.

Any good instruction should include at least five components:[2]

1. the legal framework, typically the elements of the offence or offences with which the accused is charged;
2. the factual issues arising out of the legal framework that the jury must resolve;
3. the material evidence relevant to these issues;
4. the position of the Crown and defence on these issues; and
5. the evidence supporting each of their positions on these issues.

The jury should be able to appreciate "the value and effect of that evidence, and how the law is to be applied to the facts as they find them".[3]

Elements of Clarity

The instructions must give the jury a clear understanding of:[4]

1. the factual issues to be resolved;
2. the legal principles governing the factual issues and the evidence adduced at trial;
3. the positions of the parties; and

4. the evidence relevant to the positions of the parties on the issues.

1. *R v Newton*, 2017 ONCA 496 (CanLII), 349 CCC (3d) 508, *per* Laskin JA (3:0), at para 11
2. *Newton*, *ibid.*, at para 11
3. *Newton*, *ibid.*, at para 11
4. *R v PJB*, 2012 ONCA 730 (CanLII), 97 CR (6th) 195, *per* Watt JA (3:0), at para 42 citing *R v MacKinnon*, 1999 CanLII 1723 (ON CA), 132 CCC (3d) 545, *per* Doherty JA (3:0), at para 27

R v Nadarajah, 2009 ONCA 118 (CanLII), 242 CCC (3d) 215, *per* Goudge JA (3:0), at para 37
R v Knox, 2017 SKCA 8 (CanLII), 36 CR (7th) 89, *per* Ottenbreit JA (3:0), at para 16
R v Huard, 2013 ONCA 650 (CanLII), 302 CCC (3d) 469, *per* Watt JA (3:0), at para 50
R v Daley, 2007 SCC 53 (CanLII), [2007] 3 SCR 523, *per* Bastarache J, at para 29

Pre-Charge Conference

Before beginning deliberations, the judge will hold a pre-charge conference where the parties will provide input on the form of the charge:

> **Pre-charge conference**
>
> 650.1 A judge in a jury trial may, before the charge to the jury, confer with the accused or counsel for the accused and the prosecutor with respect to the matters that should be explained to the jury and with respect to the choice of instructions to the jury.
> 1997, c. 18, s. 78.
>
> – CCC

Purpose of Conference

The purpose of the conference is to review the anticipated instructions covering:

- the offence, including lesser included offences
- the theories of the case for each party[1]
- any special directions.

Accused Must be Present

Pre-charge conference should be held in the presence of the accused and on the court record.[2]

Consequence of Agreement on Charge

An agreement on instructions at the pre-charge conference, which includes an absence of objection, that are reflected in the trial judge's instructions is a "significant factor" in assessment the adequacy of the instructions on appeal. [3]

Failure to Raise Issues

Any failure to raise any issues on the instruction or to otherwise object will be a factor the appellate court considers when reviewing the jury instructions.[4]

1. *R v Coughlin*, 1995 ABCA 318 (CanLII), 174 AR 36
2. *R v Simon*, 2010 ONCA 754 (CanLII), 263 CCC (3d) 59, *per* Watt JA (3:0)
3. *R v Bouchard*, 2013 ONCA 791 (CanLII), 305 CCC (3d) 240, *per* Doherty JA (2:1)
4. *R v Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 SCR 314, *per* Lamer CJ (4:3)
   R v Karaibrahimovic, 2002 ABCA 102 (CanLII), 164 CCC (3d) 431, *per* Fraser JA

Post-Charge Procedure

Once the jury has been charged, the jury is directed to "retire" to decide on the issues befor them.[1]

Where there are more that 12 jurors, the judge will perform a random draw of juror names to have them discharged until there are 12 remaining.[2]

1. s. 652.1(1) states ("After the charge to the jury, the jury shall retire to try the issues of the indictment."
2. see s. 652.1(2) for details on the process

Specific Instructions

- See Established Areas of Jury Instruction

Rhetorical Questions

Rhetorical questions are generally undesirable in the instructions as it may tend to show some bias.[1]

1. *R v Baltovich*, 2004 CanLII 45031 (ON CA), 73 OR (3d) 481, *per curiam* (3:0), at para 146 (" [Rhetorical questions] should be avoided in the jury charge, lest the trial judge be seen as taking up the Crown's cause and casting off the mantle of objectivity.")

Questions and Instructions During Deliberations

- Jury Deliberations

Errors in Instructions

Reviewed Wholistically

The appropriateness of instructions must be analyzed "as a whole and its overall effect".[1]

Where instructions are given on a point of law, the reviewing court should look at the instructions as a whole and consider whether the jury would not have understood the law correctly.[2]

Corrections

Repetitions of instructions on law correctly may remedy a single instance of an incorrect instruction.[3]

Non-Direction vs Misdirection

A failure to give instruction on an issue can be a "non-direction amounting to a misdirection".[4]

Level of Detail

A charge should not be "endlessly dissected and subjected to minute scrutiny and criticism".[5]

Closing Address Does Not Fix Instructions

Closing arguments of counsel cannot have the effect of making inadequate instruction become adequate and do not relieve the trial judge of their duties in giving instructions.[6]

Fairness of Instructions

Instructions must be "fair and balanced".[7]

A fair instruction requires that "the charge explain the theories of each side and review the salient facts in support of those theories.[8]

Fairness of instructions cannot be measured by the amount of time spent by the judge on each party's evidence.[9]

Theory of the Case

Before a party's theory can be put to a jury, the record must reveal "some evidence on the basis of which a reasonable jury, acting judicially, could make affect actual/could make the factual findings necessary to ground liability" on the basis of that theory[10]

Any defence theory "realistically available on the totality of evidence" should be left with the jury.[11]

1. *R v Daley*, 2007 SCC 53 (CanLII), [2007] 3 SCR 523, *per* Bastarache J (5:4), at para 31
   R v Jeanvenne, 2016 ONCA 101 (CanLII), *per* Weiler JA, at para 33
2. *R v Rodgerson*, 2014 ONCA 366 (CanLII), 309 CCC (3d) 535, *per* Doherty JA, at paras 23 to 26 - instructions on murder
   R v Jaw, 2009 SCC 42 (CanLII), [2009] 3 SCR 26, *per* LeBel J (7:2), at para 32 (“[a]n appellate court must examine the alleged error in the context of the entire charge and of the trial as a whole”)
3. e.g. *Rodgerson*, *supra* - repeated instructions on murder corrected error
4. *R v Menard*, 2009 BCCA 462 (CanLII), 281 BCAC 14, *per curiam* (3:0)
5. *R v Cooper*, 1993 CanLII 147 (SCC), [1993] 1 SCR 146, *per* Cory J (6:1), at p. 163
6. *R v Melvin*, 2016 NSCA 52 (CanLII), NSJ No 239, *per* Farrar JA, at paras 72 to 73 *R v PJB*, 2012 ONCA 730 (CanLII), 97 CR (6th) 195, *per* Watt JA (3:0), at para 47
7. *R v Baltovich*, 2004 CanLII 45031 (ON CA), , (2004) 73 OR (3d) 481, *per curiam*, at para 118 *Jeanvenne*, *supra*, at para 31
8. *Daley*, *supra*, at para 29
   Jeanvenne, *supra*, at para 31
9. *R v Greenwood*, 2014 NSCA 80 (CanLII), *per* Fichaud JA
   R v Thatcher, 1987 CanLII 53 (SCC), [1987] 1 SCR 652, *per* Dickson CJ, at para 86
10. *R v Huard*, 2013 ONCA 650 (CanLII), 302 CCC (3d) 469, *per* Watt JA, at para 60
11. R. v. Ali, 2021 ONCA 362 (CanLII)}}, at para 74
    R. v. Grewal, 2019 ONCA 630, at paras 36-37
    R. v. Ronald, 2019 ONCA 971, at paras 43-48(*complete citation pending*)

Appeal

Standard of Review

Misdirection of a jury (not including non-direction of a jury) is a question of law.[1]

Whether a judge erred in misdirecting or failing to direct a jury is reviewed on a standard of correctness.[2]

Functional Approach to Review

An appellate court should assess a jury charge "functionally". It is not an idealized approach considering whether better instructions could have been given.[3]

The adequacy of jury instructions is analyzed using "a functional approach" which is "based on the evidence at trial, the live issues raised and the submissions of counsel."[4]

The reviewing judge should determine whether the accused, based on the review of the whole charge, has had a fair trial. It is not to look for minute errors. [5]

The Court should consider whether the instructions had the ability to fulfill their purpose and not simply whether they diverted from a formula.[6]

This analysis must be in light of factors including:[7]

- the live issues at trial,
- the position of the parties,
- the overall effect of the charge.

Jury's Failure to Follow Instructions

Evidence that the jury had demonstrably not followed the jury instructions may cause a miscarriage of justice.[8]

Defences

All defences that have an air of reality are to be put to the jury, even if not raised by counsel.[9] There is "no cardinal rule against putting to a jury an alternative defence that is at first glance incompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test.".[10]

1. *R v Luciano*, 2011 ONCA 89 (CanLII), 267 CCC (3d) 16, *per* Watt JA, at para 70
2. *R v Waite*, 2013 ABCA 257 (CanLII), 309 CCC (3d) 255, *per* Rowbotham JA (2:1), at para 11
3. *R v Jacquard (C.O.)*, 1997 CanLII 374 (SCC), [1997] 1 SCR 314, *per* Lamer CJ (4:3), at para 32
   R v Cooper, 1993 CanLII 147 (SCC), [1993] 1 SCR 146, *per* Cory J, at pp. 163-164
4. *R v Howe*, 2015 NSCA 84 (CanLII), *per* Farrar JA, at para 67
5. *R v Korski (C.T.)*, 2009 MBCA 37 (CanLII), 236 Man.R. (2d) 259, *per* Steel JA (3:0), at para 102
   Cooper, *supra*, at p. 163
   R v Luciano, 2011 ONCA 89 (CanLII), 267 CCC (3d) 16, *per* Watt JA, at para 71
   Vézeau v The Queen, 1976 CanLII 7, , [1977] 2 SCR 277, *per* Martland J (7:2), at p. 285
   R v Kociuk (R.J.), 2011 MBCA 85 (CanLII), 278 CCC (3d) 1, *per* Chartier JA (2:1), at paras 69 to 72
   Jacquard, *supra*
6. *R v MacKinnon*, 1999 CanLII 1723 (ON CA), 132 CCC (3d) 545, *per* Doherty JA (3:0), at para 27
7. *R v Johnson*, 2017 NSCA 64 (CanLII), 360 CCC (3d) 246, *per* Beveridge JA (3:0), at para 47
8. *R v Richard*, 2013 MBCA 105 (CanLII), 299 Man R (2d) 1, *per* Cameron JA (3:0)

9. *R v Cinous*, 2002 SCC 29 (CanLII), [2002] 2 SCR 3, *per* McLachlin CJ and Bastarache J
10. *R v Gauthier*, 2013 SCC 32 (CanLII), [2013] 2 SCR 403, *per* Wagner J

See Also

- Jury Procedure
- Example Jury Instructions
- Model Jury Instructions

Established Areas of Jury Instruction

This page was last substantively updated or reviewed *January 2019*. (Rev. # 79483)

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General Principles

Standards of Proof

Where the jury asks a question clarifying the meaning of reasonable doubt. The judge should not simply reiterate the standard of proof instructions, but should explain the difference of the standard of "balance of probabilities" and "proof beyond all doubt".[1]

When reviewing the instructions on the standard of proof the question is "in the context of the whole charge", whether there is a "reasonable possibility that the trial judge's erroneous instruction may have misled the jury into improperly applying the reasonable doubt standard".[2]

It is not necessary that the jury be explicitly told that "reasonable doubt" is "much closer" to absolute certainty than proof on balance of probabilities.[3]

When reviewing the standard of proof beyond a reasonable doubt on a case that turns on identity, it important to couch the instructions "in terms of the frailties of eyewitness identification".[4]

1. *R v Layton*, 2008 MBCA 118 (CanLII), 238 CCC (3d) 70, *per* Hamilton JA
2. *R v Brydon*, 1995 CanLII 48 (SCC), [1995] 4 SCR 253, *per* Lamer CJ, at paras 21 and 25
   R v Gallie, 2015 NSCA 50 (CanLII), 324 CCC (3d) 333, *per* Fichaud JA, at para 55
3. *R v Archer*, 2005 CanLII 36444 (ON CA), 202 CCC (3d) 60, *per* Doherty JA, at paras 36 to 38
4. *R v Gordon*, 2016 SKCA 58 (CanLII), 476 Sask R 312, *per* Caldwell JA, at para 5
   R v Burke, 1996 CanLII 229 (SCC), [1996] 1 SCR 474, *per* Sopinka J
   R v Quercia, 1990 CanLII 2595 (ON CA), 60 CCC (3d) 380, *per* Doherty JA (2:1)

Credibility

The judge does not need to give a WD instruction or its functional equivalent in relation to every piece of evidence relied upon by the accused.[1]

the WD instructions do not need to be recited to the jury as if it was a "magic incantation".[2]

1. *R v Simon*, 2010 ONCA 754 (CanLII), 263 CCC (3d) 59, *per* Watt JA, at paras 82 to 84, 89 to 90
   R v BD, 2011 ONCA 51 (CanLII), 266 CCC (3d) 197, *per* Blair JA, at para 114
   R v MR, 2005 CanLII 5845 (ON CA), 195 CCC (3d) 26, *per* Cronk JA, at para 46
   R v Chenier, 2006 CanLII 3560 (ON CA), 205 CCC (3d) 333, *per* Blair JA, at paras 374 to 375
2. *R v JHS*, 2008 SCC 30 (CanLII), [2008] 2 SCR 152, *per* Binnnie J, at para 13
   R v WDS, 1994 CanLII 76 (SCC), [1994] 3 SCR 521, *per* Cory J, at p. 533 (SCR)

Circumstantial Evidence

A judge is permitted but not obligated to "outline the inferences that may or may not be available from some circumstantial evidence adduced at trial". [1]There is no need to "catalogue all available inferences" from each piece of evidence.[2] It is only obligation for the judge on circumstantial evidence to "clearly" explain the necessity of finding guilt beyond a reasonable doubt and how there may be more than one way to achieve the objective.[3]

1. *R v Bradley*, 2015 ONCA 738 (CanLII), 331 CCC (3d) 511, *per* Watt JA, at para 185
2. *Bradley*, *ibid.*, at para 185
3. *R v Guiboche*, 2004 MBCA 16 (CanLII), 183 CCC (3d) 361, *per* Freedman JA, at para 109 ("...in discussing circumstantial evidence, that the judge fulfills his or her obligations if the jury is made clearly aware of the necessity to find the guilt of the accused to have been established beyond a reasonable doubt and that there are more ways than one to achieve that objective.")
   R v Fleet, 1997 CanLII 867 (ON CA), 120 CCC (3d) 457, *per curiam*, at para 20

Reliability

Instructions that direct the jury to presume any incriminating parts of an accused's statement are likely true, while exculpatory statements carry less weight are known as "Duncan instructions" and should be avoided as they tend to confuse the jury.[1]

1. *R v Illes*, 2008 SCC 57 (CanLII), [2008] 3 SCR 134, *per* LeBel and Fish JJ

Effect of Multiple Complainants

Where there are multiple complainants each associated with different counts and no similar fact application has been made, the judge should give limiting instructions on the use of the evidence. The judge should remind the jury that they may not use evidence relating to a particular count to determine if another count is made out. They future cannot use any of the evidence to establish bad character and a greater likelihood that the accused is guilty.[1]

1. *R v DLW*, 2013 BCSC 1016 (CanLII), *per* Romilly J, at paras 10 to 11
   R v BM, 1998 CanLII 13326 (ON CA), OR (3d) 1, *per* Rosenberg JA at 14 (CA)
   R v Rarru, 1996 CanLII 195 (SCC), [1996] 2 SCR 165, *per* Sopinka J, at pp. 165-66
   R v LKW, 1999 CanLII 3791 (ON CA), 138 CCC (3d) 449, *per* Moldaver JA, at para 93

Reviewing the Evidence

A trial judge must review the evidence for the jury so that they can appreciate how the law is applied to the facts that they find. [1] The review should be of "substantial parts" of the evidence in order to "relate it to the issues that the jury is or may be required to decide so that the jury appreciate the nature and effect of the evidence and its relationship to the defence advanced".[2]

Substantial Review and Relating it to Issues

There is no obligation to review all of the evidence at trial, it need not be exhaustive.[3] Also a failure to mention items of evidence will not be fatal where the omission did not constitute the sole evidentiary foundation for a defence.[4] The extent of the review will vary from case-to-case.[5]

There is "considerable latitude" in reviewing the evidence and relating it to the issues for the jury.[6]

A simple "serial review" of the evidence is considered unhelpful to the jury and does not do much to "relate the evidence to the issues".[7]

The key part of a judge's duty is to review the "substantial parts of the evidence" and explain the position of the defence to the jury.[8] The judge should relate the evidence to the positions of the parties by reviewing the "substance of the evidence that bears on each issue and indicating to the jury which parts of the evidence support each party's position".[9]

In giving the instructions, the judge must relate the evidence heard at trial to the issues raised by defence. This involves first reviewing the evidence and then relating it to the position of the defence so that the jury understand the "value and effect" of the evidence. [10] A judge will often indicate which parts of the evidence supports each parties position on particular issues.[11]

A jury charge should not be reviewed in isolation, but rather in light of the evidence and closing arguments of counsel.[12]

Suggested Formula

It has been suggested that a acceptable review of the evidence related to the issues was organized for each issue as:[13]

1. identified the issue;
2. explained the legal requirements of proof;
3. summarized the essential features of the evidence that were relevant for the jury to consider in deciding the issue;
4. reiterated the Crown's burden of proof on the issue; and
5. described the consequences of the available findings on the issue for further deliberations and for the verdict.

Strong Crown Cases

In overwhelming Crown cases, the judge does not need to ignore evidence that implicates the accused to create a balanced charge, nor does he have to "spin a web of exculpatory inferences" that stretch the available conclusions.[14] This is particularly applicable where the defence argument is simply that the evidence does not meet the standard of proof.[15]

The constitution requires that even when the evidence is "overwhelming" the judge cannot direct the jury to convict.[16]

1. *Azoulay v The Queen*, 1952 CanLII 4 (SCC), [1952] 2 SCR 495, *per* Taschereau J, at pp. 497-98
   see also *R v Daley*, 2007 SCC 53 (CanLII), [2007] 3 SCR 523, *per* Bastarache J, at para 54
2. *R v Tomlinson*, 2014 ONCA 158 (CanLII), 307 CCC (3d) 36, *per* Watt JA, at para 146
   R v Cooper, 1993 CanLII 147 (SCC), [1993] 1 SCR 146, *per* Cory J, at p. 163
   R v Jacquard, 1997 CanLII 374 (SCC), [1997] 1 SCR 314, *per* Lamer CJ, at para 14
3. *R v MacKinnon*, 1999 CanLII 1723 (ON CA), OR (3d) 378, *per* Doherty JA, at paras 29 to 30
   Daley, *supra*, at paras 55 to 56
   R v PJB, 2012 ONCA 730 (CanLII), 97 CR (6th) 195, *per* Watt JA, at para 45
4. *R v Demeter*, 1975 CanLII 685 (ON CA), 25 CCC (2d) 417, *per curiam*, at p. 436 cited in *PJB*, *ibid.*, at para 46
   B(PJ), *supra*, at para 46
5. *Daley*, *supra*, at para 57
6. *Daley*, *supra*, at para 57
   R v Royz, 2009 SCC 13 (CanLII), [2009] 1 SCR 423, *per* Binnie J, at para 3
   B(PJ), *supra*, at para 46
7. *Tomlinson*, *supra*, at para 149
8. *Azoulay*, *supra*, at pp. 497-498 (SCR)
   Daley, *supra*, at para 54
9. *Tomlinson*, *supra*, at para 147
   R v S(J), 2012 ONCA 684 (CanLII), 292 CCC (3d) 202, *per* Watt JA, at para 38
   MacKinnon, *supra*, at paras 29-30{{{3}}}
10. *B(PJ)*, *supra*, at para 44
11. *B(PJ)*, *supra*, at para 44
12. *R v Stubbs*, 2013 ONCA 514 (CanLII), 300 CCC (3d) 181, *per* Watt JA, at para 137
13. *Tomlinson*, *supra*, at para 172
14. *Stubbs*, *supra*, at para 139
15. *Stubbs*, *supra*, at para 139
16. *R v Krieger*, 2006 SCC 47 (CanLII), [2006] 2 SCR 501, *per* Fish J, at para 24
    This affirmed the right to "jury nullification"

Jury Warning

A judge is permitted to provide specific warnings to the jury on certain issues of which they may not be aware of their significance.[1] Warnings or cautions are not given because the jury is seen an uninformed or unintelligent, but rather to give them knowledge from judicial experience. The warning concerns knowledge beyond the obvious that they can discern themselves. The purpose is to “help the jury appreciate the peculiarly concerning qualities of evidence which must be evaluated with particular caution in light of those concerns”[2]

1. *R v Sutherland*, 2011 ABCA 319 (CanLII), 279 CCC (3d) 478, *per curiam*, at para 7
2. see e.g. *R v White*, 2011 SCC 13 (CanLII), [2011] 1 SCR 433, 267 CCC (3d) 453, *per* Rothstein J, at paras 55 to 60 and 87{{{3}}}, see also, *per* Charron J, at paras 105 to 107 and 130 as well as, *per* Binnie J185

Limited Purpose Evidence

Generally, evidence of limited admissibility must be accompanied by specific jury instructions that satisfy the following:[1]

- identify the evidence to which they apply;
- explain the permitted use of the evidence; and
- explain the prohibited use of the evidence.

