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Appeals

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Introduction

An appeal is an application to review a matter that has been decided by a Court. The appeal is directed to the "higher" level of court above the level of the deciding court.

More precisely, an appeal is a review of an order. It is not a review of the reasons of a Court per se.[1]

The venue for the appeal depends on the venue and mode of the original proceedings.[2] Matters that are elected indictably are appealed to the Court of Appeal while matters that are summary conviction offences are appealed to the Supreme Court of the province.[3] With some exception, the type of conviction does not determine the forum of appeal.

If the accused is prosecuted indictably but convicted of a lesser summary offence, the appeal is to proceed as if by indictment.[4]

Purposes

The appeal process is supposed to protect against wrongful convictions and "enhance the fairness of the process".[5]

One of the roles of appellate level courts is to "rein in overly elastic interpretation ... provided the courts stop short of judicial amendment".[6]

The process, however, must be limited as there is a cost. The appeal process takes away from the timeliness and finality of a verdict. It is also a far from "ideal" way to resolve a criminal matter.[7]

Guilty Pleas

Generally, a guilty plea to an offence includes a waiver of any right of appeal against conviction.[8]

History

The current right of statutory was introduced in 1923 with Act to amend the Criminal Code, S.C. 1923, c. 41, s. 9, through the creation of what is now Part XXI and Part XXVI. [9] It was closely modeled on the UK's Criminal Appeal Act, 1907 (U.K.), c. 23.[10]

It was in 1930, the appeal provisions were amended to include Crown appeals on questions of law.[11]

1. *Teck Cominco Metals Ltd. v British Columbia*, 2009 BCCA 3 (CanLII), 264 BCAC 164, *per* Frankel JA (in Chambers), at para 20 ("Appeals are taken against orders, not reasons for judgment")
2. s. 813
3. *R v Edmunds*, 1981 CanLII 173 (SCC), [1981] 1 SCR 233, *per* McIntyre J
4. *R v Yaworski*, 1959 CanLII 494 (MB CA), 31 CR 55, *per* Tritschler JA
5. *R v RR*, 2008 ONCA 497 (CanLII), 234 CCC (3d) 463, *per* Doherty JA, at para 16
6. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76, *per* McLachlin CJ, at para 122 - dissenting in part
7. *RR*, *supra*, at para 16
8. See Guilty Plea
9. Public Prosecution Service of Canada Deskbook at s. 3.2
10. *R v Meltzer*, 1986 CanLII 1172 (BC CA), 29 CCC (3d) 266, at para 45
11. Deskbook, , *ibid.*

Sources of Right of Appeal

The right of appeal arises only from statute.[1] Where the matter is criminal in character, only the federal government has the power to create a right of appeal.[2]

At common law, there are no means of appealing convictions or acquittals for indictable offences.[3] The right to appeal an indictable offence to the provincial Court of Appeal is derived from the Criminal Code in Part XXI. Section 672 explicitly provides:

> **Procedure abolished**

> 674 No proceedings other than those authorized by this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*] and Part XXVI [*Pt. XXVI – Extraordinary Remedies (s. 774 to 784)*] shall be taken by way of appeal in proceedings in respect of indictable offences.
> R.S., c. C-34, s. 602.
> [*annotation(s) added*]
>
> – CCC

There are still the related common law remedies of Habeas Corpus, Mandamus and Certiorari. However, the common law writ of error and writ of error coram nobis was removed by the Criminal Code in 1892.[4]

The statutory right of appeal exists for the accused on questions of fact and mixed fact/law. The crown's statutory right to appeal exists on questions of law alone. Appeals on sentence by either Crown or Accused is considered a separate basis of appeal.

Where there is no right to appeal granted by statute, the party seeking appeal must apply and be granted leave for appeal before the court can assess the merits of the appeal issues.

No Interlocutory Right of Appeal

There is a long-standing rule that the can be no interlocutory right of appeal of criminal matters as they are instruments of delay.[5]

The reason for this rule includes (1) the opportunity for "more opinions" does not necessarily serve the ends of justice and (2) "there should not be unnecessary delay in the final disposition of proceedings" of a "criminal character"; (3) the interminability of interlocutory appeals would increase costs of the proceedings; and (4) a post trial review permits a "fuller view" and "more complete picture of the evidence and the case".[6]

There are limited exceptions for judicial review under a prerogative writ or in specific circumstances under the Evidence Act.

1. *Kourtessis v MNR*, 1993 CanLII 137 (SCC), [1993] 2 SCR 53, *per* La Forest J ("Appeals are solely creatures of statute...there is no right of appeal on any matter unless provided for by the relevant legislature.")
2. *Knox Contracting Ltd v Canada*, 1990 CanLII 71 (SCC), [1990] 2 SCR 338, *per* Sopinka J (dissenting on another issue)
3. *R v Waugh*, 2009 NBCA 23 (CanLII), 246 CCC (3d) 116, *per* Drapeau CJ, at para 15
4. *R v Reddick*, 1992 CanLII 1900 (BC CA), 13 BCAC 239, *per* Goldie JA
   Ross v Prince Albert Correctional Centre, 1997 CanLII 11360 (SK QB), 151 Sask R 79, *per* Rothery J
5. *R v Mills*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863, *per* McIntyre J, at para 271
6. *Kourtessis v MNR*, 1993 CanLII 137 (SCC), [1993] 2 SCR 53, *per* La Forest J

Role of Appellate Justices

An appellate court's role includes the power to "rein in overly elastic interpretations" found within legislation so long as it falls should of "judicial amendments".[1]

The role also includes "providing guidance to trial judges on the application of discretionary rules".[2]

1. *R v SDL*, 2017 NSCA 58 (CanLII), 352 CCC (3d) 159, *per* MacDonald CJ, at paras 9 to 10, 17
   Canadian Foundation for Children, Youth & the Law v Canada (Attorney General), 2004 SCC 4 (CanLII), [2004] 1 SCR 76, *per* McLachlin CJ, at para 122
2. *SDL*, *ibid.*, at para 11
   Professor Stephen Waddams, in “Judicial Discretion” (2001) 1 O.U.C.L.J. 59, at p. 59 (" the open-ended nature of a legal rule does not, in itself, present any particular reason to defer to a judge of first instance; on the contrary, the open-ended nature of a rule may be very good reason for the appellate court to give guidance and to settle uncertainties")

Topics

- Right of Appeal by Accused of Verdicts or Sentences for Indictable Offences
- Right of Appeal by Crown of Verdicts or Sentences for Indictable Offences
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- History of Appeal Provisions

Misc Terminology

> **Interpretation**
> **Definitions**
>
> 673 In this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*],
> ...
> **"indictment"** includes an information or charge in respect of which a person has been tried for an indictable offence under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*]; (acte d'accusation)
> **"registrar"** means the registrar or clerk of the court of appeal; (registraire)
> ...
> **"trial court"** means the court by which an accused was tried and includes a judge or a provincial court judge acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*]. (tribunal de première instance)
> R.S., 1985, c. C-46, s. 673; R.S., 1985, c. 27 (1st Supp.), ss. 138, 203, c. 23 (4th Supp.), s. 4, c. 42 (4th Supp.), s. 4; 1992, c. 1, s. 58; 1993, c. 45, s. 10; 1995, c. 22, s. 5, c. 39, ss. 155, 190; 1996, c. 19, s. 74; 1999, c. 5, ss. 25, 51, c. 25, ss. 13, 31(Preamble); 2002, c. 13, s. 63; 2005, c. 22, ss. 38, 45; 2006, c. 14, s. 6; 2013, c. 11, s. 2.
> [*annotation(s) added*]
>
> – CCC

See Also

- Ministerial Review
- Public Prosecution Service Deskbook on Appeals

Right to Appeal

Right of Appeal of Verdicts or Sentences for Indictable Offences

General Principles

An accused person may appeal a conviction for an indictable matters for the situations set out in s. 675

> **Right of appeal of person convicted**
>
> 675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
> (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
> (iii) on any ground of appeal not mentioned in subparagraph (i) [*right of appeal of person convicted — question of law*] or (ii) [*right of appeal of person convicted — question of fact or mixed (with leave)*] that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or
>
> [*omitted (b)*]
>
> [*omitted (1.1), (2), (2.1), (2.2), (2.3), (3) and (4)*]
> R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
> [*annotation(s) added*]
>
> – CCC

Thus, an accused person may appeal a conviction as of right on a question of law or a decision concerning a prerogative writ (e.g. mandamus , certiorari , or prohibition).[1] The accused needs leave before applying on a question of fact or mixed fact and law.[2] An accused also requires leave to appeal a sentence[3], unless the sentence includes parole ineligibility of greater than 10 years for second degree murder in which case leave is not required.[4]

1. See s. 675(1)(a) re question of law See s. 784(1) and (2) re writs
   R v Leroux, 2006 QCCA 1144 (CanLII), *per* Bich JA
2. see s. 675(1)(a)
3. see s. 675(1)(b)
4. s. 675(2)

Appeal From Mental Disorder Verdict

675
[*omitted (1), (2), (2.1), (2.2) and (2.3)*]

Appeals against verdicts based on mental disorder

(3) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of a person, that person may appeal to the court of appeal against that verdict on any ground of appeal mentioned in subparagraph (1)(a)(i) [*right of appeal of person convicted — question of law*], (ii) [*right of appeal of person convicted — question of fact or mixed (with leave)*] or (iii) [*right of appeal of person convicted — any other ground (with leave)*] and subject to the conditions described therein.
[*omitted (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
[*annotation(s) added*]

– CCC

Requirements of Leave

An accused appeal on questions of fact or mixed fact and law (s. 675(1)(a)(ii)) or an appeal on grounds other than questions of law (s. 675(1)(a)(iii)) require leave of the Court.