This includes evidence admitted such as bad character evidence.

A judge must provide limiting instructions on the use of prior statements of witnesses. Without instructions there is a risk that jurors "may not be aware that they cannot use such statements as substantive evidence, irrespective of the use made of the statements by counsel." We cannot safely assume jurors understand the purpose of such evidence. [2]

Failure to give the instructions is an error of law.[3] The issue for the appellate court on such an error is whether "any convictions ... can be sustained despite the error of law. Convictions may be upheld providing the error did not cause a substantial wrong or miscarriage of justice".[4]

1. *R v Largie*, 2010 ONCA 548 (CanLII), 101 OR (3d) 561, *per* Watt JA, at para 107
2. *R v Bevan*, 1993 CanLII 101 (SCC), [1993] 2 SCR 599, *per* Major J, at p. 619
   See also *R v Kokotailo*, 2008 BCCA 168 (CanLII), 254 BCAC 262, *per* Smith J, at para 44
   R v Moir, 2013 BCCA 36 (CanLII), *per* Bennett JA
3. *R v MT*, 2012 ONCA 511 (CanLII), 289 CCC (3d) 115, *per* Watt JA, at para 84
4. *R v Van*, 2009 SCC 22 (CanLII), [2009] 1 SCR 716, *per* LeBel J, at para 34
   MT, *supra*, at para 85

Evidence-related Instructions

To illustrate the frailties of identification evidence, a judge should not instruct a jury to close their eyes and attempt to accurately picture the person next to them.[1]

Due to the dangers of bolstering a witnesses credibility through prior consistent statements, "a limiting instruction will almost always be required where such statements are admitted."[2] The instruction should delineate that "consistency is not the same as accuracy" and should not be used to assess general reliability.[3]

Submissions and instructions suggesting that a hearsay statement should be relied upon for a verdict can warrant a new trial.[4]

1. *R v Francis*, 2002 CanLII 41495 (ON CA), 165 OAC 131, *per curiam*
2. *R v Ellard*, 2009 SCC 27 (CanLII), [2009] 2 SCR 19, at para 42, *per* Abella J
3. *Ellard*, *ibid.*, at para 42
4. *R v Iyeke*, 2016 ONCA 349 (CanLII), *per curiam*

Defences

The trial judge must leave every defence to the jury that is *available on the facts* of the case, regardless of whether the accused raises it.[1]

Only where there is an "air of reality" that the evidence can make out the requirements of the defence. The evidential foundation does not exist where "its only constituent elements are of a tenuous, trifling, insignificant or manifestly unsubstantive nature: there must be evidence in the record upon which a properly instructed jury, acting judicially, could entertain a reasonable doubt as to the defence that has been raised."[2]Or to put it another way, the test does not consider whether a defence is likely, somewhat likely, unlikely, or very likely. It only considers whether "there is some evidence that puts the defence in play".[3]

An accused "should not lightly be deprived of the chance to present the defence they are relying upon, and the trier of fact can deal with the deficiencies when examining the defences of their merit."[4]

Even with the defence theory is inconsistent to a particular defence, such as self-defence, but the evidence presents a "coherent route...that could lead to an acquittal" on the basis of that defense that it must be put to the jury.[5]

A charge wil not be "unfair or unbalance" only because the "trial judge did not spend an equal time reviewing the parties' evidence.[6]

1. *R v Esau*, 1997 CanLII 312 (SCC), [1997] 2 SCR 777, *per* Major J, at para 13 ("it has long been established that a trial judge must charge the jury on every defence which has an "air of reality", whether or not that defence is raised by the accused.") and, at para 26
2. *R v Fontaine*, 2004 SCC 27 (CanLII), [2004] 1 SCR 702, *per* Fish J, at para 56
3. *Fontaine*, *ibid.*
4. Lee Stuesser, The Law of Evidence, 6th ed. (Toronto: Irwin Law Inc, 2011), at p. 546
5. *R v Brar*, 2009 BCCA 585 (CanLII), 250 CCC (3d) 198, *per* Bennett JA
6. *R v Nelson*, 2013 ONCA 853 (*no CanLII links) , at para 47

Penalties

It generally prohibited for the jury to be told about the penalties associated with the charge. They are not to concern themselves with it.[1]

1. *R v Stevenson*, 1990 CanLII 2594 (ON CA), [1990] OJ No 1657, *per* Morden JA
   R v Cracknell, 1931 CanLII 168 (ON CA), 56 CCC 190 at 192, *per* Murlock JA
   R v McLean, 1933 CanLII 38 (SCC), [1933] SCR 688, at pp. 13-14 (CCC), *per curiam*
   R v Cathro v The Queen, 1955 CanLII 46 (SCC), [1956] SCR 101, *per* Estey J, at p. 241 (SCC)
   Thorne v R, 2004 NBCA 102 (CanLII), 192 CCC (3d) 424, *per* Deschênes JA, at para 10 - an exception exists for evidence regarding the use of proclamation under s. 67

Expert Opinion Evidence

The jury instruction on experts should include:[1]

- a description of the relationship between knowledge of a technical subject, the qualifications of an expert, and their ability to express opinions on the subject;
- a brief summary of the expert evidence adduced at trial;
- and a direction on how to assess the testimony of experts and to determine its impact on the decisions required of the jury at the end of the trial.

They should also be informed that expert witnesses should be evaluated in the same manner as any other witness and they are entitled to rely and believe as much or as little of the evidence as they see fit.[2]

Where the expert testifies to inadmissible evidence, the jury must be instructed not to consider the evidence.[3]

1. *R v Burnett*, 2018 ONCA 790 (CanLII), 367 CCC (3d) 65, *per* Watt JA, at para 67
2. *Burnett*, *ibid.*, at para 67
3. *Burnett*, *ibid.*, at para 68

See Also

- Example Jury Instructions

Example Jury Instructions

< Procedure and Practice < Trials < Juries < Example Jury Instructions

Introduction

The following contains quotations of instructions that were endorsed or considered by appellate courts as being sufficient under certain circumstances. There are also outlines that enumerate types of instructions.

There are four types of instructions: 1) selection instructions 2) introductory/preliminary 3) mid-trial instructions and 4) final

Example Types

- Example Jury Selection Instructions
- Example Preliminary Jury Instructions
- Example Mid-Trial Jury Instructions
- Example Final Jury Instructions

Evidence

Admissions

- "An admission stands in the place of and renders unnecessary testimony or exhibits to prove what has been admitted. Jurors are to take what is admitted as proven fact and consider the facts admitted, along with the rest of the evidence in deciding the case."[1]

1. *R v Brookfield Gardens Inc*, 2018 PECA 2 (CanLII), *per* Murphy JA, at para 25

Circumstantial Evidence

Expert Evidence

Selection

Challenge for Cause

Race

- "Thinking about your own beliefs, would your ability to judge the evidence in this case without bias, prejudice or partiality, be affected by the fact that [accused] is black?"[1]

1. *R v McKenzie*, 2018 ONSC 2764 (CanLII), *per* Campbell J, at para 25

Unsavoury (Vetrovec) Witnesses

Offences

Murder

- On the issue of intent, the Judge must instruct the jury to "consider all of the evidence" when deciding the issue of intent.[1]
- Inferences on intent "inference that may be rebutted by evidence of intoxication".[2]

1. *R v Pruden (DJ)*, 2012 MBCA 62 (CanLII), 280 Man R (2d) 207, *per* Steele JA, at para 4
2. *Pruden*, *ibid.*, at para 6

Defences

See Also

- Model Jury Instructions - National Judicial Institute

Discharging a Juror

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79483)

< Procedure and Practice < Trials < Juries

General Principles

Section 644 (1) and (2) states that:

> **Discharge of juror**
>
> 644 (1) Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.
> [*omitted (1.1)*]
>
> **Trial may continue**

(2) Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1)[*discharge of juror for reasonble cause*], the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.

Trial may continue without jury

(3) If in the course of a trial the number of jurors is reduced below 10, the judge may, with the consent of the parties, discharge the jurors, continue the trial without a jury and render a verdict.

R.S., 1985, c. C-46, s. 644; 1992, c. 41, s. 6; 1997, c. 18, s. 75; 2019, c. 25, s. 273.

– CCC

A juror can be discharged where there is well-established information that a juror's impartiality is in questioned.[1]

The judge will make inquiries to the alleged biased juror in open court. Counsel will be able to make submissions and suggest questions to be put to the juror.[2]

A judge has the discretion to discharge a juror under s. 644 and continue the trial or can dismiss the jury and declare a mistrial. [3] The procedure requires the judge to:

1. "apply the proper legal test for determining whether the information gives rise to a reasonable apprehension of bias", and
2. "at a minimum, conduct an inquiry into the circumstances in order to obtain the necessary information upon which to exercise his or her discretion" [4]

Wide discretion

The decision to discharge is "highly discretionary" and so is afforded deference.[5]

A judge generally *should* but need not consult with counsel before dismissing a juror.[6]

Timing of Discharge

Jurors can be dismissed during deliberations.[7]

Requests Must be On the Record

A judge may not hear requests and reasons for requests to be excused from members of the jury off the record and without the presence of the accused.[8]

The jury can be reduced to as little as 10 members without a mistrial or a violation of s. 11(f) Charter rights.[9]

Jury secrecy is an ancient part of the common law. [10] The purpose is to allow juries to explore reasonings without risk of impeachment.[11]

It exists today in section 649:

> **Disclosure of jury proceedings**
>
> 649 Every member of a jury, and every person providing technical, personal, interpretative or other support services to a juror with a physical disability, who, except for the purposes of
>
> (a) an investigation of an alleged offence under subsection 139(2) [*obstructing justice – other conduct*] in relation to a juror, or
> (b) giving evidence in criminal proceedings in relation to such an offence,
>
> discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.
> R.S., 1985, c. C-46, s. 649; 1998, c. 9, s. 7.
> [*annotation(s) added*]
>
> – CCC

This rule, however, does not prevent the court from taking evidence from a third party or a juror about problems that may taint the verdict.

Once the jury gives a verdict the judge is *functus* and so cannot deal with any issues of irregularities in deliberation.[12]

Discharge for Medical Emergency

Wher the trial judge is informed of a credible medical emergency in a juror's family while the jury is deliberating, the judge may advise the juror *in camera* to determine whether the juror should continue.[13]

1. *R v Budai*, 2001 BCCA 349 (CanLII), 154 CCC (3d) 289, *per* Cumming and Mackenzie JJA, at paras 27 to 40
   R v Wolfe, 2005 BCCA 307 (CanLII), 197 CCC (3d) 486, *per* Levine JA, at para 5 ("When a juror's conduct raises questions of possible bias, the trial judge may discharge the juror or dismiss the jury and declare a mistrial. Whether to take such a step is a matter which falls within the discretion of the trial judge....")
2. *R v Chambers*, 1990 CanLII 47 (SCC), [1990] 2 SCR 1293, *per* Cory J (6:1)
3. *Budai*, *supra*, at para 39
4. *Budai*, *supra*, at para 40
5. *R v Li*, 2012 ONCA 291 (CanLII), 284 CCC (3d) 207, *per* Feldman JA, at paras 77 to 78
   R v Brost, 2017 ABCA 113 (CanLII), *per curiam*, at para 7
6. *Brost*, *ibid.*, at para 7
7. *R v Krieger*, 2005 ABCA 202 (CanLII), [2005] AJ No 683 (CA), *per* Cote JA
   R v Peters, 1999 BCCA 406 (CanLII), 137 CCC (3d) 26, *per* McEachern JA
   R v Kum, 2012 ONSC 1194 (CanLII), 281 CCC (3d) 553, *per* Wein J
8. *R v Sinclair*, 2013 ONCA 64 (CanLII), 300 CCC (3d) 69, *per* Rouleau JA
9. *R v Genest*, 1990 CanLII 3175 (QC CA), 61 CCC (3d) 251, *per* Mailhot JA

10. dating back to "Lord Mansfield's Rule" of 1785 which prohibits evidence of jury deliberation
11. *R v Pan*, 2001 SCC 42 (CanLII), [2001] 2 SCR 344, *per* Arbour J (9:0)
12. see *R v Lewis*, 2012 ONSC 1074 (CanLII), OJ No 742, *per* Hill J
    R v Mirza, [2004] 1 A.C. 1118(*no CanLII links)
13. *R v Vivian*, 2012 ONCA 324 (CanLII), 290 CCC (3d) 73, *per* MacPherson JA

Standing Aside a Juror

Stand by

633 The judge may direct a juror who has been called under subsection 631(3) [*manner of drawing cards*] or (3.1) [*power to order calling out names on cards*] to stand by for reasons of personal hardship, maintaining public confidence in the administration of justice or any other reasonable cause.

R.S., 1985, c. C-46, s. 633 R.S., 1985, c. 27 (1st Supp.), s. 185(F); 1992, c. 41, s. 2; 2001, c. 32, s. 40; 2019, c. 25, s. 269.
[*annotation(s) added*]

– CCC

Calling persons who have stood by

641 (1) If a full jury and any alternate jurors have not been sworn and no cards remain to be drawn, the persons who have been directed to stand by shall be called again in the order in which their cards were drawn and shall be sworn, unless excused by the judge or challenged by the accused or the prosecutor.

Other persons becoming available

(2) If, before a person is sworn as a juror under subsection (1) [*calling persons who have stood by*], other persons in the panel become available, the prosecutor may require the cards of those persons to be put into and drawn from the box in accordance with section 631 [*procedure for jury cards*], and those persons shall be challenged, directed to stand by, excused or sworn, as the case may be, before the persons who were originally directed to stand by are called again.
R.S., 1985, c. C-46, s. 641; 1992, c. 41, s. 3; 2001, c. 32, s. 41; 2002, c. 13, s. 55; 2011, c. 16, s. 10.
[*annotation(s) added*]

– CCC

Discharging Surplus Jury Members

Trying of issues of indictment by jury

652.1 (1) After the charge to the jury, the jury shall retire to try the issues of the indictment.

Reduction of number of jurors to 12

(2) However, if there are more than 12 jurors remaining, the judge shall identify the 12 jurors who are to retire to consider the verdict by having the number of each juror written on a card that is of equal size, by causing the cards to be placed together in a box that is to be thoroughly shaken together and by drawing one card if 13 jurors remain or two cards if 14 jurors remain. The judge shall then discharge any juror whose number is drawn.
2011, c. 16, s. 13.

– CCC

Replacing Jurors

Section 644(1.1) permits the judge to select new jurors:

644
[*omitted (1)*]

Replacement of juror

(1.1) A judge may select another juror to take the place of a juror who by reason of illness or other reasonable cause cannot continue to act, if the jury has not yet begun to hear evidence, either by drawing a name from a panel of persons who were summoned to act as jurors and who are available at the court at the time of replacing the juror or by using the procedure referred to in section 642 [*summoning other jurors when panel exhausted*].
[*omitted (2) and (3)*]
R.S., 1985, c. C-46, s. 644; 1992, c. 41, s. 6; 1997, c. 18, s. 75; 2019, c. 25, s. 273.
[*annotation(s) added*]

– CCC

Jury Deliberations

This page was last substantively updated or reviewed *January 2021*. (Rev. # 79483)

General Principles

Transcripts Given to Jury

It is acceptable to provide a jury copies of transcripts.[1]

1. *R v Quashie*, 2005 CanLII 23208 (ON CA), 198 CCC (3d) 337, at paras 46 to 48

Deadlocked Juries

Where the jury is "deadlocked" and further deliberation would be "useless" the judge has the discretion to discharge the jury and impanel a new jury.

> **Disagreement of jury**
>
> 653 (1) Where the judge is satisfied that the jury is unable to agree on its verdict and that further detention of the jury would be useless, he may in his discretion discharge that jury and direct a new jury to be impaneled during the sittings of the court, or may adjourn the trial on such terms as justice may require.
>
> **Discretion not reviewable**
>
> (2) A discretion that is exercised under subsection (1) [*disagreement of jury*] by a judge is not reviewable.
> R.S., c. C-34, s. 580.
> [*annotation(s) added*]
>
> – CCC

Exhortation by Judge

Where the jury is deadlocked the judge may give an exhortation to encourage the jury to make effort to reach an agreement. The judge must be careful and balanced during the exhortation to a deadlocked jury. The jury will likely be frustrated and disgruntled and so must be handled appropriately.[1] The exhortation must be phrased carefully so as not to be seen as "coercive" and imposing "extraneous pressures" that remove the freedom of the jurors to deliberate uninfluenced.[2]

The judge should not do anything that may treat particular jurors as misunderstood or that pits one jurors against the others.[3]

It is not relevant to examine whether the jurors were affected by any of the instructions of the judge.[4]

The judge must make it clear to the jury throughout his instructions that they are "not obliged to render a verdict" if they cannot reach a consensus.[5]

When considering the applicability of a defence it is not necessary for the jury to be in agreement about which elements cause them to reject the defence.[6]

It is impermissible for the judge to suggest that a single juror was in some way wrong in their views on the law or the outcome.[7]

Analysis

The test to be applied is "whether there is a possibility that what the trial judge said could have persuaded a juror to go along with the majority notwithstanding that he or she had not been persuaded that guilt had been proven beyond a reasonable doubt".[8]

Factors

A reviewing court can consider the "entire sequence of events" that lead up to the judge's direction at issue.[9]

Examples

Suggesting to the jury that they will be sequestered longer if they are unable to reach an agreement is considered coercive.[10]

1. *R v RMG*, 1996 CanLII 176 (SCC), [1996] 3 SCR 362, *per* Cory J (7:2), at para 15
2. *R v Littlejohn*, 1978 CanLII 2326 (ON CA), 41 CCC (2d) 161, *per* Martin JA, at p. 168 ("It is well established that in exhorting a jury to endeavour to reach agreement, the trial Judge must avoid language which is coercive, and which constitutes an interference with the right of the jury to deliberate in complete freedom uninfluenced by extraneous pressures.")
3. *R v Vivian*, 2012 ONCA 324 (CanLII), 290 CCC (3d) 73, *per* MacPherson JA (3:0) , at para 47
4. *Vivian*, *ibid.*, at para 61
5. See *R v Chahal*, 2008 BCCA 529 (CanLII), 240 CCC (3d) 363, *per* Smith JA (3:0)
6. *R v Dagenais*, 2012 SKCA 103 (CanLII), 399 Sask R 271, *per* Richards JA, at para 32
7. *R v Vivian*, 2012 ONCA 324 (CanLII), 290 CCC (3d) 73, *per* MacPherson JA
8. *R v Sims*, 1991 CanLII 5756 (BC CA), 64 CCC (3d) 403, *per* Lambert JA, at para 19 (in dissent but adopted on appeal) ("The question is whether there is a possibility that what the trial judge said could have persuaded a juror to go along with the majority notwithstanding that he or she had not been persuaded that guilt had been proven beyond a reasonable doubt.") appealed to *R v Sims*, 1992 CanLII 77 (SCC), [1992] 2 SCR 858, *per* McLachlin J
9. *Littlejohn*, *supra*, at p. 168 ("In deciding whether the line has been crossed between what is permissible as mere exhortation, and what is forbidden as coercive, the entire sequence of events leading up to the direction which is assailed, must be considered.")
10. *R v Jack*, 1996 CanLII 2351 (MB CA), 131 WAC 84, *per* Scott CJ

Jury Questions

- Jury Questions

Recharge of Jury

The answer may result in a "recharge" of the jury. These recharges "must be correct and comprehensive no matter how exemplary the original charge may have been".[1]

An error in recharge cannot be forgiven simply because the original charge was correct.[2] In fact, the more time that passes between the original charge and recharge, the greater imperative that the recharge be "correct and comprehensive".[3]

1. *R v S(WD)*, 1994 CanLII 76 (SCC), [1994] 3 SCR 521, *per* Cory J (5:2), at pp. 530-531
2. *WDS*, *ibid.*, at pp. 530-531
3. *WDS*, *ibid.*, at p. 531

Internet Research by Jurors

A jury verdict must be made using only information and evidence they receive in the course of the trial.[1]

A jury verdict may be impeached where it is established there is a "reasonable possibility" that the extrinsic information the jury accessed had an effect on the verdict.[2]

This assessment is based on the examination of the record and involves a contextual case-by-case analysis.[3]

Discovery Prior to Verdict

Where a trial judge discovers the jury accessing extrinsic information prior to the verdict, the judge should conduct an inquiry into identifying the nature and extent of information acquired and then make an assessment of the jury members to determine the suitability of continuing the trial.[4]

Appellate Review

The reviewing court should defer to the conclusions of the trial judge absent legal error, misapprehension of evidence, or patent unreasonableness.[5]

1. e.g. *Patterson v Peladeau*, 2020 ONCA 137 (CanLII), *per curiam*, at para 22
2. *Patterson*, *ibid.*, at para 30
3. *Patterson*, *ibid.* at para 30
   R v Pannu, 2015 ONCA 677 (CanLII), 127 OR (3d) 545, at paras 71 to 74
   R v Farinacci, 2015 ONCA 392 (CanLII), 335 OAC 316, at para 26
   R v Pan; R v Sawyer, 2001 SCC 42 (CanLII), [2001] 2 SCR 344, at para 59
4. *Patterson*, *supra*, at para 31
5. *Pannu*, *supra*, at paras 71to 72

See Also

- wikipedia:Blank pad rule

Special Issues Relating to Jurors

< Procedure and Practice < Trials < Juries

Disabled Jurors

Support for juror with physical disability

627 The judge may permit a juror with a physical disability who is otherwise qualified to serve as a juror to have technical, personal, interpretative or other support services.
R.S., 1985, c. C-46, s. 627; R.S., 1985, c. 2 (1st Supp.), s. 1; 1998, c. 9, s. 4.

– CCC

Date of Verdict

Proceeding on Sunday, etc., not invalid

654 The taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on Sunday or on a holiday.
R.S., c. C-34, s. 581.

– CCC

Trial Verdicts

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79483)

< Procedure and Practice < Trials

Introduction

The judge's duty is to render a verdict on the charges. The verdict must be either a finding of guilt, stay of proceedings, or acquittal.

The judge has the ability, where the evidence does not make out the actual charge, to convict for included offences to the original charge under s. 662.

Under s. 804, at the conclusion of a summary conviction trial, the court must either (a) convict the accused; (b) discharge him under s.730; (c) make an order against him; or (d) dismiss the information:

Finding of guilt, conviction, order or dismissal

804 When the summary conviction court has heard the prosecutor, defendant and witnesses, it shall, after considering the matter, convict the defendant, discharge the defendant under section 730 , make an order against the defendant or dismiss the information, as the case may be.
R.S., 1985, c. C-46, s. 804; R.S., 1985, c. 27 (1st Supp.), s. 178, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10.

– CCC

Procedure

Section 570 sets out the required forms the court should use when recording a verdict of any type.

Attempts vs Full Offence

Full offence charged, attempt proved

660. Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.
R.S., c. C-34, s. 587.

– CCC

Attempt charged, full offence proved

661 (1) Where an attempt to commit an offence is charged but the evidence establishes the commission of the complete offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt unless the judge presiding at the trial, in his discretion, discharges the jury from giving a verdict and directs that the accused be indicted for the complete offence.

Conviction a bar

(2) An accused who is convicted under this section is not liable to be tried again for the offence that he was charged with attempting to commit.
R.S., c. C-34, s. 588.

– CCC

Offence charged, part only proved

662 (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

> (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
> (b) of an attempt to commit an offence so included.

[*omitted (2), (3), (4), (5) and (6)*]
R.S., 1985, c. C-46, s. 662; R.S., 1985, c. 27 (1st Supp.), s. 134; 2000, c. 2, s. 3; 2008, c. 6, s. 38; 2018, c. 21, s. 20.

– CCC

Records of Ajudication

Record of conviction or order

570
[*omitted (1)*]

Acquittal and record of acquittal

(2) If an accused who is tried under this Part is found not guilty of an offence with which the accused is charged, the judge or provincial court judge, as the case may be, shall immediately acquit the accused in respect of that offence, an order in Form 37 [*forms*] shall be drawn up and, on request, a certified copy shall be drawn up and delivered to the accused.

Transmission of record

(3) Where an accused elects to be tried by a provincial court judge under this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], the provincial court judge shall transmit the written charge, the memorandum of adjudication and the conviction, if any, into such custody as the Attorney General may direct.

Proof of conviction, order or acquittal

(4) A copy of a conviction in Form 35 [*forms*] or of an order in Form 36 [*forms*] or 37 [*forms*], certified by the judge or by the clerk or other proper officer of the court, or by the provincial court judge, as the case may be, or proved to be a true copy, is, on proof of the identity of the person to whom the conviction or order relates, sufficient evidence in any legal proceedings to prove the conviction of that person or the making of the order against that person or his acquittal, as the case may be, for the offence mentioned in the copy of the conviction or order.

Warrant of committal

(5) If an accused other than an organization is convicted, the judge or provincial court judge, as the case may be, shall issue a warrant of committal in Form 21 [*forms*], and section 528 [*endorsing warrant*] applies in respect of a warrant of committal issued under this subsection.

Admissibility of certified copy

(6) If a warrant of committal is signed by a clerk of a court, a copy of the warrant of committal, certified by the clerk, is admissible in evidence in any proceeding.

R.S., 1985, c. C-46, s. 570 R.S., 1985, c. 27 (1st Supp.), ss. 112, 203, c. 1 (4th Supp.), s. 18(F); 1994, c. 44, s. 59; 2003, c. 21, s. 10; 2019, c. 25, s. 262.
[*annotation(s) added*]

– CCC

Finding of Guilt

Once a conviction has been entered the protections under s. 11(e) of the Charter for the presumption of innocence are extinguished.[1]

Upon the conclusion of a summary conviction trial and the judge convicts the accused. He must make a "minute or memorandum" of the conviction.[2] Either the accused, the crown, or anyone else may request a certificate of conviction in compliance with Form 35 or 36[3]

A finding of "guilt" is separate and distinct from a "conviction". It is only the finding of guilt which permits a judge to enter a conviction. A conviction is not however the only option of a judge, for example she may also consider a conditional stay of proceedings on the basis of the kienapple principle. [4]

Record of conviction or order

570 (1) If an accused who is tried under this Part is determined by a judge or provincial court judge to be guilty of an offence on acceptance of a plea of guilty or on a finding of guilt, the judge or provincial court judge, as the case may be, shall endorse the information accordingly and shall sentence the accused or otherwise deal with the accused in the manner authorized by law and, on request by the accused, the prosecutor, a peace officer or any other person, a conviction in Form 35 [*forms*] and a certified copy of it, or an order in Form 36 [*forms*] and a certified copy of it, shall be drawn up and the certified copy shall be delivered to the person making the request.
[*omitted (2), (3), (4), (5) and (6)*]
R.S., 1985, c. C-46, s. 570 R.S., 1985, c. 27 (1st Supp.), ss. 112, 203, c. 1 (4th Supp.), s. 18(F); 1994, c. 44, s. 59; 2003, c. 21, s. 10; 2019, c. 25, s. 262.
[*annotation(s) added*]

– CCC

Memo of conviction or order

806 (1) If a defendant is convicted or an order is made in relation to the defendant, a minute or memorandum of the conviction or order must be made by the summary conviction court indicating that the matter was dealt with under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] and, on request by the defendant, the prosecutor or any other person, a conviction or order in Form 35 [*forms*] or 36 [*forms*], as the case may be, and a certified copy of the conviction or order must be drawn up and the certified copy must be delivered to the person making the request.

Warrant of committal

(2) Where a defendant is convicted or an order is made against him, the summary conviction court shall issue a warrant of committal in Form 21 [*forms*] or 22 [*forms*], and section 528 [*endorsing warrant*] applies in respect of a warrant of committal issued under this subsection.

Admissibility of certified copy

(3) If a warrant of committal in Form 21 [*forms*] is signed by a clerk of a court, a copy of the warrant of committal, certified by the clerk, is admissible in evidence in any proceeding.

R.S., 1985, c. C-46, s. 806; R.S., 1985, c. 27 (1st Supp.), s. 185(F); 1994, c. 44, s. 80; 2019, c. 25, s. 318
[*annotation(s) added*]

– CCC

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1. *R v Oland*, 2017 SCC 17 (CanLII), [2017] 1 SCR 250, *per* Moldaver J, at para 35 ("once a conviction is entered, the presumption of innocence is displaced and s. 11(e) of the Charter no longer applies.")
2. s. 806(1)
3. s. 806(1)
4. *R v Bérubé*, 2012 BCCA 345 (CanLII), 326 BCAC 241, *per* Groberman JA, at paras 43 to 52

Vacating a Finding of Guilt

A trial judge maintains jurisdiction up until sentencing to vacate a finding of guilt and replace it with a finding of not guilty.[1] This occurrence is "rare" and should only arise in "exceptional circumstances".[2] If a judge is considering to vacate a verdict, he must permit counsel to provide further submissions.[3]

1. e.g. *R v Griffith*, 2013 ONCA 510 (CanLII), 116 OR (3d) 561, *per* Rosenberg JA
2. *Griffith*, *ibid.*
3. *Griffith*, *ibid.*, at paras 33 to 36

Conditional Stay

A conditional stay is a post-trial verdict for a charge which, on the evidence would amount to a conviction, but is barred from doing so due to the rule against multiple convictions.[1] The stay is conditional until such time as the charge in which a conviction was entered is finally disposed of on appeal or the expiration of the appeal period.[2] If an appeal is successfully made from conviction the conditional stay is dissolved allowing the court of appeal to remit the charge for trial once more.

1. *R v Provo*, 1989 CanLII 71 (SCC), [1989] 2 SCR 3, *per* Wilson J, at para 21
2. *R v Terlecki*, 1985 CanLII 16 (SCC), 22 CCC (3d) 224, *per* Dickson CJ, at p. 529

R v Jewitt, 1985 CanLII 47 (SCC), [1985] 2 SCR 128, *per* Dickson CJ

Acquittal

There is only one type of acquittal. It does not distinguish or qualify the basis of the acquittal.[1]

The criminal law does not make a distinction between actual innocence and mere failure to meet the criminal standard. Findings of actual innocence does not fall within the purpose of criminal law.[2]

An aquittal only establishes "legal innocence" but does not address "factual innocence". [3]

From the Crown's perspective who may seek to prosecute the accused, an acquittal is to be treated as the functional "equivalent to a finding of innocence".[4]

> **Record of conviction or order**
>
> 570
> [*omitted (1)*]

Acquittal and record of acquittal

(2) If an accused who is tried under this Part is found not guilty of an offence with which the accused is charged, the judge or provincial court judge, as the case may be, shall immediately acquit the accused in respect of that offence, an order in Form 37 [*forms*] shall be drawn up and, on request, a certified copy shall be drawn up and delivered to the accused.
[*omitted (3), (4), (5) and (6)*]
R.S., 1985, c. C-46, s. 570 R.S., 1985, c. 27 (1st Supp.), ss. 112, 203, c. 1 (4th Supp.), s. 18(F); 1994, c. 44, s. 59; 2003, c. 21, s. 10; 2019, c. 25, s. 262.
[*annotation(s) added*]

– CCC

An acquittal order should use Form 37.

1. *R v Grdic*, 1985 CanLII 34 (SCC), 19 CCC (3d) 289, *per* Lamer CJ, at pp. 293 to 294
2. *R v Mullins-Johnson*, 2007 ONCA 720 (CanLII), 228 CCC (3d) 505, *per curiam*
3. *Mullins-Johnson*, *ibid.*
4. *Grdic*, *supra* - reconsideration of res judicata and ability to re-prosecute accused
   R v Grant, 1991 CanLII 38 (SCC), 67 CCC (3d) 268, *per* Lamer CJ

Topics

- Kienapple Principle
- Directed Verdicts
- Unreasonable Verdict

Related

- Mistrials
- Functus Officio
- Sufficiency of Reasons
- Withdraw and Dismissal of Charges

Analyzing Testimony

This page was last substantively updated or reviewed *August 2021*. (Rev. # 79483)

< Procedure and Practice < Trials < Weighing Oral Evidence

Findings of Fact

Only the trier-of-fact (ie. the judge or jury) can make findings of fact unless there is an agreement on facts or an admission under s. 655 of the Code.[1]

Analysis of Testimony

Tools of Analysis

When considering testimony evidence, its value comes down to four factors:[2]

1. perception,
2. memory,
3. narration, and
4. sincerity

Evidence Not to be Analyzed Separately

Facts should not be examined separately and in isolation to the standard of proof beyond a reasonable doubt.[3]

However, beyond determining whether the evidence, on the whole, proves guilt beyond a reasonable doubt, "it is for the trier of fact to determine how to proceed".[4]

No Choosing of Stories

When confronted with two contradictory stories, a judge does not need to make a finding of fact as to which story is correct.[5]

An approach that permits choosing of stories would "erode" the presumption of innocence and standard of proof beyond a reasonable doubt.[6] However, it is not an error to make "finding of credibility as between the complainant and the accused" as long as all the steps of further analysis are taken.[7] It is only in error should the judge treat the task as complete once a finding of credibility as between the complainant and accused.[8]

Guilt should not be based a credibility contest or choice between competing evidence.[9]

1. see Admissions of Fact
2. Kenneth S. Broun et al., 2 McCormick on Evidence, (6th ed.) (USA: Thomson/West, 2006), §245, at p. 125 and *R v Baldree*, 2012 ONCA 138 (CanLII), 280 CCC (3d) 191, *per* Feldman JA (2:1), at para 43 - appealed on other grounds at 2013 SCC 35 (CanLII)
3. *R v Morin*, 1988 CanLII 8 (SCC), [1988] 2 SCR 345, *per* Sopinka J (6:0) ("facts are not to be examined separately and in isolation with reference to the criminal standard")
   R v Narwal, 2009 BCCA 410 (CanLII), [2009] BCJ No 1941 (CA), *per* Frankel JA (2:1), at para 88
   R v Menow, 2013 MBCA 72 (CanLII), 300 CCC (3d) 415, *per* Cameron JA (3:0)
4. *Morin*, *supra*, at para 40 ("during the process of deliberation the jury or other trier of fact must consider the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. This of necessity requires that each element of the offence or issue be proved beyond a reasonable doubt. Beyond this injunction, it is for the trier of fact to determine how to proceed")
5. *R v Avetysan*, 2000 SCC 56 (CanLII), [2000] 2 SCR 745, *per* Major J (4:1), at para 2
6. *R v DW*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742, *per* Cory J (4:1), at pp. 757-8 (SCR) or 409 (CCC)
   Avetsyan, *supra*, at paras 18 to 22
   R v JR, 2014 QCCA 869 (CanLII), [2014] Q.J. No 3957 (CA), *per* Hesler CJ, at para 38 (the judge “cannot simply choose one over the other. That would in effect lower the prosecution's burden from proof beyond a reasonable doubt to proof on the balance of probabilities”)
7. *R v Chittick*, 2004 NSCA 135 (CanLII), 24 CR (6th) 228, *per* Cromwell JA (3:0), at paras 23 to

25
8. *Chittick*, *ibid.*, at paras 23 to 25
9. *R v MDR*, 2015 ONCA 323 (CanLII), *per curiam* (3:0)
   R v Fleig, 2014 ABCA 97 (CanLII), 572 AR 161, *per curiam* (3:0), at para 24 ("primary concern of the framework in W(D) is that a trier of fact should not line up the Crown and defence evidence and select one over the other.")
   R v ST, 2015 MBCA 36 (CanLII), MJ No 112, *per* Mainella JA (3:0), ("a trial judge cannot render a verdict in a criminal case by the process of simply deciding which competing narrative of events he or she prefers; that is the so-called 'credibility contest' error.")

Acceptance of Evidence

Selective Acceptance of a Witness' Evidence

Evidence before a judge are not facts. The judge has the power to hear evidence from which factual conclusions may be made. The testimony of a witness is *not* a fact until the trier finds it as so. It is only for the trier to decide. The trier may accept all, some, or none of what a witness says.[1] If the witness is not believed on an issue, the evidence supporting it must be rejected. [2]

Of the evidence accepted, the trier-of-fact may associate different weights to individual parts of the evidence.[3]

The determination of guilt must not be determined on the basis of a mere credibility contest or choice of preference between witnesses.[4]

Finding of Facts Limited to Issues of Dispute

It must be remembered that when assessing evidence heard at trial, it is not the court's role to "resolve the broad factual question of what happened". The judge is only obliged to decide "whether the essential elements of the charge have been proven beyond a reasonable doubt."[5]

Editing Statements

The court does have a limited power to edit statements and other forms of evidence as part of its jurisdiction over the trial process. This is usually applied where the evidence is unduly prejudicial.[6]

1. *R v DAI*, 2012 SCC 5 (CanLII), [2012] 1 SCR 149, *per* McLachlin CJ (6:3), at para 72
   R v Francois, 1994 CanLII 52 (SCC), [1994] 2 SCR 827, *per* McLachlin J (4:3), at p. 837 (or para 14)
   R v BC, 2011 ONCA 604 (CanLII), *per curiam* (3:0), at para 5 leave refused
   R v MR, 2010 ONCA 285 (CanLII), OJ No 15478, *per curiam* (3:0), at para 6
   R v DR, 1996 CanLII 207 (SCC), 107 CCC (3d) 289, *per* L'Heureux-Dube J (dissenting in result), at p. 318
   R v Hunter, 2000 CanLII 16964 (ON CA), [2000] OJ No 4089 (ONCA), *per curiam*, at para 5
   R v Abdullah, 1997 CanLII 1814 (ON CA), [1997] OJ No 2055 (CA), *per* Carthy and Goudge JJA, at paras 4 to 5
   R v Mathieu, 1994 CanLII 5561 (QC CA), 90 CCC (3d) 415, *per* Brossard JA and Fish JA, at para 61 aff'd 1995 CanLII 79 (SCC), [1995] 4 SCR 46{, *per* Lamer CJ, ("...triers of fact remain free, as they have always been in the past, to accept all, part or none of the evidence of any witness... . The evidence of each witness must be considered in the light of all the other evidence.")
   R v Lindsay, 2012 SKCA 33 (CanLII), 393 Sask R 9, *per* Jackson JA, at para 16
2. *R v Morin*, 1987 CanLII 6819 (ON CA), 36 CCC (3d) 50, *per* Cory JA
3. *R v Howe*, 2005 CanLII 253 (ON CA), 192 CCC (3d) 480, *per* Doherty JA (3:0), at para 44 ("A trier of fact is entitled to accept parts of a witness's evidence and reject other parts. Similarly, the trier of fact can accord different

weight to different parts of the evidence that the trier of fact has accepted.")