Where the leave application is denied on any matter except sentence, the accused may apply by filing within 7 days a notice of application for leave to have the appeal heard.[1]

In practice, the process of applying for leave is sometimes largely ignored and only rarely ever refused.

Where leave is denied by a judge of the Court of Appeal, the accused may make application to have the leave reviewed by a full panel of the court of appeal:

Review of Denial of Leave to the Court of Appeal

675
[*omitted (1), (1.1), (2), (2.1), (2.2), (2.3), (3)*]

Where application for leave to appeal refused by judge

(4) Where a judge of the court of appeal refuses leave to appeal under this section otherwise than under paragraph (1)(b) [*accused right of appeal against sentence*], the appellant may, by filing notice in writing with the court of appeal within seven days after the refusal, have the application for leave to appeal determined by the court of appeal.
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
[*annotation(s) added*]

– CCC

Appeal of Sentences for Indictable Offences

What Constitutes a Sentence

Under s. 673, a sentence is defined as:

673 In this Part,

...

"sentence" includes

(a) a declaration made under subsection 199(3) [*warrant to search — gaming, lottery, etc. — disposal of property seized*],
(b) an order made under subsection 109(1) [*mandatory weapons prohibition order*] or 110(1) [*discretionary weapons prohibition order*], section 161 [*s. 161 prohibition order*], subsection 164.2(1)[*forfeiture of property on conviction for s. 162.1, 163.1, 172.1 or 172.2*] or 194(1) [*damages*], section 259 [*driving prohibition orders*], 261 [*an order staying a driving prohibition order*] or 462.37 [*order of forfeiture for proceeds of crime*], subsection 491.1(2), 730(1) [*order of discharge*] or 737(2.1) [*exception for hardship*] or (3) [*victim fine surcharge*] or section 738 [*restitution orders*], 739 [*restitution orders*], 742.1 [*conditional sentence orders*], 742.3 [*conditions of conditional sentence order*], 743.6 [*an order delaying parole eligibility*], 745.4 [*murder conviction - under 16 – substitute jury sentence*] or 745.5 [*murder conviction - under 16 – substitute jury ineligibility*],
(c) a disposition made under section 731 [*probation orders*] or 732 [*Intermittent Jail Sentence Orders*] or subsection 732.2(3) [*probation order – changes to order*] or (5) [*vary or cancel probation order on breach conviction*], 742.4(3) [*supervisor changing optional conditions – decision at hearing*] or 742.6(9) [*procedure on breach of condition – powers of court*], and
(d) an order made under subsection 16(1) of the *Controlled Drugs and Substances Act*; (sentence, peine ou condamnation)

> ...
> R.S., 1985, c. C-46, s. 673; R.S., 1985, c. 27 (1st Supp.), ss. 138, 203, c. 23 (4th Supp.), s. 4, c. 42 (4th Supp.), s. 4; 1992, c. 1, s. 58; 1993, c. 45, s. 10; 1995, c. 22, s. 5, c. 39, ss. 155, 190; 1996, c. 19, s. 74; 1999, c. 5, ss. 25, 51, c. 25, ss. 13, 31(Preamble); 2002, c. 13, s. 63; 2005, c. 22, ss. 38, 45; 2006, c. 14, s. 6; 2013, c. 11, s. 2; 2018, c. 16, s. 220, c. 21, s. 21; 2019, c. 25, s. 278.
> [*annotation(s) added*]
>
> – CCC

Orders listed under s. 673 that are deemed to be part of the sentence include:

- Weapons Prohibition Orders (109 or 110)
- Section 161 Orders (161)
- Forfeiture Order for Computer-related Property (164.2)
- Damages Order for Intercepting or Disclosing Private Communications (194(1))
- Driving Prohibition Orders (259)
- An order staying a driving prohibition order (261)
- Order of Forfeiture for Proceeds of Crime (462.37)
- Order for restitution or forfeiture of property obtained by crime (491.1(2))
- Order of discharge (730(1))
- Victim Fine Surcharge (737(3) or (5))
- Restitution Orders (738, 739)
- Conditional Sentence Orders (742.1, 742.3, 742.4(3) or 742.6(9))
- Order for Delayed Parole (743.6, 745.4 or 745.5)
- Probation Orders (731, 732.2(3) or (5))
- Intermittent Jail Sentence Orders (732)
- CDSA Forfeiture Order (s. 16(1) CDSA)

Under s. 785(b), an appeal of sentence includes appeals against ancillary orders such as driving prohibitions, restitution, discharges, etc.

An appellate court has no authority to consider any issue of fitness of sentence on an appeal of verdict. There must be a specific application to appeal sentence before it can be considered.[2]

1. s 675(4)
2. *R v W(G)*, 1999 CanLII 668 (SCC), [1999] 3 SCR 597, *per* Lamer CJ - consideration of sentence without appeal of sentence created an apprehension of bias

Accused Appeal of Sentence

An appeal of sentence is a separate form of appeal from an appeal of verdict.

The defence may appeal a sentence under s.675(1)(b):

> **Right of appeal of person convicted**
>
> 675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> [*omitted (a)*]
> (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.
>
> [*omitted (1.1), (2), (2.1), (2.2), (2.3), (3) and (4)*]
> R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
>
> – CCC

Leave to Appeal

The standard to meet when seeking leave to appeal from sentence requires the appellant to show that the appeal is not "frivolous in the sense of having no arguable basis or sufficient merit".[1]

1. *R v Hillier*, 2016 NLCA 21 (CanLII), 377 Nfld. & PEIR 121, *per* Welsh JA, at para 7

Accused Appeal of Parole Ineligibility

Second Degree Murder

> 675
> [*omitted (1) and (1.1)*]
>
> **Appeal against absolute term in excess of 10 years**
>
> (2) A person who has been convicted of second degree murder and sentenced to imprisonment for life without eligibility for parole for a specified number of years in excess of ten may appeal to the court of appeal against the number of years in excess of ten of his imprisonment without eligibility for parole.
> [*omitted (2.1), (2.2), (2.3), (3) and (4)*]
> R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
>
> – CCC

First or Second Degree Murder by Youth

675
[*omitted (1), (1.1), (2) and (2.1)*]

Persons under eighteen

(2.2) A person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and sentenced to imprisonment for life without eligibility for parole until the person has served the period specified by the judge presiding at the trial may appeal to the court of appeal against the number of years in excess of the minimum number of years of imprisonment without eligibility for parole that are required to be served in respect of that person's case.
[*omitted (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

– CCC

Delayed Parole Order Under s. 743.6 or 745.51

675
[*omitted (1), (1.1) and (2)*]

Appeal against section 743.6 order

(2.1) A person against whom an order under section 743.6 [*an order delaying parole eligibility*] has been made may appeal to the court of appeal against the order.
[*omitted (2.2), (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

[*annotation(s) added*]

– CCC

675
[*omitted (1), (1.1), (2), (2.1) and (2.2)*]

Appeal against s. 745.51(1) order

(2.3) A person against whom an order under subsection 745.51(1) [*order delaying parole for multiple murders*] has been made may appeal to the court of appeal against the order.
[*omitted (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

[*annotation(s) added*]

– CCC

Right of Appeal for Summary Offences

< Procedure and Practice < Appeals

Summary Offence Appeals

Part XXVII of the Code governs appeals from summary conviction offence trials.[1] Under this Part, there are two ways to appeal a summary conviction. First, an appeal can be made under s. 813 for which remedy can be provided under s. 822. Second, an appeal can be made under s. 830 for which a remedy can be provided under s. 834.[2] Section 839 authorizes the Court of Appeal to give leave on questions of law in relation to both avenues of appeal.[3]

Historically, summary appeals were heard through a *de novo* trial.[4]

Section 812 defines Summary Conviction Appeal Court.[5]

1. *R v Pomeroy*, 2007 BCSC 142 (CanLII), 41 MVR (5th) 272, *per* Romilly J, at paras 25 to 39
2. *R v Mir*, 2016 ONCA 795 (CanLII), *per* Simmons JA, at para 9
3. *Mir*, *ibid.*, at para 10
4. see *R v Century 21 Ramos Realty Inc*, 1987 CanLII 171 (ON CA), 32 CCC (3d) 353, *per curiam*, at p. 178 for a summary of the history
5. See Definition of Judicial Officers and Offices

Right of Appeal

A party may appeal a summary conviction offence either under s. 813 or 830.