4. *R v Avetsyan*, 2000 SCC 56 (CanLII), [2000] 2 SCR 745, *per* Major J (4:1), at pp. 85 to 87
5. *R v Mah*, 2002 NSCA 99 (CanLII), 167 CCC (3d) 401, *per* Cromwell JA (3:0), at para 41
6. *R v Dubois*, 1986 CanLII 4683 (ON CA), 27 CCC (3d) 325, *per* Morden JA (3:0)

Consequence of Findings

Reliance on Evidence

The trier-of-fact may only convict where there has been "acceptable credible evidence" that was found to be factually correct.[1] If there is "contradictory evidence" on an element of the charge the accused must be given the benefit of that doubt even if the accused evidence is rejected.[2]

No Need for Corroboration

In appropriate cases, regardless of the offence, it is reasonable to find guilt based solely on the evidence of a single witness.[3]

Stereotype and prejudice

The judge may rely on reason, common sense, life experience, and logic in assessing credibility but cannot rely on "stereotypical assumptions and "generalizations lacking in an evidentiary foundation".[4]

1. *R v Campbell*, 1995 CanLII 656 (ON CA), 24 OR (3d) 537, *per* Finlayson JA (3:0)
2. *R v Chan*, 1989 ABCA 284 (CanLII), 52 CCC (3d) 184, *per curiam* (3:0)
   R v CWH, 1991 CanLII 3956 (BC CA), 68 CCC (3d) 146, *per* Wood JA (3:0)
   R v Miller, 1991 CanLII 2704 (ON CA), 68 CCC (3d) 517, *per curiam* (3:0)
3. *R v AG*, 2000 SCC 17 (CanLII), [2000] 1 SCR 439, *per* Arbour J, at pp. 453-4
   R v Vetrovec, 1982 CanLII 20 (SCC), [1982] 1 SCR 811, *per* Dickson J (9:0), at pp. 819-820
4. *R v Pastro*, 2021 BCCA 149 (CanLII), *per* Fitch JA, at para 52

Appellate Review

On appeal, findings of credibility cannot be interfered with unless the "assessments ... cannot be supported on any reasonable view of the evidence."[1] In giving deference, the law recognizes that the trial judge has the "benefit of the intangible impact of conducting the trial".[2]

Findings of witness credibility is strictly factual.[3]

An appellate court should not interfere with credibility assessments "except in very particular circumstances".[4]

The assessment of credibility is given considerable deference on review.[5] However, where a legal error is made in assessing credibility, there is no deference and may require intervention.[6]

Where the judge fails to give sufficient reasons to explain the findings on credibility and reliability intervention may be warranted.[7] It is essential that the judge resolve "major" or "significant" inconsistencies in testimony so that the accused understands why the judge is left without reasonable doubt.[8]

Where an essential element turns on credibility, a failure to make credibility findings may amount to a reversible error.[9]

The finding of a fact where there is no evidence to support it is reviewable as a question of law on a standard of correctness.[10] The same goes for interpreting the legal effect of a finding of fact.[11]

Finding of fact based on an irrelevant consideration is a question of law and reviewable on a standard of correctness.[12]

1. *R v Burke*, 1996 CanLII 229 (SCC), [1996] 1 SCR 474, *per* Sopinka J(7:0), at para 7
2. *R v GF*, 2021 SCC 20 (CanLII), *per* Karakatsanis J, at para 81
3. *R v RP*, 2012 SCC 22 (CanLII), [2012] 1 SCR 746, *per* Deschamps J (5:2), at para 10 ("Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence") [*quotation marks removed*])
4. *RP*, *ibid.*, at para 10
5. *R v DH*, 2016 ONCA 569 (CanLII), 338 CCC (3d) 251, *per* Feldman JA, at para 34 ("A trial judge's assessments of credibility are accorded very considerable deference on appeal, as long as the trial judge has sufficiently explained how significant discrepancies that could undermine credibility and reliability have been resolved.")
6. *R v Luceno*, 2015 ONCA 759 (CanLII), 331 CCC (3d) 51, *per* Weiler JA (3:0), at para 34
7. *DH*, *supra* at para 34
   R v M(A), 2014 ONCA 769 (CanLII), 123 OR (3d) 536, *per curiam* at paras 17 to 19
8. *DH*, *ibid.* at para 35
9. *R v Trotter Estate*, 2014 ONCA 841 (CanLII), 328 OAC 167, *per* Benotto JA ("Where important issues turn on credibility, failure to make credibility findings amounts to reversible error")
10. *R v JMH*, 2011 SCC 45 (CanLII), [2011] 3 SCR 197, *per* Cromwell J (9:0), at paras 24 to 32
11. *JMH*, *ibid.*, at paras 24 to 32
12. *R v Carrano*, 2011 ONSC 7718 (CanLII), OJ No 603, *per* Trotter J, at para 6

Credibility and Reliability

"Credibility" vs "Reliability"

Credibility refers to the witness's ability to be "honesty or veracity". Reliability refers to a witnesses "accuracy".[1] A discreditable witness cannot be reliable. However, a credible witness may still be make an honest mistake.[2]

Accuracy of a witness considers their ability to (1) observe, (2) recall and (3) recount to events at issue.[3]

A credible witness *can* give unreliable evidence, but a non-credible witness *cannot* give reliable evidence.[4]

Findings of a Judge

A judge may believe all, some, or none of a witness's testimony.[5] Whatever is accepted may be allocated different weight to each piece of evidence.[6]

Given that witnesses are not presumed to tell the truth, the trial judge has no obligation to accept any uncontradicted evidence given by the witness.[7] In fact, uncontradicted evidence may be rejected by the judge on the basis of "reason, common sense and rationality".[8]

Findings of credibility are sometimes made simpler through objective independent evidence or corroboration.[9]

On appellate review, it is not important whether a judge makes specific findings in reference to "credibility" and "reliability". It is only necessary that the judge turn their mind to the relevant factors that go to believability.[10] Acceptance of inculpatory evidence implies an assessment of truthfulness, sincerity, and accuracy.[11]

1. *R v Sanichar*, 2012 ONCA 117 (CanLII), 280 CCC (3d) 500, *per* Blair JA (2:1), at para 69
   R v HC, 2009 ONCA 56 (CanLII), 241 CCC (3d) 45, *per* Watt JA (3:0), at paras 41 to 44
   R v Slatter, 2019 ONCA 807 (CanLII), 382 CCC (3d) 245, *per* Pepall JA, at paras 117 to 118 ("...credibility and reliability are different concepts. Credibility deals with a witness's veracity or truthfulness, while reliability addresses the accuracy of a witness's testimony. Accuracy engages consideration of a witness's ability to accurately observe, recall, and recount...")
   R v GF, 2021 SCC 20 (CanLII), SCJ No 20, *per* Karakatsanis J at para 82 ("The jurisprudence often stresses the distinction between reliability and credibility, equating reliability with the witness' ability to observe, recall, and recount events accurately, and referring to credibility as the witness' sincerity or honesty")
2. *R v JVD*, 2016 ONSC 4462 (CanLII), *per* Tzimas J, at para 92
   R v Gostick, 1999 CanLII 3125 (ON CA), [1999] OJ No 2357, *per* Finlayson JA, at paras 15 and 16
   R v Vickerson, 2005 CanLII 23678 (ON CA), [2005] OJ No 2798, *per* Weiler JA, at para 28 (ONCA)
   R v SC, 2012 CanLII 33601 (NLSCTD), [2012] NJ No 210, 324 Nfld & PEIR 19, *per* Stack J
3. *HC*, *supra*, at para 41 ("Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately [1] observe; [2] recall; and [3] recount events in issue."
4. *HC*, *supra*, at para 41
5. *R v Cunsolo*, 2011 ONSC 1349 (CanLII), 277 CCC (3d) 435, *per* Hill J, at paras 228 to 232
   R v Francois, 1994 CanLII 52 (SCC), [1994] 2 SCR 827, *per* McLachlin J (4:3), at para 14
   DR et al. v The Queen, 1996 CanLII 207 (SCC), 107 CCC (3d) 289, *per* L'Heureux-Dubé J dissenting in result, at p. 318
   R v MR, 2010 ONCA 285 (CanLII), OJ No 15478, *per curiam* (3:0), at para 6
   R v Hunter, 2000 CanLII 16964 (ON CA), [2000] OJ No 4089 (CA), *per curiam* (3:0), at para 5
   R v Abdallah, 1997 CanLII 1814 (ON CA), [1997] OJ No 2055 (CA), *per* Carthy and Goudge JJA, at paras 4, 5
   R v Cook, 2010 ONSC 1188 (CanLII), *per* Hill J
6. *Cunsolo*, *supra*, at para 228
   R v Howe, 2005 CanLII 253 (ON CA), [2005] OJ No 39 (CA), *per* Doherty JA (3:0), at para 44
7. *R v Clark*, 2012 CMAC 3 (CanLII), 438 NR 366, *per* Watt JA, at para 41
8. *Clark*, *ibid.*, at para 41
9. *R v GF*, 2021 SCC 20 (CanLII), SCJ No 20, *per* Karakatsanis J, at para 81
10. *GF*, *supra* at para 82 ("appellate courts should consider not whether the trial judge specifically used the words "credibility" and "reliability" but whether the trial judge turned their mind to the relevant factors that go to the believability of the evidence in the factual context of the case, including truthfulness and accuracy concerns.")

11. *GF*, *supra* at para 82 ("A trial judge's determination to accept or believe inculpatory witness evidence includes an implicit assessment of truthfulness or sincerity and accuracy or reliability")
R v Vuradin, 2013 SCC 38 (CanLII), [2013] 2 SCR 639, *per* Karakatsanis J, at para 16

Analysis of Credibility

Evaluating evidence involves the assessment of a witnesses credibility and reliability. These are distinct but related concepts referring to the witness' veracity (the former) and accuracy (the latter).[1] There can be significant overlap. "Testimonial reliability" or "reliability" can often mean or include credibility.[2]

Evaluating credibility is not a scientific or intellectual process.[3]There are no hard and fast rules to apply.[4] It is not simply the application of a set of rules as much as it is "a multifactoral evaluation of the witness that includes factors such as the witness' intelligence, demeanor, ability and capacity to observe and remember, and the intent of the witness to be truthful or deceive".[5]

It involves a "complex intermingling of impressions" based on observations in the context of "independent evidence" and "preponderance of probabilities" that are recognized as reasonable.[6]

The process can often defy verbalization, particularly where "complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events."[7]

Any case that turns on the issue of credibility between two witnesses, the main question is whether the Crown has proven the case beyond a reasonable doubt.[8] Where significant inconsistencies or contradictions exist in the complainant's evidence, the trier-of-fact must assess the evidence carefully.[9]

A failure to properly articulate the credibility concerns may amount to a reversible error.[10]

A failure to cross-examine a witness on a point that is significant to an important issue can be taken into account when evaluating credibility.[11]

Totality of Evidence

The evidence of a witness must always be assessed "in light of the totality of the evidence adduced in the proceedings".[12]

This involves considering the "whole tapestry" (or the "whole scope and nature") of the evidence.[13]

It is an error of law to evaluate reliability and credibility on the basis of individual pieces of evidence without looking at the totality of the evidence.[14]

1. *R v Morrissey*, 1995 CanLII 3498 (ON CA), OR (3d) 514, *per* Doherty JA, at para 33
R v NLP, 2013 ONCA 773 (CanLII), 305 CCC (3d) 105, *per* Lauwers JA (3:0), at para 25

2. *R v Woollam*, 2012 ONSC 2188 (CanLII), 104 WCB (2d) 9, *per* Durno J, at paras 90 to 111 gives detailed canvassing of use of term "reliability" also referring to see *R v Murray*, 1997 CanLII 1090 (ON CA), 115 CCC (3d) 225, *per* Charron JA (3:0)
R v Thurston, [1986] OJ No 2011 (Gen. Div.)

(*no CanLII links)
R v KTD, [2001] OJ No 2890 (SCJ)(*no CanLII links)

3. *R v Gagnon*, 2006 SCC 17 (CanLII), [2006] 1 SCR 621, *per* Bastarache and Abella J (3:2), at paras 19 to 21
R v Mesaros, 2014 ONSC 3445 (CanLII), OJ No 2710, *per* Campbell J, at para 21
R v Wadforth, 2009 ONCA 716 (CanLII), 247 CCC (3d) 466, *per* Watt JA (3:0), at paras 66 to 67
4. *R v White*, 1947 CanLII 1 (SCC), [1947] SCR 268
R v SIC, 2011 ABPC 261 (CanLII), *per* LeGrandeur J, at para 19
5. *R v Lunz*, 2013 ABQB 150 (CanLII), *per* Topolniski J
White, *supra*, at paras 8 to 10
6. *R v JFD*, 2017 BCCA 162 (CanLII), *per* Dickson JA (3:0), at para 38
7. *Mesaros*, *supra*, at para 21
See: *R v Gagnon*, 2006 SCC 17 (CanLII), [2006] 1 SCR 621, *per* Bastarache and Abella J (3:2), at para 20 (It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:")
R v Dinardo, 2008 SCC 24 (CanLII), [2008] 1 SCR 788, *per* Charron J (7:0), at para 26
R v REM, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, *per* McLachlin CJ (7:0), at para 49 ("[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:")
Wadforth, *supra*, at para 66
R v H(W), 2013 SCC 22 (CanLII), [2013] 2 SCR 180, *per* Cromwell J (7:0), at paras 39 to 40
8. *R v Wylie*, 2012 ONSC 1077 (CanLII), [2012] OJ No 1220 (S.C.J), *per* Hill J
R v Selles, 1997 CanLII 1150 (ON CA), 101 OAC 193 (CA), *per* Finlayson JA (3:0), at pp. 207-8
R v NM, 1994 CanLII 1549 (ON CA), [1994] OJ No 1715 (CA), *per curiam* (3:0), at para 1
9. *Wylie*, *supra*, at para 84
10. *R v Braich*, 2002 SCC 27 (CanLII), [2002] 1 SCR 903, *per* Binnie J (7:0), at para 23
11. *R v Carter*, 2005 BCCA 381 (CanLII), 199 CCC (3d) 74, *per* Thackray JA (3:0)
R v Paris, 2000 CanLII 17031 (ON CA), 150 CCC (3d) 162, *per* Doherty JA (3:0)
12. *R v Clark*, 2012 CMAC 3 (CanLII), 438 NR 366, *per* Watt JA, at para 40}
13. *R v Cameron*, 2017 ABQB 217 (CanLII), *per* Jeffrey J, at para 28
Faryna v Chorny, 1951 CanLII 252 (BC CA), {{{4}}}, *per* O'Halloran JA ("The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which is a practical and informed person would readily recognize as reasonable in that place and in those conditions.")
14. *R v JMH*, 2009 ONCA 834 (CanLII), 249 CCC (3d) 140, *per* Watt JA (3:0) – Judge incorrectly acquitted the accused on the basis that a poem of the sexual salt victim referencing doubt amounted to doubt on non-consent

Disbelief vs Fabrication

There is a distinction between the disbelief of a witness and a conclusion of fabrication.[1]

A disbelieved alibi has no evidentiary value.[2] However, an alibi found to be fabricating can be evidence on which an inference of guilt may be made.[3]

Likewise, a disbelieved exculpatory statement has no value while a fabricated statement can be used in evidence.[4] The judge should consider the content of the statement and its connection with the charge.[5]

A finding of fabrication cannot be inferred simply on a finding of disbelief.[6] Fabrication must be found "on evidence that is independent from the evidence that contradicts or discredits the accused's version of events".[7] The circumstance under which the disbelieved evidence was given is not "independent evidence" permitting an adverse inference.[8]

Direct evidence of fabrication, however, does not need to be confirmed or independently proven.[9]

This evidence includes the circumstances where an accused made a disbelieved out-of-court statement, such that it suggests the accused's intent to mislead or deflect suspicion and shows a conscious knowledge that he committed an offence.[10]

Rejecting Defence Evidence

A considered and reasoned acceptance of the Crown evidence beyond a reasonable doubt on points of conflicting evidence may be sufficient to constitute an explanation to reject defence evidence.[11]

Jury Instructions

There is a "real danger" that a jury, faced with an argument seeking that they disbelieve the exculpatory explanation of the accused, will infer guilt, especially where the exculpatory version was heard for the first time at trial.[12]

1. *R v Wright*, 2017 ONCA 560 (CanLII), 354 CCC (3d) 377, *per* Simmons JA, at para 38
2. *R v Snelson*, 2013 BCCA 550 (CanLII), *per* Bennett JA (3:0), at paras 23 to 32 - no need for instructions on adverse inference on rejected alibi
   R v O'Connor, 2002 CanLII 3540 (ON CA), OR (3d) 263, *per* O'Connor ACJ (3:0), at para 38 (statement that "is merely disbelieved is not evidence that strengthens the Crown's case")
3. *R v Hibbert*, 2002 SCC 39 (CanLII), [2002] 2 SCR 445, *per* Arbour J (7:2), at paras 57 to 58
   R v Coutts, 1998 CanLII 4212 (ON CA), 126 CCC (3d) 545, *per* Doherty JA (3:0), at paras 15 to 16
   O'Connor, *supra* (3:0), at para 17
4. *R v Nedelcu*, 2012 SCC 59 (CanLII), [2012] 3 SCR 311, *per* Moldaver J (6:3), at para 23 ("rejection of an accused's testimony does not create evidence for the Crown")
   Snelson, *supra*, at para 27
5. *O'Connor*, *supra*, at para 18
6. *R v Cyr*, 2012 ONCA 919 (CanLII), 294 CCC (3d) 421, *per* Watt JA (3:0), at para 78
7. *Cyr*, *ibid.*, at para 78
   O'Connor, *supra*, at para 21
   Coutts, *supra*, at paras 15 to 16
8. *O'Connor*, *supra*, at para 23 ("...when it is an accused's testimony which is disbelieved, the circumstance in which the accused gave the disbelieved version of events -- as part of the trial process itself -- is not considered to be independent evidence of fabrication permitting an adverse inference against the accused:... Before an adverse inference may be drawn, there must be evidence capable of showing fabrication apart from both the evidence contradicting the accused's testimony and the fact that the accused is found to have testified falsely at the trial.")
9. *R v Pollock*, 2004 CanLII 16082 (ON CA), 188 OAC 37, 187 CCC (3d) 213, *per* Rosenberg JA, at para 155, ("[t]here is no requirement, however, that the evidence of fabrication must itself be confirmed or independently proved.")
10. *Cyr*, *supra*, at para 79
    O'Connor, *supra*, at paras 24, 26
11. *R v TM*, 2014 ONCA 854 (CanLII), 318 CCC (3d) 153, *per* Laskin JA (3:0), at para 68
    R v JA, 2010 ONCA 491 (CanLII), 261 CCC (3d) 125, *per* MacPherson JA (2:1), at paras 22 to 23
    R v M, 2017 ONSC 5537 (CanLII), *per* Roger J, at para 30
12. *R v JS*, 2018 ONCA 39 (CanLII), 140 OR (3d) 539, *per* Roberts JA (3:0), at para 63
    R v Oland, 2016 NBCA 58 (CanLII), NBJ No 288, *per* Drapeau CJ (3:0), at paras 66 to 69

Factors in Evaluating Credibility and Reliability

There are many tools for assessing the credibility and reliability of a witness' testimony:[1]

1. **Inconsistencies**
    1. **Internal inconsistencies:** consider the inconsistencies with previous statements or testimony at trial or other hearings.
    2. **External inconsistencies:** consider the *contradictory* and *corroborative* evidence between witnesses or between testimony and documentary evidence;
2. **Bias and Partiality:** assess the *partiality* of witnesses due to kinship, hostility, self-interest, interest in outcome, or any other motive to favour or injure the accused;
    1. **Motive to Deceive**
3. **Capacity:** consider the capacity of the witness to relate their testimony:
    1. ability and opportunity to **observe** the factual matters that the are testifying to;
    2. ability to **remember** the events observed based on emotional importance to the witness of the observation at the time they were made and the ability to refresh based on prior recordings of their recollections. Also consider the timing at which they were asked to record their recollection and the time that they were prompted of the importance of the observation. Consider as well the person's general frailties and capacity for recollection and
    3. ability to **communicate** the details of their testimony;
4. **Justifiable error:** consider whether the witness, because of the **turmoil surrounding the event** at the time it occurred, have been easily or understandably in error as to detail, or even as to the time of the occurrence;
5. consider the **emotional state** of the witness at the time (in a calm state or panicked state, for example);
6. if recollection was recorded, consider the **timing at which notes** where made;
7. consider the **demeanor** of the witness in the witness box (voice tone, body language, etc)
8. consider the **manner of response**, being whether the witness gave evidence that was forthright, candid, straightforward and was responsive to questions. Did the evidence flow in a logical and consistent manner or was the witness *evasive*, *non-responsive*, *argumentative*, or *hesitant* to answer (either at time of testimony or in prior statements);[2]
9. consider whether the testimony accords or is in "harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions". Consider whether **common sense** suggests that the evidence is *impossible or highly improbable* or whether it was reasonable and consistent with itself and with the uncontradicted facts.[3]
    1. considering whether a persons' words and actions are explained and whether it matches their emotional state at the time[4]
    2. the reasonableness of a person's reaction to events
    3. evidence showing the demeanor of a complainant shortly following the offence can be useful to credibility. A person alleging a sexual assault or common assault may be quite upset when speaking to police, which may lend to credibility.[5]
    4. whether there is any embellishment or minimizing of events. Likewise, an signs of attempts at recasting evidence to suit a particular goal; putting himself in a good light,
    5. whether the witness adjusted their evidence when confronted with new evidence or simply gave different explanations for a single action.[6]