Section 813 sets out grounds of appeal for both defence and crown:

> **Appeal by defendant, informant or Attorney General**
>
> 813. Except where otherwise provided by law,
>
> (a) the defendant in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court
>
> (i) from a conviction or order made against him,
> (ii) against a sentence passed on him,
> (iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and
>
> (b) the informant, the Attorney General or his agent in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court
>
> (i) from an order that stays proceedings on an information or dismisses an information,
> (ii) against a sentence passed on a defendant, or
> (iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial,
>
> and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.
> R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9.
> [*annotation(s) added*]
>
> – CCC

When dealing with appeals under s. 813, the provisions governing indictable appeals of ss. 683 to 689, with some exception, will apply.[1]

A summary conviction appeal judge must determine "whether the trial judge could reasonably have reached the conclusion that the appellant was guilty beyond a reasonable doubt".[2]

Section 830 was added in 1985 to expand the grounds of appeal beyond those set in s. 813 including adding appeals for "refusal or failure to exercise jurisdiction, as well as clarifying grounds of appeal such as from quashing an information and stay of proceedings.

Section 830 sets out as follows:

> **Appeals**

> 830 (1) A party to proceedings to which this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that
>
> > (a) it is erroneous in point of law;
> > (b) it is in excess of jurisdiction; or
> > (c) it constitutes a refusal or failure to exercise jurisdiction.
>
> [*omitted (2), (3) and (4)*]
> R.S., 1985, c. C-46, s. 830; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.
> [*annotation(s) added*]
>
> – CCC

It is not permissible to appeal under *both* s. 813 and 830 at the same time. They are mutually exclusive options (see s. 836).

An appeal may be made from a joint statement of fact or trial transcript (s. 812, 829, 838).

1. the exception exists for s. 683(3) and s. 686(5)
   R v Pomeroy, 2007 BCSC 142 (CanLII), 41 MVR (5th) 272, *per* Romilly J, at para 25

2. *Pomeroy*, *ibid.*, at para 26

Crown Appeal

The Crown can appeal under s.813(b):

> **Appeal by defendant, informant or Attorney General**
>
> 813 Except where otherwise provided by law,
>
> > [*omitted (a)*]
> > (b) the informant, the Attorney General or his agent in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court
> >
> > > (i) from an order that stays proceedings on an information or dismisses an information,
> > > (ii) against a sentence passed on a defendant, or
> > > (iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial,

> and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.
>
> R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9. [*annotation(s) added*]
>
> – CCC

Generally, the Crown is not restricted on a summary conviction appeal to issues of law alone, but may also appeal on issues of mixed fact and law.[1]

Under s. 813(b)(i) the crown may only appeal "from an order that stays proceedings on an information or dismisses an information" on grounds involving questions of fact alone.[2]

The reference to "dismisses an information" includes acquittals, dismissal for want of prosecutions,[3] and quashing of information at plea.[4]

The Crown may appeal an order for "costs" as an error of law.[5]

1. *R v Helm*, 2011 SKQB 32 (CanLII), 6 WWR 641, *per* Popescul J, at para 16 (" Accordingly, it is clear that the Crown is not restricted on summary conviction appeals to raising only questions of law but may also raise matters of fact and mixed fact and law.")
2. *R v Century 21 Ramos Realty Inc and Ramos*, 1987 CanLII 171 (ON CA), 32 CCC (3d) 353, *per curiam*, at pp. 768-769
   R v Multitech Warehouse (Manitoba) Direct Inc, 1995 CanLII 6261 (MB CA), 100 CCC (3d) 153, *per* Scott JA, at p. 149
   R v Gilles and Ash (1990), 81 Nfld. & P.E.I. R.1 (Nfld. C.A.)(*no CanLII links) , at para 51
   R v Medicine Hat Greenhouses Ltd. and German, 1981 ABCA 114 (CanLII), 59 CCC (2d) 257, *per* Harradence JA, at para 30
3. *R v Allen*, 1960 CanLII 453 (BC SC), 128 CCC 409, *per* Schultz J
4. *R v Moore*, 1987 CanLII 6798 (ON CA), 38 CCC (3d) 471, *per* Martin JA
5. *R v Krueger*, 2006 ABCA 63 (CanLII), 206 CCC (3d) 390, *per* O'Brien JA, at para 28

Defence Appeal

Under s. 813(a), an accused can appeal a summary conviction:

> **Appeal by defendant, informant or Attorney General**
>
> 813 Except where otherwise provided by law,
>
> (a) the defendant in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court

(i) from a conviction or order made against him,
(ii) against a sentence passed on him,
(iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and

[*omitted (b)*]
and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.

R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9. [*annotation(s) added*]

– CCC

Appeal Right Under 813 Not Lost By Payment of Fine

Payment of fine not a waiver of appeal

820 (1) A person does not waive his right of appeal under section 813 [*appeal by defendant, informant or Attorney General*] by reason only that he pays the fine imposed on conviction, without in any way indicating an intention to appeal or reserving the right to appeal.

Presumption

(2) A conviction, order or sentence shall be deemed not to have been appealed against until the contrary is shown.

R.S., c. C-34, s. 753.

– CCC

Appeal of Sentences

The right of appeal of sentence for a summary offences exists in s. 813(a)(ii) and (b)(ii):

Appeal by defendant, informant or Attorney General

813 Except where otherwise provided by law,

(a) the defendant in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court

[*omitted (i)*]
(ii) against a sentence passed on him, or
[*omitted (iii)*]

(b) the informant, the Attorney General or his agent in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court

[*omitted (i)*]
(ii) against a sentence passed on a defendant, or
[*omitted (iii)*]

and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.

R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9. [*annotation(s) added*]

– CCC

"Sentence"

785 In this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*],
...
"sentence" includes

(a) a declaration made under subsection 199(3) [*warrant to search — gaming, lottery, etc. — disposal of property seized*],
(b) an order made under subsection 109(1) [*mandatory weapons prohibition order*] or 110(1) [*mandatory weapons prohibition order*], section 259 [*driving prohibition orders*] or 261 [*an order staying a driving prohibition order*], subsection 730(1) [*order of discharge*] or 737(1.1) , (3) [*victim fine surcharge*] or (5) [*victim fine surcharge*] or section 738 [*restitution orders*], 739 [*restitution orders*], 742.1 [*conditional sentence orders*] or 742.3 [*conditions of conditional sentence order*],
(c) a disposition made under section 731 [*probation orders*] or 732 [*Intermittent Jail Sentence Orders*] or subsection 732.2(3) [*probation order – changes to order*] or (5) [*vary or cancel probation order on breach conviction*], 742.4(3) [*supervisor changing optional conditions – decision at hearing*] or 742.6(9) [*procedure on breach of condition – powers of court*],
(d) an order made under subsection 16(1)

of the *Controlled Drugs and Substances Act*, and

(e) an order made under subsection 94(1) of the *Cannabis Act*; (sentence, peine ou condamnation)

...

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

Grounds of Summary Conviction Appeal

A summary conviction appeal judge cannot interfere with a trial judge's findings unless they were unreasonable or unsupported by evidence.[1]

1. *R v Smits*, 2012 ONCA 524 (CanLII), 294 OAC 355, *per* Brown J, at para 67

see *R v Grosse*, 1996 CanLII 6643 (ON CA), 29 OR (3d) 785, *per curiam*, at pp. 791-92

Summary Conviction Appeal to the Court of Appeal

- Right of Appeal of a Summary Conviction Appeal Decision

Venue of Appeal

Certain provinces require that Summary Conviction appeals under s. 813 be undertaken within the venue specified in the Code:

Manitoba and Alberta

814 (1) In the Provinces of Manitoba and Alberta, an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be heard at the sittings of the appeal court that is held nearest to the place where the cause of the proceedings arose, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

Saskatchewan

(2) In the Province of Saskatchewan, an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be heard at the sittings of the appeal court at the judicial centre nearest to the place where the adjudication was made, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

British Columbia

(3) In the Province of British Columbia, an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be heard at the sittings of the appeal court that is held nearest to the place where the adjudication was made, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

Territories

(4) In Yukon, the Northwest Territories and Nunavut, an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be heard at the place where the cause of the proceedings arose or at the place nearest to it where a court is appointed to be held.
R.S., 1985, c. C-46, s. 814; 1993, c. 28, s. 78; 2002, c. 7, s. 150.
[*annotation(s) added*]

– CCC

Right of Appeal of Verdicts or Sentences for Indictable Offences

< Procedure and Practice < Appeals

General Principles

An accused person may appeal a conviction for an indictable matters for the situations set out in s. 675

Right of appeal of person convicted

675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

(a) against his conviction

(i) on any ground of appeal that involves a question of law alone,

(ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
(iii) on any ground of appeal not mentioned in subparagraph (i) [*right of appeal of person convicted — question of law*] or (ii) [*right of appeal of person convicted — question of fact or mixed (with leave)*] that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or

[*omitted (b)*]

[*omitted (1.1), (2), (2.1), (2.2), (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
[*annotation(s) added*]

– CCC

Thus, an accused person may appeal a conviction as of right on a question of law or a decision concerning a prerogative writ (e.g. mandamus , certiorari , or prohibition).[1] The accused needs leave before applying on a question of fact or mixed fact and law.[2] An accused also requires leave to appeal a sentence[3], unless the sentence includes parole ineligibility of greater than 10 years for second degree murder in which case leave is not required.[4]

1. See s. 675(1)(a) re question of law See s. 784(1) and (2) re writs
R v Leroux, 2006 QCCA 1144 (CanLII), *per* Bich JA
2. see s. 675(1)(a)
3. see s. 675(1)(b)
4. s. 675(2)

Appeal From Mental Disorder Verdict

675
[*omitted (1), (2), (2.1), (2.2) and (2.3)*]

Appeals against verdicts based on mental disorder

(3) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of a person, that person may appeal to the court of appeal against that verdict on any ground of appeal mentioned in subparagraph (1)(a)(i) [*right of appeal of person convicted — question of law*], (ii) [*right of appeal of person convicted — question of fact or mixed (with leave)*] or (iii) [*right of appeal of person convicted — any other ground (with leave)*] and subject to the conditions described therein.

[*omitted (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
[*annotation(s) added*]

– CCC

Requirements of Leave

An accused appeal on questions of fact or mixed fact and law (s. 675(1)(a)(ii)) or an appeal on grounds other than questions of law (s. 675(1)(a)(iii)) require leave of the Court.

Where the leave application is denied on any matter except sentence, the accused may apply by filing within 7 days a notice of application for leave to have the appeal heard.[1]

In practice, the process of applying for leave is sometimes largely ignored and only rarely ever refused.

Where leave is denied by a judge of the Court of Appeal, the accused may make application to have the leave reviewed by a full panel of the court of appeal:

Review of Denial of Leave to the Court of Appeal

675
[*omitted (1), (1.1), (2), (2.1), (2.2), (2.3), (3)*]

Where application for leave to appeal refused by judge

(4) Where a judge of the court of appeal refuses leave to appeal under this section otherwise than under paragraph (1)(b) [*accused right of appeal against sentence*], the appellant may, by filing notice in writing with the court of appeal within seven days after the refusal, have the application for leave to appeal determined by the court of appeal.
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
[*annotation(s) added*]

– CCC

Appeal of Sentences for Indictable Offences

What Constitutes a Sentence

Under s. 673, a sentence is defined as:

> 673 In this Part,
> ...
> **"sentence"** includes
>
> (a) a declaration made under subsection 199(3) [*warrant to search — gaming, lottery, etc. — disposal of property seized*],
> (b) an order made under subsection 109(1) [*mandatory weapons prohibition order*] or 110(1) [*discretionary weapons prohibition order*], section 161 [*s. 161 prohibition order*], subsection 164.2(1)[*forfeiture of property on conviction for s. 162.1, 163.1, 172.1 or 172.2*] or 194(1) [*damages*], section 259 [*driving prohibition orders*], 261 [*an order staying a driving prohibition order*] or 462.37 [*order of forfeiture for proceeds of crime*], subsection 491.1(2), 730(1) [*order of discharge*] or 737(2.1) [*exception for hardship*] or (3) [*victim fine surcharge*] or section 738 [*restitution orders*], 739 [*restitution orders*], 742.1 [*conditional sentence orders*], 742.3 [*conditions of conditional sentence order*], 743.6 [*an order delaying parole eligibility*], 745.4 [*murder conviction - under 16 – substitute jury sentence*] or 745.5 [*murder conviction - under 16 – substitute jury ineligibility*],
> (c) a disposition made under section 731 [*probation orders*] or 732 [*Intermittent Jail Sentence Orders*] or subsection 732.2(3) [*probation order – changes to order*] or (5) [*vary or cancel probation order on breach conviction*], 742.4(3) [*supervisor changing optional conditions – decision at hearing*] or 742.6(9) [*procedure on breach of condition – powers of court*], and
> (d) an order made under subsection 16(1) of the *Controlled Drugs and Substances Act*; (sentence, peine ou condamnation)
>
> ...
> R.S., 1985, c. C-46, s. 673; R.S., 1985, c. 27 (1st Supp.), ss. 138, 203, c. 23 (4th Supp.), s. 4, c. 42 (4th Supp.), s. 4; 1992, c. 1, s. 58; 1993, c. 45, s. 10; 1995, c. 22, s. 5, c. 39, ss. 155, 190; 1996, c. 19, s. 74; 1999, c. 5, ss. 25, 51, c. 25, ss. 13, 31(Preamble); 2002, c. 13, s. 63; 2005, c. 22, ss. 38, 45; 2006, c. 14, s. 6; 2013, c. 11, s. 2; 2018, c. 16, s. 220, c. 21, s. 21; 2019, c. 25, s. 278.
> [*annotation(s) added*]
>
> – CCC

Orders listed under s. 673 that are deemed to be part of the sentence include:

- Weapons Prohibition Orders (109 or 110)
- Section 161 Orders (161)
- Forfeiture Order for Computer-related Property (164.2)

- Damages Order for Intercepting or Disclosing Private Communications (194(1))
- Driving Prohibition Orders (259)
- An order staying a driving prohibition order (261)
- Order of Forfeiture for Proceeds of Crime (462.37)
- Order for restitution or forfeiture of property obtained by crime (491.1(2))
- Order of discharge (730(1))
- Victim Fine Surcharge (737(3) or (5))
- Restitution Orders (738, 739)
- Conditional Sentence Orders (742.1, 742.3, 742.4(3) or 742.6(9))
- Order for Delayed Parole (743.6, 745.4 or 745.5)
- Probation Orders (731, 732.2(3) or (5))
- Intermittent Jail Sentence Orders (732)
- CDSA Forfeiture Order (s. 16(1) CDSA)

Under s. 785(b), an appeal of sentence includes appeals against ancillary orders such as driving prohibitions, restitution, discharges, etc.

An appellate court has no authority to consider any issue of fitness of sentence on an appeal of verdict. There must be a specific application to appeal sentence before it can be considered.[2]

1. s 675(4)
2. *R v W(G)*, 1999 CanLII 668 (SCC), [1999] 3 SCR 597, *per* Lamer CJ - consideration of sentence without appeal of sentence created an apprehension of bias

Accused Appeal of Sentence

An appeal of sentence is a separate form of appeal from an appeal of verdict.

The defence may appeal a sentence under s.675(1)(b):

> **Right of appeal of person convicted**
>
> 675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> [*omitted (a)*]
> (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.
>
> [*omitted (1.1), (2), (2.1), (2.2), (2.3), (3) and (4)*]
> R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
>
> – CCC

Leave to Appeal

The standard to meet when seeking leave to appeal from sentence requires the appellant to show that the appeal is not "frivolous in the sense of having no arguable basis or sufficient merit".[1]

1. *R v Hillier*, 2016 NLCA 21 (CanLII), 377 Nfld. & PEIR 121, *per* Welsh JA, at para 7

Accused Appeal of Parole Ineligibility

Second Degree Murder

675
[*omitted (1) and (1.1)*]

Appeal against absolute term in excess of 10 years

(2) A person who has been convicted of second degree murder and sentenced to imprisonment for life without eligibility for parole for a specified number of years in excess of ten may appeal to the court of appeal against the number of years in excess of ten of his imprisonment without eligibility for parole.
[*omitted (2.1), (2.2), (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

– CCC

First or Second Degree Murder by Youth

675
[*omitted (1), (1.1), (2) and (2.1)*]

Persons under eighteen

(2.2) A person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and sentenced to imprisonment for life without eligibility for parole until the person has served the period specified by the judge presiding at the trial may appeal to the court of appeal against the number of years in excess of the minimum number of years of imprisonment without eligibility for parole that are required to be served in respect of that person's case.

[*omitted (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

– CCC

Delayed Parole Order Under s. 743.6 or 745.51

675
[*omitted (1), (1.1) and (2)*]

Appeal against section 743.6 order

(2.1) A person against whom an order under section 743.6 [*an order delaying parole eligibility*] has been made may appeal to the court of appeal against the order.
[*omitted (2.2), (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

[*annotation(s) added*]

– CCC

675
[*omitted (1), (1.1), (2), (2.1) and (2.2)*]

Appeal against s. 745.51(1) order

(2.3) A person against whom an order under subsection 745.51(1) [*order delaying parole for multiple murders*] has been made may appeal to the court of appeal against the order.
[*omitted (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

[*annotation(s) added*]

– CCC

Right of Appeal by Accused of Verdicts or Sentences for Indictable Offences

< Procedure and Practice < Appeals

General Principles

An accused person may appeal a conviction for an indictable matters for the situations set out in s. 675

> **Right of appeal of person convicted**
>
> 675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
> (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
> (iii) on any ground of appeal not mentioned in subparagraph (i) [*right of appeal of person convicted — question of law*] or (ii) [*right of appeal of person convicted — question of fact or mixed (with leave)*] that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or
>
> [*omitted (b)*]
>
> [*omitted (1.1), (2), (2.1), (2.2), (2.3), (3) and (4)*]
> R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
> [*annotation(s) added*]
>
> – CCC

Thus, an accused person may appeal a conviction as of right on a question of law or a decision concerning a prerogative writ (e.g. mandamus , certiorari , or prohibition).[1] The accused needs leave before applying on a question of fact or mixed fact and law.[2] An accused also requires leave to appeal

a sentence[3], unless the sentence includes parole ineligibility of greater than 10 years for second degree murder in which case leave is not required.[4]

1. See s. 675(1)(a) re question of law See s. 784(1) and (2) re writs
   R v Leroux, 2006 QCCA 1144 (CanLII), *per* Bich JA
2. see s. 675(1)(a)
3. see s. 675(1)(b)
4. s. 675(2)

Appeal From Mental Disorder Verdict

675
[*omitted (1), (2), (2.1), (2.2) and (2.3)*]

Appeals against verdicts based on mental disorder

(3) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of a person, that person may appeal to the court of appeal against that verdict on any ground of appeal mentioned in subparagraph (1)(a)(i) [*right of appeal of person convicted — question of law*], (ii) [*right of appeal of person convicted — question of fact or mixed (with leave)*] or (iii) [*right of appeal of person convicted — any other ground (with leave)*] and subject to the conditions described therein.
[*omitted (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
[*annotation(s) added*]

– CCC

Requirements of Leave

An accused appeal on questions of fact or mixed fact and law (s. 675(1)(a)(ii)) or an appeal on grounds other than questions of law (s. 675(1)(a)(iii)) require leave of the Court.