6. whether the explanation contains an inordinate level of complexity.[7]

10. Where applicable, was the witness able to give admissions against interest? Or were there signs of self-serving?

1. e.g. see list in *R v Jacquot*, 2010 NSPC 13 (CanLII), 914 APR 203, *per* Tax J, at para 40
Bake v Aboud, 2017 NSSC 42 (CanLII), *per* Fogeron J, at para 13 *R v Comer*, 2006 NSSC 217 (CanLII), *per* Cacchione J, at para 96
R v Snow, 2006 ABPC 92 (CanLII), AJ No 530, *per* Semenuk J, at para 70
R v McKay, 2011 ABPC 82 (CanLII), *per* Anderson J, at para 14
R v Abdirashid, 2012 ABPC 22 (CanLII), [2012] A.J. No 131, *per* Bascom J, at paras 8 to 11
Baker-Warren v Denault, 2009 NSSC 59 (CanILI), 882 APR 271, *per* Forgeron J, at para 19
Faryna v Chorny, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354 (BCCA), *per* O'Halloran JA, at paras 9, 10
R v DFM, 2008 NSSC 312 (CanLII), *per* Murphy J, at para 11 citing *R v Ross*2006 NSPC 20(*no CanLII links) , at para 6
2. e.g. *R v McGrath*, 2014 NLCA 40 (CanLII), 356 Nfld & PEIR 252, *per* Rowe JA (3:0), at para 19 citing trial judge's reasons for disbelieving accused ("Her answers to other questions were often vague and evasive. When confronted by evidence that was contrary to her testimony, the accused would immediately recant and change her testimony to conform.")
3. *Faryna v Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354 (BCCA), *per* O'Halloran JA
4. A judge is entitled to consider the emotional condition of the accused for consistency with the claimed offence:
R v Murphy, 1976 CanLII 198 (SCC), [1977] 2 SCR 603, *per* Spence J, at p. 612
See also *R v Sidhu*, 2004 BCCA 59 (CanLII), 183 CCC (3d) 199, at para 51
R v Lavallee, [1993] BCJ No 669(*no CanLII links) , at paras 2, 5 and 11 (CA)
R v Huang, [1989] BCJ No 1296 at 7 (CA)(*no CanLII links) , *per* Macdonald JA
R v Dorsey, [1987] OJ No 349(*no CanLII links) , at pp. 4 (CA)
5. *R v Mete*, [1998] OJ No 16 (OCJ)(*no CanLII links)
6. e.g. *McGrath*, *supra*, at para 19
7. e.g. *McGrath*, *supra*, at para 19

Inconsistencies

Consistencies and inconsistencies are an "important aspect" in assessing credibility.[1]

Use on Inconsistencies in Cross-examination

Cross-examining a witness on a prior inconsistent statement may *only* be used to go to the live issue of credibility.[2] The prior statement cannot be used for the truth of its contents unless the witness adopts the statement.[3]

It is necessary that the judge provide limiting instructions on the use of a prior inconsistent statement.[4]

Evaluation of Seriousness of Inconsistencies

Generally speaking, inconsistencies in a witnesses evidence must be evaluated before the judge can accept it.[5]

Inconsistencies on peripheral matters and not to the "essence" of the charges and so may be excused.[6]

A series of minor inconsistencies "may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence". The trier-of-fact should consider the "totality of the inconsistencies in order to assess whether the witness's evidence is reliable".[7]

The trial judge does not need to address every inconsistency. [8]

Minor Inconsistencies

Inconsistencies between witnesses regarding "peripheral matters" such as time, speed and distance, all of which are affected by subjective assessments, will usually have a limited effect on reliability unless glaringly different. Minor differences on details can in fact enhance, rather than detract, from the credibility of the witness as too much similarity will suggest collusion. [9] Such inconsistencies should be considered in the context of the witnesses age at the time of the events.[10]

The courts should be hesitant to devalue a witnesses testimony based on minor or “perceived inconsistencies”.[11] The benefit of the doubt should be given to the witness.[12]

A "series" of "minor inconsistencies" may become "quite significant" such that the trier of fact may create a reasonable doubt on the reliability of the witness.[13]

There is no "rule" that determines when minor inconsistencies collectively amount to reason to find doubt in the witnesses overall credibility.[14]

Major Inconsistencies

Where there are two equally credible witnesses there are a number of rules of thumb that can be applied:

- the testimony must be contrasted with the undisputed facts to see which is the closer "fit".[15]
- The judge should consider what is reasonably recallable and not recallable by the particular witness.
- the judge should favour the witness who is in a better position to know a particular fact.[16]
- where evidence is "incredible", there must be more undisputed facts to support this claim[17]

An inconsistency may or may not be significant depending on whether such errors in detail are "normal" and "to be expected" or, alternatively, are errors that "are "unlikely to be mistaken" and "demonstrate a carelessness with the truth or raise reliability issues".[18]

Where there are major inconsistencies or contradictions with with key crown witnesses, or where there are otherwise conflicting evidence, the trier-of-fact would be "carefully assess" the evidence before.[19]

Resolving Inconsistencies

The judge is obligated to consider all the evidence as a whole, especially where credibility is at issue.[20] However, inconsistencies of facts that are not necessary to determine the case do not need to be resolved.[21]

1. *R v CH*, 1999 CanLII 18939 (NL CA), 182 Nfld. & PEIR 32, 44 WCB (2d) 162, *per* Wells CJ, at para 23
   R v MG, 1994 CanLII 8733 (ON CA), [1994] OJ No 2086, *per* Galligan JA (2:1), at para 27, appeal discontinued [1994] SCCA No 390, at para 27 ("Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness-box and what the witness said on other occasions, whether on oath or not.")
2. *R v GH*, 2020 ONCA 1 (CanLII), at para 32 ("A prior inconsistent statement can be used to cross-examine a witness. It can only be used on the issue of credibility.")
3. *GH*, *ibid.*, at para 32
4. *GH*, *ibid.*, at para 32
   Deacon v The King, 1947 CanLII 38 (SCC), [1947] SCR 531, *per* Kerwin J
   McInroy and Rouse v R, 1978 CanLII 175 (SCC), [1979] 1 SCR 588, *per* Martland J
   R v Mannion, 1986 CanLII 31 (SCC), [1986] 2 SCR 272, *per* McIntyre J

5. e.g. *R v Wigle*, 2009 ONCA 604 (CanLII), 252 OAC 209, *per* Lang JA (3:0) - conviction overturned because judge failed to explain why complainant's inconsistencies did not affect credibility.
see also *CH*, *supra*, at para 23
6. *R v Broesky*, 2014 SKCA 36 (CanLII), 433 Sask R 300, *per* Ryan-Froslie JA (3:0), at para 3
R v Lindsay, 2012 SKCA 33 (CanLII), 393 Sask R 9, *per* Jackson JA (3:0)
7. *CH*, *supra*, at para 29
RWB
8. *R v RS*, 2014 NSCA 105 (CanLII), *per* Scanlan JA (3:0), at para 24
9. ??
10. *R v DLW*, 2013 BCSC 1327 (CanLII), BCJ No 1620, *per* Romilly J, at para 129
11. *R v AF*, 2010 ONSC 5824 (CanLII), OJ No 4564, *per* Hill J, at para 87
e.g. *DLW*, *supra*, at para 128
12. *R v Tran*, 1994 CanLII 56 (SCC), [1994] 2 SCR 951, *per* Lamer CJ (7:0), at p. 248
13. *R v RWB* (1993), 24 BCAC 1, 40 WAC 1 (BCCA)(*no CanLII links) at pp. 9-10 , *per* Rowles JA (" While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. ")
14. *RWB*, *ibid.* ("There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable.")
15. *R v FE*, 1999 BCCA 414 (CanLII), BCAC 161, *per* Hollinrake JA (3:0)
R v Ross, 2002 BCSC 445 (CanLII), BCTC 445, *per* Taylor J
16. *R v FJU*, 1994 CanLII 1085 (ON CA), 90 CCC (3d) 541, *per* Osborne JA - appealed to 1995 CanLII 74 (CanLII) on different grounds
17. *R v GB*, 1990 CanLII 115 (SCC), [1990] 2 SCR 57
18. *R v Smith*, 2018 ABQB 199 (CanLII), *per* Goss J, at para 50
R v MG, 1994 CanLII 8733 (ON CA), [1994] OJ No 2086, *per* Galligan JA (2:1), at paras 2327 (" But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely upon the testimony of a witness who has demonstrated carelessness with the truth.")
R v AM, 2014 ONCA 769 (CanLII), 123 OR (3d) 536, *per curiam* (3:0), at para 12
19. *R v SW*, 1994 CanLII 7208 (ON CA), OR (3d) 509, *per* Finlayson JA (3:0), at p. 517
R v Oziel, 1997 CanLII 549 (ON CA), [1997] OJ No 1185 (CA), *per curiam* (3:0), at paras 8, 9
R v Norman, 1993 CanLII 3387 (ON CA), 87 CCC (3d) 153, *per* Finlayson JA (3:0), at pp. 172-4
20. *McCabe v British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 77 (CanLII), *per* Saunders JA
21. e.g. *R v Drydgen*, 2021 BCCA 125 (CanLII), *per* Butler JA, at para 40

Consistencies and Corroboration

- See Corroboration and Prior Consistent Statements

Motive and Bias

The judge may take into account the existence or absence of evidence of a motive to fabricate the allegation.[1] There is no onus on the accused to establish a motive to lie on the part of the complainant.[2] Do to otherwise, would have the effect of removing the presumption of innocence.

Motive is only one factor to consider when assessing credibility.[3]

The absence of motive to fabricate should not be given undue weight to suggest that the complainant is telling the truth.[4] The absence should not be considered the same as an absence of a motive to fabricate.[5] Suggesting that it is true unfairly bolster's the witness's credibility. Corrective jury instructions should be given if such a suggestion is made.[6]

Evidence establishing motive is always admissible, but it should not be mistaken for evidence that merely shows a history of incidents between parties.[7] The Crown may present evidence that suggests an absence of any motive on the part of the complainant to fabricate their story.[8] This can include presenting evidence of the relationship between complainants or between the accused and a single complainant.[9]

Proven absence of motive is "always an important fact in favour of the accused".[10]

Questions that go beyond what the witness would have known and invite speculation as to the motive is improper.[11] This includes asking the accused to explain why the complainant would make allegations against them.[12]

Where the accused theory alleges that a Crown witness lied out of self-interest, the judge may "consider that the [Crown] witness would have had no, or less, reason to be untruthful on *particular points* of evidence in respect of which [the accused] provided radically inconsistent testimony".[13]

It is permitted for the trial judge to conclude that the evidence of a witness are not based on actual memories but are more likely rationalizations, assumptions or believed on how they *would have* behaved.[14]

1. see *R v Jackson*, 1995 CanLII 3506 (ON CA), [1995] OJ No 2471 (CA), *per curiam* (3:0)
   R v LeBrocq, 2011 ONCA 405 (CanLII), [2011] OJ No 2323, *per curiam* (3:0)
   R v Plews, 2010 ONSC 5653 (CanLII), 91 WCB (2d) 420, *per* Hill J, at para 335
   R v KGB, 1993 CanLII 116 (SCC), 79 CCC (3d) 257, *per* Lamer CJ, at p. 300
   R v Greer, 2009 ONCA 505 (CanLII), OJ No 2566, *per curiam* (3:0), at para 5
2. *R v Batte*, 2000 CanLII 5750 (ON CA), OR (3d) 321, *per* Rosenberg JA (3:0), at paras 120 to 124
   R v Krack, 1990 CanLII 10976 (ON CA), 56 CCC (3d) 555, *per* Lacouriciere JA (3:0), at pp. 561-562 (CCC)
   Plews, *supra*, at para 335
3. *Batte*, *supra*, at paras 120 to 124
4. *R v LL*, 2009 ONCA 413 (CanLII), 244 CCC (3d) 149, *per* Simmons JA (3:0), at paras 40 to 42
5. *LL*, *ibid.*, at para 44 ("When dealing with the issue of a complainant's motive to fabricate, it is important to recognize that the absence of evidence of motive to fabricate is not the same as absence of motive to fabricate. As Rowles J.A. stated in R v B. (R.W.) [citation omitted] at para. 28: "it does not logically follow that because there is no apparent reason for a witness to lie, the witness must be telling the truth." Put another way, the fact that a complainant has no apparent motive to fabricate does not mean that the complainant has no motive to fabricate")
6. see *LL*, *ibid.*, at para 53
7. *R v Barbour*, 1938 CanLII 29 (SCC), [1938] SCR 465, *per* Duff CJ, at p. 5
8. *R v AJS*, 1998 CanLII 18004 (NL CA), 513 APR 183, *per* Steele JA
   R v TM, 2014 ONCA 854 (CanLII), 318 CCC (3d) 153, *per* Laskin JA (3:0), at para 40 (In a historical sex assault where credibility is at issue, "[t]he Crown was entitled to try to show the absence of a motive to fabricate, because it is a factor in the assessment of credibility.")

9. *TM*, *supra* ("...questions that explored the nature of the relationship between the appellant and the complainants, or between the complainants themselves, were proper.")
R v GH, 2020 ONCA 1 (CanLII), *per* Benotto JA, at para 25
10. *R v Lewis*, 1979 CanLII 19 (SCC), [1979] 2 SCR 821, *per* Dickson J, at pp. 12-14
11. *GH*, *supra*, at para 25
12. *GH*, *supra*, at paras 25 to 28
13. *R v Laboucan*, 2010 SCC 12 (CanLII), [2010] 1 SCR 397, *per* Charron J, at para 22
14. *R v BJT*, 2000 SKQB 572 (CanLII), [2000] SJ No 801, *per* Baynton J, at para 19
R v Chen, 2016 ABQB 644 (CanLII), *per* Michalyshyn J, at para 122
R v JR, 2006 CanLII 22658 (ON SC), 70 WCB (2d) 85, *per* T Ducharme J, at paras 21 to 22

Emotional State

Evidence of emotional state "may constitute circumstantial evidence confirming that the offence occurred... including the temporal nexus to the alleged offence and the existence of alternative explanations for the emotional state." [1]

Intoxication

A witnesses level of intoxication will tend to reduce the amount of reliability placed upon the witnesses evidence.[2]

1. *R v Lindsay*, 2005 CanLII 24240 (ON SC), [2005] OJ No 2870 (SCJ), *per* Fuerst J
2. e.g. *R v Crocker*, 2015 CanLII 1001 (NL PC), *per* Gorman J

Demeanour

Credibility may be assessed from demeanour. This can include "non-verbal cues" and "body language, eyes, tone of voice, and the manner" of speaking [1] as well as "their movements, glances, hesitations, trembling, blushing, surprise or bravado".[2]

Reliability of Demeanour

A subjective view of demeanour can be unreliable indicator of accuracy.[3] It should only be considered "with caution".[4]

1. par113>, retrieved on 2021-04-22

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The conduct and behaviour of a witness in court should not be given too much weight.[5]

A judge should not decide matters of credibility on the strength of demeanour evidence alone as it would be too "dangerous".[6]

Demeanour can be affected by factors including "culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom".[7]

It should be recognized that witnesses are testifying in a foreign environment and are often nervous and are feeling significant pressure, especially when undergoing prolonged cross-examination.[8]

A Judge should consider how "unfamiliar and stressful" a courtroom is when testifying which may affect demeanour. It would follow then to consider some sort of "baseline" on how they react in stressful situations.[9]

Decision Exclusively on Demeanour

A decision on credibility based solely or predominantly on demeanour of a witness is an error.[10]

Demeanour evidence alone is not always considered a proper manner of assessing credibility.[11]

Demeanour by itself cannot be sufficient alone to make a conclusion on credibility or conviction, especially where there are "significant and unexplained inconsistencies in the evidence.[12]

Demeanour Outside of Witness Box

A court may only take "modest reliance" on demeanour evidence when the witness is not in the witness box.[13] The use of this demeanour evidence to make significant findings of credibility against the accused is a reverseable error.[14] The risks associated with misinterpreting demeanour is even stronger when they are simply sitting in the courtroom.[15]

1. *R v NS*, 2010 ONCA 670 (CanLII), (2010) 102 OR (3d) 161, *per* Doherty JA, at paras 55, 57
2. *Laurentide motels ltd. v Beauport (City)*, 1989 CanLII 81 (SCC), [1989] 1 SCR 705, *per* L'Heureux-Dube J
3. *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193 (CanLII), 99 OR (3d) 1, *per* Doherty JA, at para 66
   R v Smith, 2010 ONCA 229 (CanLII), 260 OAC 180, *per* Sharpe JA (3:0), at para 11
   R v GG, 1997 CanLII 1976 (ON CA), 115 CCC (3d) 1, *per* Finlayson JA (2:1), at pp. 6-8
   R v P.-P.(S.H.), 2003 NSCA 53 (CanLII), 176 CCC (3d) 281, *per* Hamilton JA, at paras 28 to 30
   R v Levert, 2001 CanLII 8606 (ON CA), 159 CCC (3d) 71, *per* Rosenberg JA (3:0), at pp. 80-2
   R v Norman, 1993 CanLII 3387 (ON CA), (1993) 16 OR (3d) 295, *per* Finlayson JA, at para 55
4. *R v WJM*, 2018 NSCA 54 (CanLII), *per* Beveridge JA, at para 45
   R v Ramos, 2020 MBCA 111 (CanLII), MJ No 266, at para 113 ("...in assessing credibility, caution should be exercised in reliance on demeanour evidence; undue weight should not be placed on it.")
5. *R v Jeng*, 2004 BCCA 464 (CanLII), BCJ No 1884, *per* Ryan JA, at para 54
6. *R v JAA*, 2011 SCC 17 (CanLII), [2011] 1 SCR 628, *per* Charron J (5:2), at para 14 (“it would be dangerous for this Court to uphold the convictions and thus resolve the credibility issue in this case on the strength of demeanour evidence, or on the basis that one party’s version was less plausible than the other’s.”) *WJM*, *supra*, at para 45 ("It is not infallible and should not be used as the sole determinant of credibility.")
7. *R v Dyce*, 2017 ONCA 123 (CanLII), *per* Juriansz JA, at para 12
   R v Rhayel, 2015 ONCA 377 (CanLII), 324 CCC (3d) 362, *per* Epstein JA, at para 85 ("It is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom. One of the dangers is that sincerity can be and often is misinterpreted as indicating truthfulness.")
8. *R v Shields*, 2017 BCPC 395 (CanLII), BCJ No 2608, *per* Doherty J, at para 74
   R v DTO, 2018 BCPC 120 (CanLII), *per* MacCarthy J, at para 125
9. *R v TM*, 2014 ONCA 854 (CanLII), 318 CCC (3d) 153, *per* Laskin JA (3:0), *per* Laskin JA, at para 64

10. e.g. *R v JF*, 2003 CanLII 52166 (ON CA), 177 CCC (3d) 1, *per* Feldman JA, at para 101
R v Norman, 1993 CanLII 3387 (ON CA), 87 CCC (3d) 153, *per* Finlayson JA (3:0) at 173
R v Gostick, 1999 CanLII 3125 (ON CA), 137 CCC (3d) 53, *per* Finlayson JA (3:0) at 59-61
R v KA, 1999 CanLII 3756 (ON CA), 137 CCC (3d) 554, *per* Rosenberg JA (3:0), at para 44
R v Bourgeois, 2017 ABCA 32 (CanLII), 345 CCC (3d) 439, *per curiam* (2:1), at para 21 (it is error of law "when a trial judge's assessment of the witness's demeanour becomes the sole or dominant basis for determining credibility, and where the trial judge appears to be unaware of the risks associated with over-reliance on demeanour") aff'd 2017 SCC 49 *R v Ramos*, 2020 MBCA 111 (CanLII), MJ No 266, *per* Mainella JA, at para 113
11. e.g. *R v Penney*, 2002 NFCA 24 (CanLII), [2002] NJ No 98 (NLCA), *per* Wells CJ, at para 61
12. see *R v WS*, 1994 CanLII 7208 (ON CA), 90 CCC (3d) 242, *per* Finlayson JA (3:0), at p. 250
Faryna v Chorny, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354 (BCCA), *per* O'Halloran JA, at p. 357 ("The real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions")
13. *TM*, *supra*, at para 69
14. *R v NM*, 1994 CanLII 1549 (ON CA), [1994] OJ No 1715 (CA), *per curiam* (3:0), at para 58
15. *TM*, *ibid.*, at para 64

Intuition

There is some support for the proposition that judge may rely upon their intuition to determine the credibility of a witness. A judge will often invoke their appreciation that the witness has a "ring of truth".[1]

1. *R v Mervyn*, 2003 YKTC 34 (CanLII), *per* Lilles J
R v Roble, 2004 CanLII 23106 (ON CA), *per curiam*

Common Sense and Plausibility

It would be dangerous to uphold a conviction "on the basis that one party's version was less plausible than the other's" alone.[1] That is not to say that common sense and plausibility are not useful tools in evaluating evidence. Triers-of-fact are permitted to reject a witnesses evidence, including that of the accused, on the basis that it does not accord with "collective human understanding of the behaviour" of a person in the shoes of the alleged victim.[2]

It is said that "[h]uman nature, common sense and life's experience are indispensable when assessing credibility".[3]

1. *R v JAA*, 2011 SCC 17 (CanLII), [2011] 1 SCR 628, 268 CCC (3d) 135, *per* Charron J (5:2), at para 14 ("it would be dangerous for this Court to uphold the convictions and thus resolve the credibility issue in this case on the strength of demeanour evidence, or on the basis that one party's version was less plausible than the other's.")
2. *R v Kontzamanis*, 2011 BCCA 184 (CanLII), *per* Kirkpatrick JA (3:0), at para 38
3. *R v DDS*, 2006 NSCA 34 (CanLII), 207 CCC (3d) 319, *per* Saunder JA

Observations Made in Court

A judge should not reject the defence evidence based solely on observations of the witness' build to infer his capacity.[1]

1. *R v Gyimah*, 2010 ONSC 4055 (CanLII), *per* Healey J, judge wrongly rejected defence evidence of difficulty in moving a mattress because the accused "looked fit"

Evidence of Collusion or Tainting

Evidence that the witness was influenced by others would be reason to give no weight to their evidence.