Where the leave application is denied on any matter except sentence, the accused may apply by filing within 7 days a notice of application for leave to have the appeal heard.[1]

In practice, the process of applying for leave is sometimes largely ignored and only rarely ever refused.

Where leave is denied by a judge of the Court of Appeal, the accused may make application to have the leave reviewed by a full panel of the court of appeal:

675
[*omitted (1), (1.1), (2), (2.1), (2.2), (2.3), (3)*]

Where application for leave to appeal refused by judge

(4) Where a judge of the court of appeal refuses leave to appeal under this section otherwise than under paragraph (1)(b) [*accused right of appeal against sentence*], the appellant may, by filing notice in writing with the court of appeal within seven days after the refusal, have the application for leave to appeal determined by the court of appeal.
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
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– CCC

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What Constitutes a Sentence

Under s. 673, a sentence is defined as:

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...
"sentence" includes

(a) a declaration made under subsection 199(3) [*warrant to search — gaming, lottery, etc. — disposal of property seized*],
(b) an order made under subsection 109(1) [*mandatory weapons prohibition order*] or 110(1) [*discretionary weapons prohibition order*], section 161 [*s. 161 prohibition order*], subsection 164.2(1)[*forfeiture of property on conviction for s. 162.1, 163.1, 172.1 or 172.2*] or 194(1) [*damages*], section 259 [*driving prohibition orders*], 261 [*an order staying a driving prohibition order*] or 462.37 [*order of forfeiture for proceeds of crime*], subsection 491.1(2), 730(1) [*order of discharge*] or 737(2.1) [*exception for hardship*] or (3) [*victim fine surcharge*] or section 738 [*restitution orders*], 739 [*restitution orders*], 742.1 [*conditional sentence orders*], 742.3 [*conditions of conditional sentence order*], 743.6 [*an order delaying parole eligibility*], 745.4 [*murder conviction - under 16 – substitute jury sentence*] or 745.5 [*murder conviction - under 16 – substitute jury ineligibility*],

(c) a disposition made under section 731 [*probation orders*] or 732 [*Intermittent Jail Sentence Orders*] or subsection 732.2(3) [*probation order – changes to order*] or (5) [*vary or cancel probation order on breach conviction*], 742.4(3) [*supervisor changing optional conditions – decision at hearing*] or 742.6(9) [*procedure on breach of condition – powers of court*], and
(d) an order made under subsection 16(1) of the *Controlled Drugs and Substances Act*; (sentence, peine ou condamnation)

...
R.S., 1985, c. C-46, s. 673; R.S., 1985, c. 27 (1st Supp.), ss. 138, 203, c. 23 (4th Supp.), s. 4, c. 42 (4th Supp.), s. 4; 1992, c. 1, s. 58; 1993, c. 45, s. 10; 1995, c. 22, s. 5, c. 39, ss. 155, 190; 1996, c. 19, s. 74; 1999, c. 5, ss. 25, 51, c. 25, ss. 13, 31(Preamble); 2002, c. 13, s. 63; 2005, c. 22, ss. 38, 45; 2006, c. 14, s. 6; 2013, c. 11, s. 2; 2018, c. 16, s. 220, c. 21, s. 21; 2019, c. 25, s. 278.
[*annotation(s) added*]

– CCC

Orders listed under s. 673 that are deemed to be part of the sentence include:

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- Section 161 Orders (161)
- Forfeiture Order for Computer-related Property (164.2)
- Damages Order for Intercepting or Disclosing Private Communications (194(1))
- Driving Prohibition Orders (259)
- An order staying a driving prohibition order (261)
- Order of Forfeiture for Proceeds of Crime (462.37)
- Order for restitution or forfeiture of property obtained by crime (491.1(2))
- Order of discharge (730(1))
- Victim Fine Surcharge (737(3) or (5))
- Restitution Orders (738, 739)
- Conditional Sentence Orders (742.1, 742.3, 742.4(3) or 742.6(9))
- Order for Delayed Parole (743.6, 745.4 or 745.5)
- Probation Orders (731, 732.2(3) or (5))
- Intermittent Jail Sentence Orders (732)
- CDSA Forfeiture Order (s. 16(1) CDSA)

Under s. 785(b), an appeal of sentence includes appeals against ancillary orders such as driving prohibitions, restitution, discharges, etc.

An appellate court has no authority to consider any issue of fitness of sentence on an appeal of verdict. There must be a specific application to appeal sentence before it can be considered.[2]

1. s 675(4)
2. *R v W(G)*, 1999 CanLII 668 (SCC), [1999] 3 SCR 597, *per* Lamer CJ - consideration of

sentence without appeal of sentence created an apprehension of bias

Accused Appeal of Sentence

An appeal of sentence is a separate form of appeal from an appeal of verdict.

The defence may appeal a sentence under s.675(1)(b):

> **Right of appeal of person convicted**
>
> 675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> [*omitted (a)*]
> (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.
>
> [*omitted (1.1), (2), (2.1), (2.2), (2.3), (3) and (4)*]
> R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
>
> – CCC

Leave to Appeal

The standard to meet when seeking leave to appeal from sentence requires the appellant to show that the appeal is not "frivolous in the sense of having no arguable basis or sufficient merit".[1]

1. *R v Hillier*, 2016 NLCA 21 (CanLII), 377 Nfld. & PEIR 121, *per* Welsh JA, at para 7

Accused Appeal of Parole Ineligibility

Second Degree Murder

> 675
> [*omitted (1) and (1.1)*]
>
> **Appeal against absolute term in excess of 10 years**
>
> (2) A person who has been convicted of second degree murder and sentenced to imprisonment for life without eligibility for parole for a specified number of years in excess of ten may appeal to the court of appeal against the number of years in

excess of ten of his imprisonment without eligibility for parole.
[*omitted (2.1), (2.2), (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

– CCC

First or Second Degree Murder by Youth

675
[*omitted (1), (1.1), (2) and (2.1)*]

Persons under eighteen

(2.2) A person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and sentenced to imprisonment for life without eligibility for parole until the person has served the period specified by the judge presiding at the trial may appeal to the court of appeal against the number of years in excess of the minimum number of years of imprisonment without eligibility for parole that are required to be served in respect of that person's case.
[*omitted (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

– CCC

Delayed Parole Order Under s. 743.6 or 745.51

675
[*omitted (1), (1.1) and (2)*]

Appeal against section 743.6 order

(2.1) A person against whom an order under section 743.6 [*an order delaying parole eligibility*] has been made may appeal to the court of appeal against the order.
[*omitted (2.2), (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92;

1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

[*annotation(s) added*]

– CCC

675
[*omitted (1), (1.1), (2), (2.1) and (2.2)*]

Appeal against s. 745.51(1) order

(2.3) A person against whom an order under subsection 745.51(1) [*order delaying parole for multiple murders*] has been made may appeal to the court of appeal against the order.
[*omitted (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.

[*annotation(s) added*]

– CCC

Right of Appeal by Crown of Verdicts or Sentences for Indictable Offences

< Procedure and Practice < Appeals

General Principles

The crown may appeal on indictable matters for the situations set out in section 676:

Right of Attorney General to appeal

676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

> (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone; [*omitted (b), (c) and (d)*]
>
> [*omitted (1.1), (2), (3), (4), (5) and (6)*]
> R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.
>
> – CCC

So long as the "trial judge took a legally correct approach to the evidence, the Crown cannot argue that the verdict is unreasonable".[1]

Before the Crown can successfully obtain a new trial, they must "establish that the error of law might reasonably have had a material bearing on the acquittal".[2] The threshold relies on a “reasonable degree of certainty”.[3] It is not a question of "abstract or purely hypothetical possibility", nor is it one that is "necessarily" material.[4]

This section provides the Crown with a right of appeal to an acquittal or NCR verdict on a question of law alone (676(1)(a)), a court order to quash an indictment (676(1)(b), 676(1)(c)), an order for a stay of proceedings (676(1)(c)).[5]

1. R. v. Rudge, 2011 ONCA 791(*complete citation pending*), 108 O.R. (3d) 161, at para. 35
   R. v. Curry, 2014 ONCA 174, 317 O.A.C. 329 at para. 37
   R v Palmer, 2021 ONCA 348 (CanLII), *per* Tulloch JA, at para 60
2. *R v Vaillancourt*, 2019 ABCA 317 (CanLII), 93 Alta LR (6th) 98, *per curiam*, at para 14
   R v Graveline, 2006 SCC 16 (CanLII), [2006] 1 SCR 609, *per* Fish J, at para 14
3. *R v George*, 2017 SCC 38 (CanLII), [2017] 1 SCR 1021, *per* Gascon J, at para 27
4. *George*, *ibid.*, at para 27
5. *R v Chapman*, 2016 ONCA 310 (CanLII), 337 CCC (3d) 269, *per* Cronk JA, at para 13

Question of Law

The Crown has a right of appeal an acquittal only on a question of law.[1]

Crown appeals on questions of law include:[2]

1. misinterpretation or misapplication of salient legal standards, including the elements of the offences;
2. assessing evidence based on erroneous legal principles;
3. making findings of fact not based on the evidence;
4. failing to give legal effect to findings of fact or of undisputed facts;
5. failing to consider all the evidence bearing on guilt or innocence;

6. failing to properly admit evidence; and,
7. failing to provide adequate reasons

The meaning of "question of law alone" is no different than "question of law".[3]

Acquittals based on matters of credibility cannot be appealed.

Burden

The Crown has a "heavy onus" to overturn an acquittal, particularly on jury verdicts.[4] Acquittals are not lightly overturned.[5]

Connection Between Error and Acquittal

Even where there is a question of law alone, the Crown must still establish a connection between the error in law and the acquittal. The error must be "directly and concretely" related to the acquittal.[6]

Categories

There are at least four categories of cases where assessments of evidence amount to an error of law:[7]

1. it is an error of law to make a finding of fact for which there is no supporting evidence. However, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule. Rather, it is a conclusion that the standard of persuasion beyond a reasonable doubt has not been met;
2. the legal effect of findings of fact or of undisputed facts may give rise to an error of law;
3. an assessment of the evidence based on a misapprehension or misdirection concerning a legal principle is an error of law; and
4. a failure to consider all the evidence in relation to the ultimate issue of guilt or innocence is also an error of law.

Unreasonable Verdict or Miscarriage of Justice

The Crown is prohibited from appealing a verdict on the basis that it is simply "unreasonable". Thee must be an error of law that leads to it.[8]

Cases of "unreasonable verdict" or "miscarriage of justice" have little relevance to crown appeals under s. 676(1)(a) for error of law.[9]

The Courts must "avoid seizing on perceived deficiencies in a trial judge's reasons for acquittal to create a ground of unreasonable acquittal."[10]

Acquittal Verdict Includes Offences Where Other Charges Convicted

> 676
> [*omitted (1) and (1.1)*]
>
> **Acquittal**

(2) For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 730 [*order of discharge*] of any other offence.
[*omitted (3), (4), (5) and (6)*]

[*annotation(s) added*]

– CCC

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1. see s. 676(1)(a)
2. *R v Trachy*, 2019 ONCA 622 (CanLII), 379 CCC (3d) 51, *per* Benotto JA, at para 68
3. *R v Biniaris*, 2000 SCC 15 (CanLII), [2000] 1 SCR 381, *per* Arbour J, at para 31
4. *R v Samuels (J.K.)*, 2009 ONCA 614 (CanLII), 265 OAC 214, *per* Laskin J, at para 19
   R v Evans, 1993 CanLII 102 (SCC), [1993] 2 SCR 629, *per* Cory J, at p. 645 referring to a "very heavy onus"
5. *R v Sutton*, 2000 SCC 50 (CanLII), [2000] 2 SCR 595, *per* McLachlin CJ, at para 2
6. *R v RGB*, 2012 MBCA 5 (CanLII), 275 Man.R. (2d) 119, 287 CCC (3d) 463, *per* Freedman and Chartier JJA, at para 19
7. *R v JMH*, 2011 SCC 45 (CanLII), [2011] 3 SCR 197, *per* Cromwell J, at paras 25 to 32
8. *Biniaris*, *supra*, at para 32
9. *R v JMH*, 2011 SCC 45 (CanLII), [2011] 3 SCR 197, *per* Cromwell J, at para 35
10. *R v Walker*, 2008 SCC 34 (CanLII), [2008] 2 SCR 245, *per* Binnie J, at para 2

Crown Appeal on Specific Types of Charges

Decision on Mental Health

676
[*omitted (1), (1.1) and (2)*]

Appeal against verdict of unfit to stand trial

(3) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.
[*omitted (4), (5) and (6)*]
R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.

– CCC

Stay of Proceedings or Quashing of Indictment

- See Appeals Other Than Verdicts or Sentences#Crown Appeal of a Stay of Proceedings or Quashing of Charges

Crown Appeal of Sentence

Crown appeals of sentence for indictable offences must have leave of the court of appeal.[1]

The crown may appeal on indictable matters for the situations set out in section 676:

> **Right of Attorney General to appeal**
>
> 676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> > [*omitted (a), (b) and (c)*]
> > or
> > (d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.
>
> [*omitted (1.1), (2), (3), (4), (5) and (6)*]
> R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.
>
> – CCC

1. see s 676 (1)(d) ("with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.")

Crown Appeal of Parole Ineligibility

Decision on Parole Ineligibility for Murder

> 676
> [*omitted (1), (1.1), (2) and (3)*]
>
> **Appeal against ineligible parole period**

(4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.
[*omitted (5) and (6)*]
R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.

– CCC

Decision on Delayed Parole Under s. 743.6 or 745.51

676
[*omitted (1), (1.1), (2), (3) and (4)*]

Appeal against decision not to make section 743.6 order

(5) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under section 743.6 [*an order delaying parole eligibility*].

Appeal against decision not to make s. 745.51(1) order

(6) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under subsection 745.51(1) [*order delaying parole for multiple murders*].
R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.
[*annotation(s) added*]

– CCC

Right of Appeal of Verdicts or Sentences for Summary Offences

Summary Offence Appeals

Part XXVII of the Code governs appeals from summary conviction offence trials.[1] Under this Part, there are two ways to appeal a summary conviction. First, an appeal can be made under s. 813 for which remedy can be provided under s. 822. Second, an appeal can be made under s. 830 for which a remedy can be provided under s. 834.[2] Section 839 authorizes the Court of Appeal to give leave on questions of law in relation to both avenues of appeal.[3]

Historically, summary appeals were heard through a *de novo* trial.[4]

Section 812 defines Summary Conviction Appeal Court.[5]

1. *R v Pomeroy*, 2007 BCSC 142 (CanLII), 41 MVR (5th) 272, *per* Romilly J, at paras 25 to 39
2. *R v Mir*, 2016 ONCA 795 (CanLII), *per* Simmons JA, at para 9
3. *Mir*, *ibid.*, at para 10
4. see *R v Century 21 Ramos Realty Inc*, 1987 CanLII 171 (ON CA), 32 CCC (3d) 353, *per curiam*, at p. 178 for a summary of the history
5. See Definition of Judicial Officers and Offices

Right of Appeal

A party may appeal a summary conviction offence either under s. 813 or 830.

Section 813 sets out grounds of appeal for both defence and crown:

> **Appeal by defendant, informant or Attorney General**
>
> 813. Except where otherwise provided by law,
>
> (a) the defendant in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court
>
> (i) from a conviction or order made against him,
> (ii) against a sentence passed on him,
> (iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and
>
> (b) the informant, the Attorney General or his agent in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court
>
> (i) from an order that stays proceedings on an information or dismisses an information,
> (ii) against a sentence passed on a defendant, or
> (iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial,

and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.
R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9.
[*annotation(s) added*]

– CCC

When dealing with appeals under s. 813, the provisions governing indictable appeals of ss. 683 to 689, with some exception, will apply.[1]

A summary conviction appeal judge must determine "whether the trial judge could reasonably have reached the conclusion that the appellant was guilty beyond a reasonable doubt".[2]

Section 830 was added in 1985 to expand the grounds of appeal beyond those set in s. 813 including adding appeals for "refusal or failure to exercise jurisdiction, as well as clarifying grounds of appeal such as from quashing an information and stay of proceedings.

Section 830 sets out as follows:

Appeals

830 (1) A party to proceedings to which this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that

(a) it is erroneous in point of law;
(b) it is in excess of jurisdiction; or
(c) it constitutes a refusal or failure to exercise jurisdiction.

[*omitted (2), (3) and (4)*]
R.S., 1985, c. C-46, s. 830; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.
[*annotation(s) added*]

– CCC

It is not permissible to appeal under *both* s. 813 and 830 at the same time. They are mutually exclusive options (see s. 836).

An appeal may be made from a joint statement of fact or trial transcript (s. 812, 829, 838).