Collusion

There is no requirement that the judge *must* make an *actual* finding that collusion occurred in order to discount the evidence of a witness. In some circumstances it is open to the judge to rely upon an "opportunity to collude".[1] However, a witness should generally not be entirely discredited merely on the basis of opportunity.[2]

Collusion can be unintentional such as where multiple individuals watch the same news story and are influenced by the single story.[3]

Tainting of Evidence

The independence of a person's recollection can be compromised by being exposed to other persons statements.[4]

A witness who sat in on the preliminary inquiry evidence before giving a statement to police can be reason to find there is no credibility in their evidence.[5]

1. *R v Shearing*, 2002 SCC 58 (CanLII), [2002] 3 SCR 33, *per* Binnie J (7:2)
   R v Burke, 1996 CanLII 229 (SCC), [1996] 1 SCR 474, 105 CCC (3d) 205, *per* Sopinka J (7:0), at para 45
2. e.g. *R v Almasi*, 2016 ONSC 2943 (CanLII), *per* Goldstein J, at paras 47 to 51 - witness evidnece incorrectly dismissed simply because it matched another witness believed to be lying
3. *R v Dorsey*, 2012 ONCA 185 (CanLII), 288 CCC (3d) 62, *per* MacPherson JA
4. Eg. *R v Burton*, 2017 NSSC 3 (CanLII), *per* Arnold J, at para 40
5. e.g. *R v Corbett*, 2015 ONSC 1633 (CanLII), *per* Hambly J, at para 10

Special Types of Testimony

Judge's must be very careful to avoid falling into an analysis which compares the two versions without assessing "the whole evidence to establish proof of guilt beyond a reasonable doubt."[1]

The trier of fact should not place much weight on exculpatory stories in absence of evidence supporting the theory.[2]

A judge must not subject an accused's testimony more scrutiny than that of the complainant.[3] The judge must apply an "even and equal level of careful analysis".[4]

There are special considerations when assessing credibility no a Charter voir dire.[5]

No Presumptions For or Against Truthfulness or Accuracy

There is no legal presumption that those testifying in criminal trials are telling the truth or that they are testifying accurately.[6]

There is no rules that says that the trier of fact has to believe or disbelieve any part of a witnesses testimony.[7]

1. *R v Ogden*, 2011 NSCA 89 (CanLII), *per* Saunders JA (3:0), at para 10
   R v WH, 2011 NLCA 59 (CanLII), 278 CCC (3d) 237, *per* Barry JA
2. *R v Jenner*, 2005 MBCA 44 (CanLII), 195 CCC (3d), *per* Monnin JA (3:0), at para 21
3. *R v Costache*, 2013 ONSC 4447 (CanLII), OJ No 3038, *per* Campbell J, at para 34
4. *Costache*, *ibid.*, at para 34
5. See: *R v Gunsch*, 2013 ABPC 104 (CanLII), *per* Rosborough J, at paras 27 to 37
6. *R v Luciano*, 2011 ONCA 89 (CanLII), 267 CCC (3d) 16, *per* Watt JA (3:0)
   R v Thain, 2009 ONCA 223 (CanLII), 243 CCC (3d) 230, *per* Sharpe JA (3:0), at para 32
   R v Downey, 2013 NSCA 101 (CanLII), *per* Farrar JA (3:0), at paras 15 to 20
7. *Novak Estate (Re)*, 2008 NSSC 283 (CanLII), 860 APR 84, at para 37 ("There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence")

Credibility of Accused (The W.D. Test)

- Weighing Testimony of the Accused

The WD Test which concerns analysis of the accused testifying, has application outside of merely the accused testifying but also on any evidence called by the defence that conflicts with the Crown evidence on a "vital" issue.[1]

Assessing An Accused Cautioned Statement to Police

Where the Crown adduces the accused's statement to police as part of it case, the Court must assess that evidence which addresses a "vital issue" in the same manner as if the accused testified himself.[2]

1. *R v M*, 2017 ONSC 5537 (CanLII), *per* Roger J, at para 29 ("The W.(D.) analysis applies where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case.")
   R v BD, 2011 ONCA 51 (CanLII), 266 CCC (3d) 197, *per* Blair JA (3:0), at para 114 ("What I take from a review of all of these authorities is that the principles underlying W.(D.) are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings.")
   R v Morningstar, 2017 NBCA 39 (CanLII), *per* Larlee JA (3:0)
2. *R v Castelein and Berthelette*, 2017 MBQB 173 (CanLII), *per* Greenberg J, at para 13 ("In deciding whether the Crown has met its burden, I must consider Mr. Berthelette's exculpatory statement in the same manner as I

would had he testified")
R v BD, 2011 ONCA 51 (CanLII), 266 CCC (3d) 197, *per* Blair JA (3:0), at para 114 ("What I take from a review of all of these authorities is that the principles underlying W.(D.) are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. ")

Credibility of Persons from Other Cultures

Assessing Interpreter Evidence

Assessing credibility through an interpreter requires careful consideration as it is recognized as a much more difficult endeavour.[1]

Courts should not put too much weight on perceived inconsistencies where evidence is conveyed through a interpreter.[2]

1. Sopinka, Lederman & Bryant, The Law of Evidence in Canada (2nd ed.) (Toronto: Butterworths, 1999), at s. 16.25
R v Singh, 2016 ONSC 3688 (CanLII), *per* Hill J
R v Tran, 1994 CanLII 56 (SCC), [1994] 2 SCR 951, *per* Lamer CJ (7:0), at p. 248 (court suggests that testifying through interpreter should have "benefit of the doubt" with respect to inconsistencies)
R v X(J), 2012 ABCA 69 (CanLII), 524 AR 123, *per curiam* (3:0), at para 13 ("Some confusion …[is] inevitable" and can result in a record that is "is often unclear")
R v Zewari, 2005 CanLII 16078 (ON CA), [2005] OJ No 1953 (CA), *per curiam* (3:0), at para 4 (trial judge properly averted to difficulty in evaluating credibility when an interpreter is required)
Serrurier v City of Ottawa, 1983 CanLII 1628 (ON CA), , 42 OR (2d) 321 (CA), *per* Grange JA (3:0), at pp. 322-23 ("Cross examination becomes more difficult, and often less effective, when each question and answer must be interpreted")
J.H. Wigmore, Evidence in Trials at Common Law (Chadbourn Rev.) (Toronto: Little Brown and Co., 1979), Vol. 3, §811 (quoting: "ARTHUR TRAIN, The Prisoner at the Bar 239 (1908) … It is also practically impossible to cross-examine through an interpreter, for the whole psychological significance of the answer is destroyed, ample opportunity being given for the witness to collect his wits and carefully to frame his reply")
2. *Tran*, *supra*, at p. 987 ("the courts have cautioned that interpreted evidence should not be examined microscopically for inconsistencies. The benefit of a doubt should be given to the witness")
JX, *supra*, at para 13
R v Zewari, 2005 CanLII 16078 (ON CA), [2005] OJ No 1953 (CA), *per curiam* (3:0), at para 4
NAFF v Minister of Immigration (2004), 221 C.L.R. 1 (H.C. Aust.), at para 30
Sopinka, Lederman & Bryant, The Law of Evidence in Canada (2nd ed.) (Toronto: Butterworths, 1999), at s. 16.25 ("It is much more difficult to assess the credibility of evidence given through an interpreter")

Credibility of Children

- Credibility and Reliability of Child Witnesses

Adults Testifying to Events Occurring When a Child

Adults testifying to events that occurred while they were a child should be assessed using standard factors for adult witnesses.[1] However, the evidence should be considered in the context of the age of the witness. Minor inconsistencies should be considered in light of the witnesses age at the time.[2]

Common sense should be applied to the level of "exactitude and detail" which may be missing from a child's world perspective.[3]

1. *R v DLW*, 2013 BCSC 1327 (CanLII), BCJ No 1620, *per* Romilly J, at para 131
2. *DLW*, *ibid.*, at para 131
   R v RW, 1992 CanLII 56 (SCC), [1992] 2 SCR 122, *per* McLachlin J (6:0)
   R v Cuthbert, 1996 CanLII 8341 (BC CA), 106 CCC (3d) 28, *per* Lambert JA (2:1), at para 23
3. *R v Plews*, 2010 ONSC 5653 (CanLII), 91 WCB (2d) 420, *per* Hill J, at para 329
   R v Curtis, 2000 BCCA 618 (CanLII), *per* Hall JA, at 9 paras 8, 9{{{3}}}

Credibility of Police Officers

It is not proper for courts to take the evidence of a police officer over that of a civilian by virtue of their position.

Police Notes

Police notes are no longer simply an aide-memoire simply used to refresh an officer's memory. Officers have an "inherent duty" to take notes.[1]

Without notes an officer's credibility can be diminished and his evidence can be discounted.[2]

Police notes must be independent and contemporaneous. [3] This is essential to the reliability and integrity of the officer's notes.[4] Notes are only for the purpose of assisting the officer in testifying at trial.[5] Without notes the evidence of the officer can be "sketchy at best" and will be unreliable. There must be indication that the notes are the officer's independent recollection. An officer should not be using someone else's notes to refresh their memory or else they will simply be reciting hearsay.[6]

As a general rule in an investigation involving multiple officers, notes should not be made after a collective debriefing.[7]

The absence of note taking can go to the reliability of the officer's testimony.[8] Where an officer is experienced they should be in the practice of taking notes of all relevant observations.

An officer is expected to take notes of all significant aspects of their investigation. Proper note taking is an important part of the fact-finding, as evidence should not be left to the whim of memory.[9]

It is not an acceptable excuse to not have notes where the officer “would remember it”.[10] Where notes are not taken the court is allowed to conclude that observation evidence was in fact not observed but a belief created after the investigation.[11] This is not necessarily always the case however and the judge may still accept the evidence.[12]

Memory of a police officer for things that occurred a considerably long time in the past where no notes were taken will has diminished reliability.[13]

The effect of an absence of notes will vary from case-to-case.[14]

Failure to take proper notes on observations of impairment allows a judge to find that there were insufficient evidence to form reasonable and probable grounds.[15]

1. *R v Odgers*, 2009 ONCJ 287 (CanLII), [2009] OJ No 2592, *per* Fournier J, at para 16
2. *Odgers*, *ibid.*, at para 16
3. *Schaeffer v Wood*, 2011 ONCA 716 (CanLII), 107 OR (3d) 721, *per* Sharpe JA (3:0), at paras 69 to 70 on appeal to SCC
4. *Schaeffer v Wood*, *ibid.*
5. *Schaeffer v Wood*, *ibid.*
6. *Schaeffer v Wood*, *ibid.*
7. *R v Thompson*, 2013 ONSC 1527 (CanLII), [2013] OJ No 1236 (Sup. Ct.), *per* Hill J, at para 212 ("[W]here multiple officers participate in investigation of an incident, their notes should be made independently and not as a collective and not after a (de)briefing where the incident is discussed as a group.")
8. *R v Tang*, 2011 ONCJ 525 (CanLII), *per* Reinhardt J, at para 53 -- police officer evidence entirely ignored due to poor notes
   R v Odgers, 2009 ONCJ 287 (CanLII), OJ No 2592, *per* Fournier J
   R v Machado, 2010 ONSC 277 (CanLII), 92 MVR (5th) 58, *per* Durno J at 120-123
9. *R v Lozanovski*, 2005 ONCJ 112 (CanLII), [2005] OCJ 112, *per* Feldman J, at p. 3
10. *R v Zack* (1999) OJ No 5747 (ONCJ)(*no CanLII links) , at p. 2
    R v Khan, 2006 OJ 2717(*no CanLII links) at 18
11. *Zack*, *supra*, at p. 2
12. e.g. *R v Thompson*, 2001 CanLII 24186 (ON CA), 151 CCC (3d) 339, *per* Morden JA (3:0)
    R v Bennett, 2005 OJ No 4035 (ONCJ) (*no CanLII links)
13. *Khan*, *supra*, at paras 17 to 18
    R v Hayes, 2005 OJ No 5057(*no CanLII links) at 9
    R v McGee, 2012 ONCJ 63 (CanLII), 92 CR (6th) 96, *per* Grossman J, at para 66
14. *R v Noureddine*, 2014 ONCJ 537 (CanLII), [2014] OJ No 1397 (OCJ), *per* Selkirk J, at paras 12 to 17
15. *R v Bero*, 2014 ONCJ 444 (CanLII), *per* Cooper J

Credibility of the Complainant or Victim

- Credibility of Complainants or Victims

Credibility for Other Types of Witnesses

Expert evidence may be admitted to establish the effect that the "code of silence" will have upon a witness including a reluctance to testify or a prior inconsistent statement.[1]

When assessing expert evidence, the jury is entitled to accept or reject any part of the testimony and determine how much waits to be given just as it is permitted for lay witness evidence.[2]

1. e.g. *R v Boswell*, 2011 ONCA 283 (CanLII), 277 CCC (3d) 156, *per* Cronk JA (3:0)
2. *R v Smithers*, 1977 CanLII 7 (SCC), [1978] 1 SCR 506, *per* Dickson J at p. 518 (SCR)

Related Topics

- Verdicts
- Proving Facts (inferences, presumptions, etc.)
- Role of the Trial Judge

See Also

- Jury Instructions

Weighing Testimony of the Accused

This page was last substantively updated or reviewed *August 2021*. (Rev. # 79483)

< Procedure and Practice < Trials < Weighing Oral Evidence

General Principles

When an accused testifies and their credibility is at issue, the trial judge must apply what is known as the "WD test" to determine what weight to put on their evidence.[1]

Purpose of WD Framework

The WD framework intends to explain "what reasonable doubt means in the context of conflicting testimonial accounts".[2] The WD test is to "ensure that the jury know how to apply the burden of proof to the issue of credibility. The jury must be cautioned that a trial is not a contest of credibility between witnesses, and that they do not have to accept the defence evidence in full in order to acquit." [3]

The purpose of the test is not "based on a choice between the accused's and the Crown's evidence, but on whether, based on the whole of the evidence, [the trier-of-fact] is left with a reasonable doubt".[4]

When it DW Test Applies

The DW analysis is only necessary where credibility is a central or significant issue, usually between the accused and a complainant or eye-witness, and often where there is no significant extrinsic evidence.[5]

Rule Against Shifting Burden

At no time should the trier-of-fact ever shift the burden "from the Crown to prove every element of the offence beyond a reasonable doubt".[6]

1. *R v W(D)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742, *per* Cory J (4:1)
2. *R v JHS*, 2008 SCC 30 (CanLII), [2008] 2 SCR 152, *per* Binnie J (7:0), at para 9
3. *R v Van*, 2009 SCC 22 (CanLII), [2009] 1 SCR 716, *per* LeBel J (5:4), at para 23
   W(D), *supra*, at p. 757
4. *R v CLY*, 2008 SCC 2 (CanLII), [2008] 1 SCR 5, *per* Abella J (4:3), at para 8
5. *R v Daley*, 2007 SCC 53 (CanLII), [2007] 3 SCR 523, *per* Bastarache J
   R v Smith, 2018 ABQB 199 (CanLII), *per* Goss J, at para 49
6. *JHS*, *supra*, at para 13

Sufficiency of Analysis

A judge does not need to discuss all the evidence of the accused on a given point. They must only show that they recognized credibility was a live issue and "grappled with the substance of the live issue".[1]

They do not need to "summarize specific findings on credibility" by giving statements on overall credibility.[2]

It is not necessary that the judge reconcile the positive findings of one witness against the negative findings of a contradictory witness.[3]

1. *R v REM*, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, *per* McLachlin CJ, at para 64
2. *REM*, *ibid.* at para 64
3. *REM*, *ibid.* at para 65

Application

Where the accused an a complainant give contradictory evidence, the judge must apply the test from the case of R v D.W.[1]

The test in WD will primarily only apply to cases where the accused gives evidence.[2] However, the principles of DW will apply in any case where a crucial issue turns on creditability.[3]

The W(D) steps apply not only to the accused's testimony but also to other exculpatory evidence that emerges during a trial that relates to a "vital issue".[4]

In the context of a voir dire, the principles of D.W. do not apply.[5] Guilt or innocence is not at issue and the standard of proof is one of reasonable doubt, thus an accused will be considered in the same manner as any other witness. Thus if the accused's version conflicts with a police officer, for example, then the court must determine who is telling the truth. If the court cannot decide who is telling the truth then the applicant must fail.

Where the accused and another witness testifies for the defence, the W(D) test is applied differently.[6]

Rejection of Evidence Not Evidence of Guilt

A trial judge cannot infer guilt from the fact that the accused's evidence is not worthy of belief. This inference is only permitted where there is independence evidence of fabrication or concoction.[7]

1. *R v W(D)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742, *per* Cory J
   R v Fowler, 1993 CanLII 1907 (BC CA), *per* Toy JA
   R v CLY, 2008 SCC 2 (CanLII), [2008] 1 SCR 5, *per* Abella J (4:3)
   R v McKenzie (P.N.), 1996 CanLII 4976 (SK CA), 141 Sask R 221 (Sask CA), *per* Tallis JA, at para 4
   R v Rose (A.), 1992 CanLII 987 (BCCA), 20 BCAC 7 (BCCA), *per curiam*
   R v Currie, 2008 ABCA 374 (CanLII), 446 AR 41, *per* Côté JA (3:0)
   R v BGS, 2010 SKCA 24 (CanLII), 346 Sask R 150, *per* Ottenbreit JA (3:0)
2. *R v Warren*, 2011 CanLII 80607 (NL PC), *per* Gorman J at 24
3. *R v FEE*, 2011 ONCA 783 (CanLII), 282 CCC (3d) 552, *per* Watt JA (3:0), at para 104
4. *R v BD*, 2011 ONCA 51 (CanLII), 266 CCC (3d) 197, *per* Blair JA (3:0), at paras 113 to 114
   R v Cyr, 2012 ONCA 919 (CanLII), 294 CCC (3d) 421, *per* Watt JA (3:0), at para 50
5. See *R v Kocovic*, 2004 ABPC 190 (CanLII), 25 CR (6th) 265, *per* Semenuk J
6. see *R v Van*, 2009 SCC 22 (CanLII), [2009] 1 SCR 716, *per* LeBel J (5:4), at paras 20 to 23
7. *R v MacIsaac*, 2017 ONCA 172 (CanLII), 347 CCC (3d) 37, *per* Trotter JA (3:0)
   R v St Pierre, 2017 ONCA 241 (CanLII), *per curiam* (3:0)
   R v Turcotte, 2018 SKCA 16 (CanLII), *per* Schwann JA, at para 14

The "W.D." Test

The proper analysis of testimony is designed to ensure that Judges do not engage in any weighing of competing versions of events in absence of consideration of the presumption of innocence or reasonable doubt.[1]

Purpose of W(D) Test

The purpose of the WD test is to ensure that the trier of fact "understand that the verdict should not be based on a choice between the accused's and Crown's evidence, but on whether, based on the whole of the evidence, they are left with a reasonable doubt as to the accused's guilt".[2] It further intends to make clear that the burden never shifts from the Crown to prove every element of the offence.[3]

Formulations of the WD Test

Where the defence calls the accused to give evidence that contradicts the crown evidence, the trier of fact must determine:[4]

1. If you believe the evidence of the Accused obviously you must acquit.
2. If you do not believe the testimony of the Accused but you are left in reasonable doubt by it, you must acquit.
3. Even if you are not left in reasonable doubt by the evidence of the Accused you must ask yourself whether on the basis of the evidence which you do accept you are convinced beyond a reasonable doubt by that evidence of the guilt of the Accused.

A more recent formulation with four steps suggests the following:[5]

1. if you believe the evidence of the accused, obviously you must acquit.
2. if you do not know whether to believe the accused or a competing witness, you must acquit.
3. if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.
4. even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused

Yet another version of the test was phrased as follows:[6]

1. If you accept as accurate evidence that cannot co-exist with a finding that the accused is guilty, obviously you must acquit;
2. If you are left unsure whether evidence that cannot co-exist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit;
3. You should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused; and
4. Even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt.

Application of the WD Test

The order of the steps are not significant but the steps must all be applied separately.[7]

It is wrong when considering conflicting evidence of credibility to "weigh" one story over the other.[8] The trier of fact cannot "prefer" one story over the other or consider who is "most" credible. The "either/or" approach, preferring one over the other should be avoided.[9] To prefer one testimony over another has

the effect of reversing the onus upon the accused.[10]

There is nothing preventing a judge from believing both the complainant and the accused even where they gave divergent or contradictory evidence[11]

The real issue is not who is telling the truth, but instead, whether, on the entirety of the evidence, the crown has proven the case beyond a reasonable doubt.[12]

Standard of Appellate Review

Any error in applying the W(D) test must be reviewed as a question of law on a standard of correctness.[13]

In reviewing the reasons given in W(D) analysis, the appellate judge should not "cherry-pick" parts of the reasons but rather look at them as a whole.[14]

Mis-statement of the Test

A mere failure to use the exact words of the W(D) test before a judge or jury is not fatal.[15] Equally, an exact recitation does not protect the decision from review where the principles were applied wrong.[16]

Proposed Reformluation

In Alberta, the test for credibility has been re-written as comprising several stages.[17] At the first stage it should be made clear that:[18]

1. the [credibility] instruction applies only to exculpatory evidence, that is, to evidence that either negates an element of the offence or establishes a defence (other than a reverse onus defence);
2. it applies to exculpatory evidence whether presented by the Crown or the accused.

At the second stage analysis should be as follows:[19]

1. The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown. (Subject to the caveat that this does not apply to defences, such as that found in s 16 of the Criminal Code, where the onus rests with the proponent of the defence.)
2. In that context, if the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if they are not confident they can accept the Crown's version of events, they must acquit. (Subject to defences with additional elements such as an objective component ...).
3. While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit.
4. Even if the jury completely rejects the accused's evidence (or where applicable, other exculpatory evidence), they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.

Finally, it must be understood that where there are multiple charges, it must be understood that "reasonable doubt with regard to one offence will not necessarily entitle the accused to an acquittal on all charges".[20]

1. *R v Newman*, 2018 ABPC 143 (CanLII), *per* Pharo J, at para 18
2. *R v CLY*, 2008 SCC 2 (CanLII), [2008] 1 SCR 5, *per* Abella J (4:3), at para 8
   JHS, *supra*, at para 9 (to “explain what reasonable doubt means in the context of evaluating conflicting testimonial accounts”)
3. *JHS*, *supra*, at para 13
4. *R v W(D)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742, *per* Cory J
   R v PNM, 1996 CanLII 4976 (SK CA), 106 CCC (3d) 1, *per* Tallis JA - frames it as a four step inquiry
   R v Minuskin, 2003 CanLII 11604 (ON CA), 181 CCC (3d) 542, *per* Rosenberg JA, at p. 550 *R v BD*, 2011 ONCA 51 (CanLII), 266 CCC (3d) 197, *per* Blair JA, at paras 102 to 114
   R v Turmel, 2004 BCCA 555 (CanLII), [2004] BCJ No. 2265 (CA), *per* Newbury JA, at paras 9 to 17
   R v Gray, 2012 ABCA 51 (CanLII), 285 CCC (3d) 539, *per* Martin JA (3:0), at para 42
   R v Vuradin, 2013 SCC 38 (CanLII), [2013] 2 SCR 639, *per* Karakatsanis J (5:0), at para 21
   R v Tyers, 2015 BCCA 507 (CanLII), 381 BCAC 46, *per* Stromberg-Stein JA (3:0), at paras 12, 15
   R v Mann, 2010 BCCA 569 (CanLII), 297 BCAC 234, *per* Chiasson JA, at para 31
5. *R v PDB*, 2014 NBQB 213 (CanLII), *per* Ferguson J, at para 67 - this is taking into account the additional formulation from *JHS*, *supra*
   R v NM, 2019 NSCA 4 (CanLII), 370 CCC (3d) 143, *per* Bourgeois JA, at para 23
   R v Wheyee, 2019 ABQB 548 (CanLII), *per* Horner J, at para 72
6. David Paciocco, "Doubt about Doubt: Coping with R. v W.(D.) and Credibility Assessment", (2017) 22 Can. Crim. L. Rev. 31 at para 72 [2]
7. *R v JHS*, 2007 NSCA 12 (CanLII), 217 CCC (3d) 52, *per* Saunders JA - on appeal to SCC
8. *R v BGS*, 2010 SKCA 24 (CanLII), 346 Sask R 150, *per* Ottenbreit JA (3:0), at para 9
9. *R v Challice*, 1979 CanLII 2969 (ON CA), 45 CCC (2d) 546 (Ont CA), *per* Morden JA
   R v Morin, 1988 CanLII 8 (SCC), [1988] 2 SCR 345, *per* Sopinka J
   R v Chan, 1989 ABCA 284 (CanLII), 52 CCC (3d) 184, *per curiam*
   R v Jaura, 2006 ONCJ 385 (CanLII), [2006] OJ No 4157, *per* Duncan J, at paras 12, 13
10. *R v Abdirashid*, 2012 ABPC 22 (CanLII), [2012] A.J. No 131, *per* Bascom J, at para 6
11. *R v Nadeau*, 1984 CanLII 28 (SCC), [1984] 2 SCR 570, *per* Lamer J
12. Canadian Criminal Evidence, Second Edition, by P.R. McWilliams, Q.C., at page 652
    R v Nykiforuk, 1946 CanLII 202 (SK CA), 86 CCC 151, *per* MacKenzie JA
13. *R v JAH*, 2012 NSCA 121 (CanLII), NSJ No 644, *per* Bryson JA, at para 7
    R v NM, 2019 NSCA 4 (CanLII), 370 CCC (3d) 143, *per* Bourgeois JA, at para 25
    R v Coburn, 2021 NSCA 1 at para 27(*complete citation pending*)
14. *NM*, *ibid.*, at para 25
15. *W(D)*, *supra*, at p. 758 [SCR]
    JHS, *supra*, at para 14
    R v Vuradin, 2013 SCC 38 (CanLII), [2013] 2 SCR 639, *per* Karakatsanis J (5:0), at para 26
16. *R v JP*, 2014 NSCA 29 (CanLII), 342 NSR (2d) 324, *per* Beveridge JA, at paras 62 to 64, 73, 85
17. *R v Ryon*, 2019 ABCA 36 (CanLII), 371 CCC (3d) 225, *per* Martin JA (3:0)
18. *Ryon*, *ibid.*, at para 49
19. *Ryon*, *ibid.*, at para 51
20. *Ryon*, *ibid.*, at para 52

Looking at Evidence as a Whole

The steps of WD are not considered "watertight" compartments. The analysis at each step should take into account the evidence as a whole.[1]

The first two steps in the WD test require the "weighing [of] the accused's evidence together with the conflicting Crown evidence."[2]

While it was not specifically stated in the original formulation of the DW test. The judge must analyze the first step in the context of the evidence as a whole".[3]

It is essential that the court not look at any witnesses' evidence in a vacuum and instead look at it in relation to all the evidence presented as a whole. [4]

1. *R v Berg*, 2016 SKPC 55 (CanLII), *per* Kovatch J - commentary by Kovatch PCJ
2. *R v Humphrey*, 2011 ONSC 3024 (CanLII), [2011] O.J. No. 2412 (Sup. Ct.), *per* Code J, at para 152
   see also *R v Newton*, 2006 CanLII 7733 (ON CA), *per curiam* (3:0), at para 5
   R v Hull, 2006 CanLII 26572 (ON CA), 70 WCB (2d) 274, *per curiam* (3:0), at para 5
   R v Snider, 2006 ONCJ 65 (CanLII), [2006] O.J. 879, *per* MacDonnell J, at para 37
   R v Hoohing, 2007 ONCA 577 (CanLII), 74 WCB (2d) 676, *per* Feldman JA, at para 15
3. *R v Newman*, 2018 ABPC 143 (CanLII), *per* Pharo J, at para 18 ("Although the phrase “in context of the evidence as a whole” is not repeated in the first step of the formula instructions, it should be read into those instructions.")
4. *R v Lake*, 2005 NSCA 162 (CanLII), NSJ No. 506, *per* Fichaud JA (3:0)

First Step: Whether to Reject the Accused's Evidence

The accused's evidence should be the evidence considered first.[1]

Obligation to Give Reasons

It is necessary that in any case that turns on the accused's credibility, the judge's reasons "should disclose whether she believes or disbelieves the accused."[2]

However, where the judge fails to give reasons and the "road to conviction is nonetheless clear" the omission will not be fatal.[3]

When in Conflict with the Complainant's Evidence

It is crucial that the judge not discount the accused's evidence for the reason that the complainant is believed. Otherwise, the defence is completely neutered before even testifying. [4] Simply rejecting the accused's evidence on the basis that it conflicts with the complainant's evidence which has been accepted without explanation shifts the burden of proof unconstitutionally.[5]

There is some support to suggest that "trial judge can reject the evidence of an accused and convict solely on the basis of his acceptance of the evidence of the complainant, provided that he also gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding his acceptance of the complainant's evidence."[6]

It is certainly permissible however to reject the accused's evidence on the basis that when "stacked beside" all the other evidence.[7]

In explaining the reason to reject the accused's evidence it can be sufficient to justify it based on the reasoned acceptance beyond a reasonable doubt of a fact that conflicts with the evidence rejected. [8] This means that The accused evidence can be rejected on the sole basis that it conflicts other evidence that is accepted beyond a reasonable doubt. [9]

Impugning the accused's credibility is a permissible form of post-offence conduct.[10]

Rejection Where No Obvious Flaw in Exculpatory Testimony

A trier-of-fact may reject the accused's evidence even where there are no obvious flaws to the testimony where the Crown mounts a strong prosecution.[11]

Accused's Access to Disclosure

It is impermissible to use the fact that the accused had access to their disclosure as a reason to discount their testimony.[12]

Effect of Rejection of Evidence

The rejection of the accused's evidence does not amount to evidence in favour of the Crown.[13]

A trial judge's observations that the accused testimony was "self-serving" can lead to the appearance that the judge suspects the accused testimony was inherently unreliable since it would be advantageous for him to misrepresent events in order to acquit himself.[14] Disbelieving the accused because of their self-interest to be acquitted is a reversible error.[15]

The disbelief of the accused evidence cannot be used as "positive proof of guilt by moving directly from disbelief to a finding of guilt."[16]

It is an error of law to infer guilt merely from the fact that the accused's evidence has been disbelieved.[17]

Accused Has No Burden to Explain the Allegations

It is not permissible to reject the accused's evidence due to the fact that the accused was unable to explain why the accuser would have made allegations against him.[18]

Application of Personal Experience

The judge cannot apply their own *specific* personal experience, as a form of judicial notice, to make determinations of credibility against the accused.[19]

1. *R v CLY*, 2008 SCC 2 (CanLII), [2008] 1 SCR 5, *per* Abella J (4:3)
2. *R v Lake*, 2005 NSCA 162 (CanLII), 203 CCC (3d) 316, *per* Fichaud JA (3:0), at para 14 - however an implied conclusion is sufficient, see para 17
   R v Maharaj, 2004 CanLII 39045 (ON CA), 186 CCC (3d) 247, *per* Laskin JA (3:0)
3. *R v Stamp*, 2007 ABCA 140 (CanLII), 219 CCC (3d) 471, *per* Berger JA, at para 25
   R v CJJ, 2018 ABCA 7 (CanLII), 358 CCC (3d) 163, *per curiam*, at para 35
4. *Lake*, *supra*, at para 21
5. *R v YM*, 2004 CanLII 39045 (ON CA), 186 CCC (3d) 247, *per* Laskin JA (3:0), at para 30
6. *R v Surana*, 2013 ABPC 164 (CanLII), *per* Allen J, at para 78
7. *R v TS*, 2012 ONCA 289 (CanLII), 284 CCC (3d) 394, *per* Watt JA, at para 79 ("…as a matter of law, reasoned acceptance of a complainant's evidence is a basis upon which a trial judge can reject the evidence of an accused and find guilt proven beyond a reasonable doubt. A reasoned and considered acceptance of the complainant evidence is as much as explanation for rejecting the contrary evidence of an accused as are problems inherent in an accused's own testimony.")
8. *R v JJRD*, 2006 CanLII 40088 (ON CA), 215 CCC (3d) 252, *per* Doherty JA, at para 53 ("An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.")

9. *R v DP*, 2017 ONCA 263 (CanLII), *per curiam* (3:0), at paras 23 to 25
10. *R v Jaw*, 2009 SCC 42 (CanLII), [2009] 3 SCR 26, *per* LeBel J (7:2), at para 39
    R v White, 1998 CanLII 789 (SCC), [1998] 2 SCR 72, *per* Major J (7:0), at para 26
11. *R v CL*, 2020 ONCA 258 (CanLII), OJ No 1669, *per* Paciocco JA, at para 30 ("In such a case a trier of fact may appropriately find that the incriminating evidence is so compelling that the only appropriate outcome is to reject the exculpatory evidence beyond a reasonable doubt and find guilt beyond a reasonable doubt. There may be exceptional cases where it is appropriate for a trial judge to explain this avenue of conviction to the jury.")
    R v OM, 2014 ONCA 503 (CanLII), 313 CCC (3d) 5, *per* Cronk JA, at para 40
    R v JJRD, 2006 CanLII 40088 (ON CA), 215 CCC (3d) 252, *per* Doherty JA, at para 53 ("...The trial judge rejected totally the appellant's denial because stacked beside A.D.'s evidence and the evidence concerning the diary, the appellant's evidence, despite the absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt. An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.")
12. *R v Gordon*, 2012 ONCA 533 (CanLII), [2012] O.J. No. 4059 (ONCA), *per curiam*, at para 6 ("Crown counsel…seemed to invite the jury at one point in his closing to draw an inference against the appellant's credibility because the appellant had the benefit of full disclosure and hearing the Crown's case before testifying. At the outset of his charge to the jury, the trial judge emphatically advised the jury that no such inference could be drawn.")
13. *R v Nedelcu*, 2012 SCC 59 (CanLII), [2012] 3 SCR 311, *per* Moldaver J (6:3) ("rejection of an accused's testimony does not create evidence for the Crown")
14. *R v Drescher*, 2010 ABQB 94 (CanLII), 488 AR 341, *per* Lee J, at para 30
    R v Murray, 1997 CanLII 1090 (ON CA), 115 CCC (3d) 225, *per* Charron JA (3:0)
    R v BG (2000), O.J. No. 1347 (Ont. C.A.)(*no CanLII links)
    R v Masse, 2000 CanLII 5755 (ON CA), O.J. No. 2687 (Ont. C.A.), *per curiam*
    R v MJ, 2002 CanLII 49364 (ON CA), OJ No 1211 (Ont. CA), *per curiam* (3:0)
15. *R v LB*, 1993 CanLII 8508 (ON CA), 82 CCC (3d) 189, *per* Arbour JA (3:0)
16. *R v MQ*, 2010 ONSC 61 (CanLII), OJ No 378, *per* Hill J
17. *R v To*, 1992 CanLII 913 (BCCA), , 16 B.C.A.C. 223, *per* McEachern JA (3:0), at paras 24, 28
    R v Moore, 2005 BCCA 85 (CanLII), *per* Rowles JA (3:0)
    R v Levy, 1991 CanLII 2726 (ON CA), 62 CCC (3d) 97, *per* Doherty JA at 101
18. *R v JCH*, 2011 NLCA 8 (CanLII), 267 CCC (3d) 166, *per* Rowe JA (3:0) , at para 18
19. *R v JM*, 2021 ONCA 150 (CanLII), *per* Brown JA, at paras 49 to 50

Second Step

The second step in WD requires that the trier-of-fact consider, after deciding not to believe the evidence of the accused, whether they "are left in reasonable doubt" by the accused's evidence.[1]

The importance of this step is to avoid the risk of a binary view of credibility analysis, which would be an error of law.[2] The trier may have a "total acceptance, total rejection, or something in between".[3] This means that where there is not a "total acceptance" the trier must consider whether, any part of the accused evidence creates doubt on an essential element of the offence.