1. the exception exists for s. 683(3) and s. 686(5)
R v Pomeroy, 2007 BCSC 142 (CanLII), 41 MVR (5th) 272, *per* Romilly J, at para 25

2. *Pomeroy*, *ibid.*, at para 26

Crown Appeal

The Crown can appeal under s.813(b):

> **Appeal by defendant, informant or Attorney General**
>
> 813 Except where otherwise provided by law,
>
> [*omitted (a)*]
> (b) the informant, the Attorney General or his agent in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court
>
> (i) from an order that stays proceedings on an information or dismisses an information,
> (ii) against a sentence passed on a defendant, or
> (iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial,
>
> and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.
>
> R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9.
> [*annotation(s) added*]
>
> – CCC

Generally, the Crown is not restricted on a summary conviction appeal to issues of law alone, but may also appeal on issues of mixed fact and law.[1]

Under s. 813(b)(i) the crown may only appeal "from an order that stays proceedings on an information or dismisses an information" on grounds involving questions of fact alone.[2]

The reference to "dismisses an information" includes acquittals, dismissal for want of prosecutions, [3] and quashing of information at plea.[4]

The Crown may appeal an order for "costs" as an error of law.[5]

1. *R v Helm*, 2011 SKQB 32 (CanLII), 6 WWR 641, *per* Popescul J, at para 16 (" Accordingly, it is clear that the Crown is not restricted on summary conviction appeals to raising only questions of law but may also raise matters of fact and mixed fact and law.")
2. *R v Century 21 Ramos Realty Inc and Ramos*, 1987 CanLII 171 (ON CA), 32 CCC (3d) 353, *per curiam*, at pp. 768-769
   R v Multitech Warehouse (Manitoba) Direct Inc, 1995 CanLII 6261 (MB CA), 100 CCC (3d) 153, *per* Scott JA, at p. 149
   R v Gilles and Ash (1990), 81 Nfld. & P.E.I. R.1 (Nfld. C.A.)(*no CanLII links) , at para 51
   R v Medicine Hat Greenhouses Ltd. and German, 1981 ABCA 114 (CanLII), 59 CCC (2d) 257, *per* Harradence JA, at para 30
3. *R v Allen*, 1960 CanLII 453 (BC SC), 128 CCC 409, *per* Schultz J
4. *R v Moore*, 1987 CanLII 6798 (ON CA), 38 CCC (3d) 471, *per* Martin JA
5. *R v Krueger*, 2006 ABCA 63 (CanLII), 206 CCC (3d) 390, *per* O'Brien JA, at para 28

Defence Appeal

Under s. 813(a), an accused can appeal a summary conviction:

> **Appeal by defendant, informant or Attorney General**
>
> 813 Except where otherwise provided by law,
>
> (a) the defendant in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court
>
> (i) from a conviction or order made against him,
> (ii) against a sentence passed on him,
> (iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and
>
> [*omitted (b)*]
> and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.
>
> R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9.
> [*annotation(s) added*]
>
> – CCC

Appeal Right Under 813 Not Lost By Payment of Fine

Payment of fine not a waiver of appeal

820 (1) A person does not waive his right of appeal under section 813 [*appeal by defendant, informant or Attorney General*] by reason only that he pays the fine imposed on conviction, without in any way indicating an intention to appeal or reserving the right to appeal.

Presumption

(2) A conviction, order or sentence shall be deemed not to have been appealed against until the contrary is shown.

R.S., c. C-34, s. 753.

– CCC

Appeal of Sentences

The right of appeal of sentence for a summary offences exists in s. 813(a)(ii) and (b)(ii):

Appeal by defendant, informant or Attorney General

813 Except where otherwise provided by law,

(a) the defendant in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court

[*omitted (i)*]
(ii) against a sentence passed on him, or
[*omitted (iii)*]

(b) the informant, the Attorney General or his agent in proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] may appeal to the appeal court

[*omitted (i)*]
(ii) against a sentence passed on a defendant, or
[*omitted (iii)*]

and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.

R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9.
[*annotation(s) added*]

– CCC

"Sentence"

785 In this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*],
...
"sentence" includes

(a) a declaration made under subsection 199(3) [*warrant to search — gaming, lottery, etc. — disposal of property seized*],
(b) an order made under subsection 109(1) [*mandatory weapons prohibition order*] or 110(1) [*mandatory weapons prohibition order*], section 259 [*driving prohibition orders*] or 261 [*an order staying a driving prohibition order*], subsection 730(1) [*order of discharge*] or 737(1.1) , (3) [*victim fine surcharge*] or (5) [*victim fine surcharge*] or section 738 [*restitution orders*], 739 [*restitution orders*], 742.1 [*conditional sentence orders*] or 742.3 [*conditions of conditional sentence order*],
(c) a disposition made under section 731 [*probation orders*] or 732 [*Intermittent Jail Sentence Orders*] or subsection 732.2(3) [*probation order – changes to order*] or (5) [*vary or cancel probation order on breach conviction*], 742.4(3) [*supervisor changing optional conditions – decision at hearing*] or 742.6(9) [*procedure on breach of condition – powers of court*],
(d) an order made under subsection 16(1)

of the *Controlled Drugs and Substances Act*, and

(e) an order made under subsection 94(1) of the *Cannabis Act*; (sentence, peine ou condamnation)

...
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

Grounds of Summary Conviction Appeal

A summary conviction appeal judge cannot interfere with a trial judge's findings unless they were unreasonable or unsupported by evidence.[1]

1. *R v Smits*, 2012 ONCA 524 (CanLII), 294 OAC 355, *per* Brown J, at para 67

see *R v Grosse*, 1996 CanLII 6643 (ON CA), 29 OR (3d) 785, *per curiam*, at pp. 791-92

Summary Conviction Appeal to the Court of Appeal

- Right of Appeal of a Summary Conviction Appeal Decision

Venue of Appeal

Certain provinces require that Summary Conviction appeals under s. 813 be undertaken within the venue specified in the Code:

> **Manitoba and Alberta**
>
> 814 (1) In the Provinces of Manitoba and Alberta, an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be heard at the sittings of the appeal court that is held nearest to the place where the cause of the proceedings arose, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.
>
> **Saskatchewan**
>
> (2) In the Province of Saskatchewan, an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be heard at the sittings of the appeal court at the judicial centre nearest to the place where the adjudication was made, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.
>
> **British Columbia**
>
> (3) In the Province of British Columbia, an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be heard at the sittings of the appeal court that is held nearest to the place where the adjudication was made, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.
>
> **Territories**
>
> (4) In Yukon, the Northwest Territories and Nunavut, an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be heard at the place where the cause of the proceedings arose or at the place nearest to it where a court

is appointed to be held.
R.S., 1985, c. C-46, s. 814; 1993, c. 28, s. 78; 2002, c. 7, s. 150.
[*annotation(s) added*]

– CCC

Right of Appeal of a Summary Conviction Appeal Decision

< Procedure and Practice < Appeals

General Principles

The Court of Appeal has no jurisdiction to hear summary conviction appeals without leave.

Leave for Appeal Under s. 676 by Defence

675
[*omitted (1)*]

Summary conviction appeals

(1.1) A person may appeal, pursuant to subsection (1) [*right of appeal of person convicted*], with leave of the court of appeal or a judge of that court, to that court in respect of a summary conviction or a sentence passed with respect to a summary conviction as if the summary conviction had been a conviction in proceedings by indictment if

(a) there has not been an appeal with respect to the summary conviction;
(b) the summary conviction offence was tried with an indictable offence; and
(c) there is an appeal in respect of the indictable offence.

[*omitted (2), (2.1), (2.2), (2.3), (3) and (4)*]
R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; 2002, c. 13, s. 64; 2011, c. 5, s. 2.
[*annotation(s) added*]

– CCC

Leave for Appeal Under s. 675 by Crown

676
[*omitted (1)*]

Summary conviction appeals

(1.1) The Attorney General or counsel instructed by the Attorney General may appeal, pursuant to subsection (1) [*Crown right of appeal – types*], with leave of the court of appeal or a judge of that court, to that court in respect of a verdict of acquittal in a summary offence proceeding or a sentence passed with respect to a summary conviction as if the summary offence proceeding was a proceeding by indictment if

(a) there has not been an appeal with respect to the summary conviction;
(b) the summary conviction offence was tried with an indictable offence; and
(c) there is an appeal in respect of the indictable offence.

[*omitted (2), (3), (4), (5) and (6)*]
R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.

– CCC

Leave for Appeal Under s. 839 by Crown or Defence

The applicant, either Crown or Defence, must apply for leave before appealing to the Court of Appeal under s. 839:

Appeals to Court of Appeal
Appeal on question of law

839 (1) Subject to subsection (1.1), an appeal to the court of appeal as defined in section 673 [*Pt. XXI — appeals — definitions*] may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against

(a) a decision of a court in respect of an appeal under section 822 [*provision for indictable appeals apply to s. 813 summary trial appeals*]; or
(b) a decision of an appeal court under section 834 [*power of summary appeal court after hearing*], except where that court is the court of appeal.

[*omitted (1.1)*]

Sections applicable

(2) Sections 673 to 689 [*appeal of indictable offences*] apply with such modifications as the circumstances require to an appeal under this section.

Costs

(3) Notwithstanding subsection (2) [*appeal of summary appeal court – applicable appeal sections*], the court of appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.

Enforcement of decision

(4) The decision of the court of appeal may be enforced in the same manner as if it had been made by the summary conviction court before which the proceedings were originally heard and determined.

Right of Attorney General of Canada to appeal

(5) The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this Part.
R.S., 1985, c. C-46, s. 839; R.S., 1985, c. 27 (1st Supp.), s. 183; 1999, c. 3, s. 57.
[*annotation(s) added*]

– CCC

Test for Appeal

An appellant must have leave to appeal a summary conviction appeal decision. The appellant must establish the requirements of s. 839 of the Criminal Code:[1]

1. the issue sought to be raised is a question of law alone;
2. the issue is important/the matter raises an arguable case of substance; and
3. is the question of sufficient importance to merit the attention of the full court.