It is important to remember that this step does *not* ask whether the evidence is "possibly true". The step only considers whether the evidence creates a "reasonable possibility of innocence" or that the evidence "might reasonably be true"[4] The phrase "might reasonably be true" must be used with caution and applies mostly to instances relating to the doctrine of recent possession. Its use poses the risk of unintentionally reverse the burden proof.[5]

This step can also be addressed by acquitting if the judge "cannot decide whether the evidence inconsistent with guilt is true".[6]

1. See *WD*, *supra*
2. *WD*, *supra*
3. *R v Morin*, 1988 CanLII 8 (SCC), [1988] 2 SCR 345, *per* Sopinka J (6:0), at p. 357 (SCR)
   R v Thatcher, 1987 CanLII 53 (SCC), [1987] 1 SCR 652, *per* Dickson CJ (7:0)
4. *R v Graham*, 2021 BCCA 163 (CanLII), at para 24
   R v Roberts, 1975 CanLII 1394 (BC CA), 24 CCC (2d) 539, *per* Carrothers JA at 550 (cited with approval in WD)
5. *R v Murray*, 2020 BCCA 42 (CanLII) at para. 54
6. *Graham*, *supra*, at para 27

Third Step

The court simply rejecting the accused story is not enough. [1] The purpose of the third part of the test is to convey that "a complete rejection of the [accused's] evidence does not mean that his guilt is established." [2]

It is an error to "use disbelief of the accused's evidence as positive proof of guilt by moving directly from disbelief to a finding of guilt"[3]

It is an error of law to use the disbelief of the accused's evidence as proof of guilt.[4]

1. *R v BCG*, 2010 MBCA 88 (CanLII), [2010] MJ No. 290, *per* Chartier JA (3:0) ("reasonable doubt is not forgotten" simply because a trial judge rejects "the accused's version of events.")
   R v Liberatore, 2010 NSCA 82 (CanLII), [2010] NSJ No. 556, *per* Hamilton JA (3:0), at 15 stated WD prevents "a trier of fact from treating the standard of proof as a simple credibility contest"
2. *R v Gray*, 2012 ABCA 51 (CanLII), 285 CCC (3d) 539, *per* Martin JA (3:0), at para 40
3. *R v Dore*, 2004 CanLII 32078 (ON CA), 189 CCC (3d) 526, *per curiam* (3:0), at p. 527
   R v SH, 2001 CanLII 24109 (ON CA), OJ No 118 (CA), *per curiam* (3:0), at paras 4 to 6
4. *Dore*, *supra*, at p. 527
   SH, *supra*, at paras 4 to 6

"Fourth" Step

Several Court's of Appeal recommend an additional element to the D.W. test after the first step directing the judge that "If after careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit".[1]

A judge cannot take into account roadside statements in the assessment of the accused's credibility.[2]

1. *R v CWH*, 1991 CanLII 3956 , 68 CCC (3d) 146, *per* Wood JA (3:0)
   R v PNM, 1996 CanLII 4976 (SKCA), 106 CCC (3d) 1, *per* Tallis JA

2. *R v Huff*, [2000] O.J. No. 3487(*no CanLII links) leave to appeal to SCC denied [2000] SCCA No 562

Other Considerations

It has sometimes been suggested that the proper approach should be to consider the accused's evidence first before looking at the complainant's evidence in order to avoid creating a burden upon the accused.[1] But this approach has had some critics.[2]

A judge may reject the accused evidence on the sole basis that it contradicts the accepted evidence.[3]

Blanket Denials

An accused's testimony which merely denies the offence and provides no further detail cannot be the basis to dismiss the testimony as unworthy of belief.[4]

It should also be acknowledged that a general denial will "necessarily be lacking in detail" and should be considered in that context.[5]

1. *R v Moose*, 2004 MBCA 176 (CanLII), 190 CCC (3d) 521, *per* Huband JA (3:0), at para 20
2. *R v DAM*2010 NBQB 80(*no CanLII links) , at paras 53 and 56
   R v Schauman, 2006 ONCJ 304 (CanLII), OJ No 3425, *per* Fairgrieve J, at para 6
   R v CLY, 2008 SCC 2 (CanLII), [2008] 1 SCR 5, *per* Abella J (4:3)
   R v Currie, 2008 ABCA 374 (CanLII), [2008] AJ No 1212, *per* Côté JA (3:0)
3. *R v JJRD*, 2006 CanLII 40088 (ON CA), 215 CCC (3d) 252, *per* Doherty JA, at para 53
   R v REM, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, *per* McLachlin CJ (7:0), at para 66
   R v Thomas, 2012 ONSC 6653 (CanLII), OJ No 5692, *per* Code J, at para 26
4. *R v Surana*, 2013 ABPC 164 (CanLII), *per* Allen J, at para 71
5. *R v Freamo*, 2021 ONCA 223 (CanLII), *per curiam*, at paras 9to 10

Credibility of Complainants or Victims

This page was last substantively updated or reviewed *January 2018*. (Rev. # 79483)

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General Principles

A judge in his decision evaluating the credibility of a complainant must consider the evidence in its whole context and address any internal contradictions. He cannot ignore evidence that goes against the conclusion.[1]

The fact that the complainant "pursues a complaint" cannot be used to support credibility without having the effect of reversing the onus of proof.[2]

Evidence of the overall relationship with a domestic partner may be knitted "to establish the true and complete nature of the couple's relationship in so far as it is reasonably capable of setting forth the contextual narrative in the course of which the events or said to of occurred" or where it can establish

motive or animus of the accused or where it where it is relevant to explain failure to report.The judge must weigh the probative value against the prejudicial effect.[3]

Prior consistent statements can be useful to be admitted for narrative. They may be a central "to understand the unfolding events, for example, eliminating gaps or explaining why soda was done to terminate the abuse or to bring the alleged perpetrator to justice". It may also supposed to "understand how and when I complain its story came to be disclosed".[4]

Post Offence Demeanour

There is no hard and fast rule about how a victim will react after a traumatic event such as a sexual assault.[5]

Delayed or Recent Complaint

The relevancy of a delayed complaint is "contextual and will vary from case to case".[6]

In the context of a sexual assault offence, a delay in disclosure, by itself, will not permit an adverse inference on the witnesses credibility.[7]

Inability to Explain Reason for Fabrication

It is well established that Crown cannot ask an accused why a complainant would lie and then use the failure to respond as reason to infer guilt.

There is some suggestion that this prohibition would apply more generally where the lack of evidence showing a reason to lie is used to infer guilt.[8]

1. *R v G(W)*, 1999 CanLII 3125 (ON CA), 137 CCC (3d) 53, *per* Finlayson JA at 13, 14, 17-19
   R v DA, 2012 ONCA 200 (CanLII), 289 OAC 242, *per* MacPherson JA
2. *R v MQ*, 2010 ONSC 61 (CanLII), OJ No 378, *per* Hill J
3. *MQ*, *ibid.*
4. *MQ*, *ibid.*
   see also Prior Consistent Statements
5. *R v DD*, 2000 SCC 43 (CanLII), [2000] 2 SCR 275, *per* Major J, at para 65 ("A trial judge should recognize and so instruct a jury that there is no inviolable rule how people who are victims of trauma like a sexual assault will behave. ... In assessing the credibility of a complainant, the timing of the complaint is simply one of circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant. ")
   R v JA, 2010 ONCA 491 (CanLII), 261 CCC (3d) 125, *per* MacPherson JA, at para 17
6. *MQ*, *ibid.*
7. *DD*, *supra* ("Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complaint.")
8. *R v VY*, 2010 ONCA 544 (CanLII), 258 CCC (3d) 281, *per* LaForme JA, at paras 25 to 26
   R v MP, 2010 ONSC 5653 (CanLII), *per* Hill J, at para 323
   (“ A trier of fact cannot conclude guilt by accepting the complainant as a credible witness and then considering that the accused has put forward no credible explanation for the allegations”)

Credibility in Sexual Assault-related Offences

Timeliness of Complaint

The doctrine of recent complaint in sexual assault cases does not exist in Canada. A failure to make a timely complaint in a sexual assault or abuse cannot be used to make an adverse inference of credibility.[1]

> 275. The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151 [*sexual interference*], 152 [*invitation to sexual touching*], 153 [*sexual exploitation*], 153.1 [*sexual exploitation of disabled*], 155 [*incest*] and 159 [*anal intercourse*], subsections 160(2) [*compelling bestiality*] and (3) [*bestiality in presence of or by child*] and sections 170 [*parent or guardian procuring sexual activity*], 171 [*householder permitting prohibited sexual activity*], 172 [*corrupting children*], 173 [*Indecent acts*], 271 [*sexual assault*], 272 [*sexual assault with a weapon or causing bodily harm*] and 273 [*aggravated sexual assault*].
> R.S., 1985, c. C-46, s. 275; R.S., 1985, c. 19 (3rd Supp.), s. 11; 2002, c. 13, s. 12.
> [*annotation(s) added*]
>
> – CCC

Those offences listed in s. 275 consist of:

- Sexual Interference (151)
- Invitation to Sexual Touching (152)
- Sexual Exploitation (153 or 153.1)
- Incest (155)
- Anal Intercourse (159)
- Bestiality (160(2) or (3))
- Parent or guardian procuring sexual activity (170)
- Householder permitting sexual activity (171)
- Corrupting Children (172)
- Indecent Acts (173)
- Sexual Assault (271)
- Sexual Assault with a Weapon (272)
- Sexual Assault Causing Bodily Harm (272)
- Aggravated Sexual Assault (273)

Late disclosure, by itself, cannot allow an adverse inference against the complainant in a sexual assault case.[2]

However, the court may use evidence of the making of the complaint as "narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility."[3] These statements cannot be used in “confirming the truthfulness of the sworn allegations”.[4]

Behaviour of Victim

In sexual assault cases, it has been stated that a strict analysis of the reasonableness of the complainant's actions as "reactive human behaviour is variable and unpredictable" and there is the risk of "stereotypical thinking as to how a female complainant should react in a given scenario".[5]

There is no "no inviolable rule on how people who are the victims of trauma like sexual assault will behave".[6]

Post-Offence Demeanour and Conduct in Sexual Offences

Post-event demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events.[7] This can include evidence such as:

- complainant's willingness to undergo the invasive sexual assault examination;[8]
- complainant's demeanour immediately after the assault[9]

The observed "lack of avoidant behaviour or lack of change in behaviour [after the offence is alleged to have occurred], must never be used to draw an adverse inference about a complainant's credibility."[10]

1. *R v DD*, 2000 SCC 43 (CanLII), [2000] 2 SCR 275, *per* Major J
2. *DD*, *supra*, at paras 63, 65
3. *R v Dinardo*, 2008 SCC 24 (CanLII), [2008] 1 SCR 788, at para 37
4. *Dinardo*, *ibid.*, at para 37
   see *R v GC*, [2006] OJ No 2245 (CA)(*no CanLII links)
   R v Fair, 1993 CanLII 3384 (ON CA), OR (3d) 1, at para 21
5. *R v Lally*, 2012 ONCJ 397 (CanLII), *per* Keast J at 105 to 113
6. *DD*, *supra*, at para 65
7. *R v JJA*, 2011 SCC 17 (CanLII), [2011] 1 SCR 628, *per* Charron J, at paras 40 to 41
   R v Mugabo, 2017 ONCA 323 (CanLII), 348 CCC (3d) 265, *per* Gillese JA, at para 25 ("It has long been held that post-event demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events")
8. *Mugabo*, *ibid.*, at para 25
9. *Mugabo*, *ibid.*, at para 25
10. *R v ARD*, 2017 ABCA 237 (CanLII), 353 CCC (3d) 1, *per* Slatter JA, at para 64

Credibility and Reliability of Child Witnesses

This page was last substantively updated or reviewed *January 2018*. (Rev. # 79483)

General Principles

There is no fixed formula for dealing with child witnesses.[1]

"Reasonable child" standard

The credibility of children is approached generally in the same way as adults. However, the standard of a "reasonable adult" may not be appropriate as a "reasonable child" may differ from that of an adult.[2] "Flaws, such as contradictions, in the testimony of a child may not toll so heavily against credibility and

reliability as equivalent flaws in the testimony of an adult."[3] A child should not be held to the same "exacting standards" as an adult.[4] The evidence of a child must be approached on a "common sense" basis, "taking into account the strengths and weaknesses which characterize the evidence". [5]

Difference of Perception

Children "experience the world differently from adults", as such absence of details such as time and place are understandable and not necessarily fatal.[6] Stereotypes of children should be avoided.[7]

Same Standard of Scrutiny

Regardless, the standard of proof for the Crown is always the same and should be examined with the same level of scrutiny.[8]

No Corroboration Needed

In certain cases, guilt can be found upon the testimony of a single child witness without corroboration.[9]

Inconsistencies

Guilt may also be found despite the presence of inconsistencies on material issues, lack of recent complaint, motive to lie and concoct, passage of time, and recovered memory.[10]

Passage of Time

The passage of a significant amount of time between the events and the laying of charges does not by itself warrant any caution.[11]

Recollection by Child

It is recognized that a child "will have a better recollection of events shortly after they occurred" than weeks or months after.[12]

Guidelines

Suggested guidelines include:[13]

1. the credibility of child witnesses must be assessed carefully (in this context, “carefully” implies no bias either towards accepting or rejecting that evidence);
2. the standard to be applied in assessing the credibility of a child witness is not necessarily the same as that applied to a reasonable adult;
3. allowance must be made for the fact that young children may not be able to recount precise details and may not be able to communicate precisely the “when” and the “where” of an event, but their inability to do so should not lead to the conclusion that they have misperceived what has happened to them or who has done something to them;
4. there is no assumption or presumption at law that a child’s evidence is less reliable than an adult’s;
5. a common sense approach must be used in assessing the credibility of a child’s evidence, having regard to the age of the child, the child’s mental development and the child’s ability to communicate;
6. inconsistencies, particularly concerning peripheral matters such as time or place, should not have the same adverse effect on the credibility of a child as it might in the case of an adult, having regard to the age and mental development of the child and other relevant factors;
7. the burden of proof (guilt beyond a reasonable doubt) remains unchanged when the Crown case is founded upon the evidence of a child or children. Specifically, the rules pertaining to credibility as set

out by the Supreme Court of Canada in R v D.W. do not change just because the Crown's case is founded upon such evidence.

No Assumption of Unreliability

There can be no assumption that a witness is unreliable simply because of their age.[14] However, where the age is particularly young, such as where a 6 year old is testifying to a time when he was under 2 years old, then special considerations should be made.[15]

Child evidence that is graphic, clear, and unambiguous and is consistent with other witnesses are particularly compelling.[16]

Stereotypes of Children

It is an error of law for judges to rely on stereotypes on how children are expected to react in the circumstances of sexual offences.[17]

1. *R v Marquard*, 1993 CanLII 37 (SCC), [1993] 4 SCR 223, *per* McLachlin J
2. *R v GB*, 1990 CanLII 114 (SCC), [1990] 2 SCR 30, *per* McLachlin J, at para 48
   R v HC, 2009 ONCA 56 (CanLII), 241 CCC (3d) 45, *per* Watt JA, at para 42 ("Credibility requires a careful assessment, against a standard of proof that is common to young and old alike. But the standard of the "reasonable adult" is not necessarily apt for assessing the credibility of young children. Flaws, such as contradictions, in the testimony of a child may not toll so heavily against credibility and reliability as equivalent flaws in the testimony of an adult")
3. *HC*, *supra*, at para 42
4. *GB*, *supra*, at para 48
5. *R v RW*, 1992 CanLII 56 (SCC), [1992] 2 SCR 122, *per* McLachlin J
6. *RW*, *ibid.*, at para 24
   R v RRD, 2011 NLTD(G) 78(*no CanLII links)
   R v BEM, 2010 BCCA 602 (CanLII), [2010] BCJ No 2787 (CA), *per* Bennett JA (3:0)
7. *RRD*, *supra*
   BEM, *supra*
8. *GB*, *supra*, at para 48
   RW, *supra*, at para 25 (the approach to child evidence does "not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases.")
   Marquard, *supra*, at pp. 221-222
   R v WS, 1994 CanLII 7208, 90 CCC (3d) 242, *per* Finlayson JA, at p. 251
   R v PB, [2011] OJ No 423 (SCJ)(*no CanLII links)
   R v TP, 2010 CanLII 79501 (NL PC), [2010] NJ No 414 (P.C.), *per* Brazil J
9. *R v Vetrovec*, 1982 CanLII 20 (SCC), [1982] 1 SCR 811, *per* Dickson J ("The common law, rejecting the 'numerical criterion' common to some legal systems, has traditionally held that the testimony of a single witness is a sufficient basis for a criminal conviction.")
10. *R v François*, 1994 CanLII 52 (SCC), [1994] 2 SCR 827, *per* McLachlin J
11. *R v Betker*, 1997 CanLII 1902 (ON CA), 115 CCC (3d) 421, *per* Moldaver JA - adult testifying to abuse as child
12. *R v F(CC)*, 1997 CanLII 306 (SCC), [1997] 3 SCR 1183, *per* Cory J, at para 19 ("It is self-evident to every observant parent and to all who have worked closely with young people that children, even more than adults, will have a better recollection of events shortly after they occurred than they will some weeks, months or years later.")
13. *R v AF*, 2007 BCPC 345 (CanLII), *per* Skilnick J
14. *R v VK*, 1991 CanLII 5761 (BC CA), 68 CCC (3d) 18, *per* Wood JA, at paras 18, 33

15. *R v CF*, 1996 CanLII 623 (ON CA), 104 CCC (3d) 461, *per* Brooke JA, at para 18
Marquard
16. *R v Marleau*, 2005 CanLII 8667 (ON CA), 197 OAC 29, *per* Lang JA
17. *R v ARD*, 2017 ABCA 237 (CanLII), 353 CCC (3d) 1, *per curiam* (2:1)

Recovered Memories

The accuracy of memories of children may be affected adversely by the use of therapy. Prudence must be taken in accepting recovered memories.[1]

1. *PC v RC*, 1994 CanLII 7501 (ON SC), 114 DLR (4th) 151, *per* Corbett J
R v ZEB, 2006 NSSC 36 (CanLII), *per* Gruchy J, at para 42
see also *R v GDD*, [1995] NSJ No 529(*no CanLII links)

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Kienapple Principle

This page was last substantively updated or reviewed *January 2018*. (Rev. # 79483)

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General Principles

The rule against multiple convictions, known typically as the "Kienapple" principle, prevents multiple convictions for a single criminal act.[1] That is to say that Kienapple will apply where "the offences charged do not describe different criminal wrongs, but instead describe different ways of committing the same criminal wrong".[2]

Requirement for Kienapple

There are two components to the Kienapple principle. Before it can be applied there must be "both a factual and legal nexus between the charges".[3]

Factual Nexus

The two offence must "arise from the same ‘cause’, ‘matter’, or ‘delict’, and if there is sufficient proximity between the offences charged".[4]

There should be no "additional and distinguishing" element differentiating between the two offences.[5]

The Kienapple principle will apply where the same transaction gives rise to convictions for two or more offences which have "substantially the same elements". [6]

Legal Nexus

There must be a legal connection (ie. nexus) between the offences as well as a factual connection. The offence elements must have sufficient correspondence with each other. That is, they must be “substantially” the same.[7] The question of legal nexus is a "nuanced" exercise.[8] Courts must "compare

the constituent elements of the respective offences together with their societal purpose as may be established by statutory and jurisprudential interpretation."[9] The focus is upon the "the presence or absence of additional distinguishing elements" rather than simply matching and comparing offence elements.[10]

Kienapple will not apply where:[11]

1. where the offences are designed to protect different societal interests,
2. where the offences concern violence against different victims, or
3. where the offences proscribe different consequences.

Comparisons of penalties between offences is a factor to consider for the legal nexus.[12]

See also: *R v Cook*, 2010 ONSC 4534 (CanLII), *per* Hill J

Effect of Principle

Where Kienapple applies, the offence which is conditionally stayed is the "lesser" of the two.[13]

Procedure

In trial, the court cannot consider the issue of Kienapple until the court first is satisfied that the Crown has proven the offender had committed all of the offences at issue.[14]

Where two offences are admitted but believed to be subject to the Kienapple principled and stayed, the accused may accept responsibility for the offence and seek a stay instead of entering a conviction on the charge.[15]

1. See *R v Kienapple*, 1974 CanLII 14 (SCC), [1975] 1 SCR 729, *per* Laskin J
   R v Prince, 1986 CanLII 40 (SCC), [1986] 2 SCR 480, *per* Dickson CJ
2. *R v Heaney*, 2013 BCCA 177 (CanLII), *per* Bennett JA, at para 25
   R v Cook, 2010 ONSC 4534 (CanLII), *per* Hill J
3. *R v Wigman*, 1985 CanLII 1 (SCC), [1987] 1 SCR 246, *per curiam*, at p. 256
4. *Wigman*, *ibid.*, at p. 256
   R v Bienvenue, 2016 ONCA 865 (CanLII), *per curiam*, at para 9 ("The requisite factual nexus is established if the charges arise out of the same transaction.")
5. *Wigman*, *ibid.* ("This requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the Kienapple principle."
   Bienvenue, *supra*, at para 9 ("The legal nexus is established if the offences constitute a single criminal wrong")
6. *R v Kinnear*, 2005 CanLII 21092 (ON CA), 198 CCC (3d) 232, *per* Doherty JA, at para 25
7. *Prince*, *supra*, at para 34
8. *Cook*, *supra*, at para 12
9. *Cook*, *supra*, at para 12
10. *Cook*, *supra*, at para 12
11. *Heaney*, *supra*, at para 26
12. *Bienvenue*, *ibid.*, at para 15
13. *R v JF*, 2008 SCC 60 (CanLII), [2008] 3 SCR 215, *per* Fish J
    Kinnear, *supra*, at para 25 ("accused should be convicted of only the most serious of the offences. The other(s) should be stayed.")
14. *R v Sullivan*, 1991 CanLII 85 (SCC), [1991] 1 SCR 489, *per* Lamer CJ
15. e.g. *R v Nottebrock*, 2014 ABQB 318 (CanLII), *per* Wittmann CJ

Specific Offences

The following offences have been found to be subject of the Kienapple Principle in certain circumstances:

- theft and possession[1]

The following offences have be found not to be subject of the Kienapple Principle:

- Impaired driving, dangerous driving and criminal negligence[2]
- aggravated sexual assault and choking[3]
- Possession of a prohibited firearm with accessible ammo is not an included offence to possession of a loaded firearm.[4]

Unlawful Confinement

A conviction for both kidnapping and unlawful confinement should subject to the Kienapple principle and one of the two offences should be stayed.[5]

1. *R v Francis*, 2011 ONSC 4323 (CanLII), *per* Archibald J
2. *R v Ramage*, 2010 ONCA 488 (CanLII), 257 CCC (3d) 261, *per* Doherty JA
3. *R v Hill*, 2010 ONSC 5150 (CanLII), OJ No 3956, *per* Bryant J
4. *R v Wong*, 2012 ONCA 432 (CanLII), 293 OAC 30, *per* Weiler JA
5. *R v Dhillon*, 2017 ONSC 900 (CanLII), *per* Sproat J, at para 104

See Also

- Kienapple (Cases)
- Double Jeopardy, Res Judicata and Issue Estoppel

Directed Verdicts

This page was last substantively updated or reviewed *March 2021*. (Rev. # 79483)

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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