Appeals of SCAC decisions are not meant as a second review of the provincial court level. They can only be reviews of errors of law from the SCAC judge.[2]

Leave under s. 839(1)(a) should be granted sparingly and "discouraged in absence of some compelling reason". The main factors to consider are whether there "are the significance of the legal issues raised to the general administration of criminal justice" and "the merits of the proposed grounds of appeal"[3]

Where the grounds are not strong, leave may still be granted if the "significance to the administration of justice beyond the facts of the case".[4]

Where the general significance to the administration of justice is not strong, leave may still be granted where there is "clear error".[5]

1. *R v Meikle*, 2010 BCCA 337 (CanLII), DTC 5140, *per* Saunders JA
   R v Brunner, 1996 CanLII 3308 (BCCA), [1996] BCJ No 628 (CA), *per* Hinds JA, at para 3
   R v Bryan, 2004 BCCA 140 (CanLII), 236 DLR (4th) 340, *per* Smith JA, at para 14
   R v Parmar, 2005 BCCA 187 (CanLII), 195 CCC (3d) 112, *per* Thackray JA, at paras 3 to 10
   R v Schalla (K.T.), 2007 MBCA 104 (CanLII), 220 Man.R. (2d) 69, *per* Freedman JA, at para 1
   R v Langlois (D.J.), 2008 MBCA 72 (CanLII), 228 Man.R. (2d) 256, *per* Chartier JA
   R v Jacob, 2012 MBCA 19 (CanLII), 280 Man R (2d) 6, *per* Beard JA
   R v RWM, 2011 MBCA 74 (CanLII), 270 Man R (2d) 29, *per* Freedman JA, at paras 23 to 26
   R v Dickson, 2012 MBCA 2 (CanLII), 275 Man R (2d) 38, *per* Scott CJ
   R v Rowe, 2013 ONCA 311 (CanLII), *per curiam*, at para 4
   R v Newfoundland Recycling Ltd., 2009 NLCA 28 (CanLII), 875 APR 153, *per* Rowe JA
   R v Panko, 2010 ONCA 660 (CanLII), 276 OAC 49, *per curiam*, at para 6
   R v Tibu, 2016 ABCA 97 (CanLII), AJ No 329, *per* Schutz JA, at paras 6 to 7
   R v Bennett, 2004 ABCA 116 (CanLII), 354 AR 6, *per* O'Leary JA, at paras 9 to 10
   R v Edmonton, 2013 ABCA 318 (CanLII), 561 AR 25 at para 31(*complete citation pending*)
   R v Dufault, 2014 ABCA 271 (CanLII), 68 MVR (6th) 219, *per* Veldhuis J, at para 13
2. *R v RR*, 2008 ONCA 497 (CanLII), 90 OR (3d) 641, *per* Doherty JA, at para 24
   R v Chatur, 2012 BCCA 163 (CanLII), 320 BCAC 85, *per* Smith JA, at para 17
3. *RR*, *supra*, at paras 30 and 1z15s37
   Tibu, *supra* at para 9
   Dufault, *supra*, at para 14 ("Applications for leave pursuant to s 839 of the Criminal Code should be granted sparingly and with good reason. ... Here the granting of leave would bring about a second-level appeal, which is to be discouraged in the absence of some compelling reason to conclude otherwise.")
4. *R v Mayrhofer-Lima*, 2017 ONCA 949 (CanLII), *per curiam*, at para 8
5. *RR*, *supra*, at para 24
   Mayrhofer-Lima, *supra*, at para 8

Standard of Review

Leave should only be granted sparingly and only in exceptional cases.[1]

The appellant should demonstrate the exceptional circumstances that would justify a further review.[2]

The fitness of sentence may be a factor to consider.[3]

On summary conviction appeal, the reviewing judge must decide whether the decision of the trial judge could have been reasonably reached. The appeal should only be allowed if:[4]

1. cannot be supported by the evidence; or
2. is clearly wrong in law; or
3. is clearly unreasonable; or
4. there has been a miscarriage of justice.

1. fxpqk, *per* Farrar JA, at para 21
   R v RR, 2008 ONCA 497 (CanLII), 90 OR (3d) 641, *per* Doherty JA, at paras 25, 37
   R v Chatur, 2012 BCCA 163 (CanLII), 320 BCAC 85, *per* Smith JA, at para 18
   R v Paterson, 2009 ONCA 331 (CanLII), *per curiam*, at para 1
2. *Pottie*, *supra*, at para 21
   RR, *supra*, at para 27
   R v Dickson, 2012 MBCA 2 (CanLII), 275 Man R (2d) 38, *per* Scott CJ, at para 14
   R v RWM, 2011 MBCA 74 (CanLII), 270 Man R (2d) 29, *per* Freedman JA, at para 32
3. *Chatur*, *supra*, at para 19
   R v Im, 2009 ONCA 101 (CanLII), 242 CCC (3d) 77, *per* Epstein JA, at para 22
4. *R v Kumar*, 2016 ONSC 7928 (CanLII), *per* Bielby J, at para 16
   R v Mason, 2013 ONSC 478 (CanLII), *per* Fragomeni J, at para 49

Importance of Issue

The case must be of sufficient importance to merit the attention of the court. There is a compelling reason for a second level of court to review. Reasons include raising matters that are significant to the administration of justice or development of law.[1]

In considering the question of importance, the main consideration is "interests of justice". [2]

Factors include:

- the merits of the appeal sought.[3]
- the need to settle the law on the issue.[4]
- whether an injustice would result from denying leave[5]

Leave should be denied, even if there is an error, where there is no potential to significantly impact the law.[6] However, leave should be warranted for areas of law that are not settled.[7]

The appeal should not be granted for appeals concerning well-settled areas of law.[8]

Appeal should not be granted where the issue is significant to the administration of justice, not merely "arguable" on the merits. There should be a "clear" error.[9]

1. *R v Denys (C.D.)*, 2009 MBCA 39 (CanLII), (2009) 240 Man.R. (2d) 13, *per* Freedman JA
   R v Chaluk, 1998 ABCA 253 (CanLII), 197 WAC 366, *per* Russell JA, at para 7
   R v Johnson, 2013 ABCA 322 (CanLII), *per* Rowbotham JA, at para 11
2. *R v Meikle*, 2010 BCCA 337 (CanLII), DTC 5140, *per* Saunders JA
   R v Andrews, 2007 BCCA 597 (CanLII), 76 WCB (2d) 223, *per* Donald JA
3. *R v Bennett*, 2004 ABCA 116 (CanLII), 354 AR 6, *per* O'Leary JA
4. *R v Edmonton*, 2013 ABCA 318 (CanLII), 561 AR 25, *per* Côté JA, at para 31
5. *R v Toor*, 2001 ABCA 88 (CanLII), 155 CCC (3d) 345, *per* Paperny JA, at para 8
6. *Toor*, *ibid.*, at para 8
7. *R v A(DC)*, 1999 ABCA 244 (CanLII), AJ No 937, *per* Picard JA
8. *R v Zaky*, 2010 ABCA 95 (CanLII), *per* Paperny JA, at para 10
   R v Im, 2009 ONCA 101 (CanLII), 242 CCC (3d) 77, *per* Epstein JA, at para 17
   R v Hengeveld, 2010 ONCA 60 (CanLII), *per curiam*, at para 5
   R v RR, 2008 ONCA 497 (CanLII), 234 CCC (3d) 463, *per* Doherty JA, at para 31
9. *R v M(RW)*, 2011 MBCA 74 (CanLII), 270 Man R (2d) 29, *per* Freedman JA, at para 37
   RR, *supra*, at para 32

Appeals Relating to Young Persons

General Principles

Appeals

37 (1) An appeal in respect of an indictable offence or an offence that the Attorney General elects to proceed with as an indictable offence lies under this Act in accordance with Part XXI (appeals — indictable offences) of the Criminal Code, which Part applies with any modifications that the circumstances require.

Appeals for contempt of court

(2) A finding of guilt under section 15 for contempt of court or a sentence imposed in respect of the finding may be appealed as if the finding were a conviction or the sentence were a sentence in a prosecution by indictment.

Appeal

(3) Section 10 of the Criminal Code applies if a person is convicted of contempt of court under subsection 27(4) (failure of parent to attend court).

Appeals heard together

(4) An order under subsection 72(1) or (1.1) (adult or youth sentence) or 76(1) (placement when subject to adult sentence) may be appealed as part of the sentence and, unless the court to which the appeal is taken otherwise orders, if more than one of these is appealed they must be part of the same appeal proceeding.

Appeals for summary conviction offences

(5) An appeal in respect of an offence punishable on summary conviction or an offence that the Attorney General elects to proceed with as an offence punishable on summary conviction lies under this Act in accordance with Part XXVII (summary conviction offences) of the Criminal Code, which Part applies with any modifications that the circumstances require.

Appeals where offences are tried jointly

(6) An appeal in respect of one or more indictable offences and one or more summary conviction offences that are tried jointly or in respect of which youth sentences are jointly imposed lies under this Act in accordance with Part XXI

(appeals — indictable offences) of the Criminal Code, which Part applies with any modifications that the circumstances require.

Deemed election

(7) For the purpose of appeals under this Act, if no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General is deemed to have elected to proceed with the offence as an offence punishable on summary conviction.

If the youth justice court is a superior court

(8) In any province where the youth justice court is a superior court, an appeal under subsection (5) shall be made to the court of appeal of the province.

Nunavut

(9) Despite subsection (8), if the Nunavut Court of Justice is acting as a youth justice court, an appeal under subsection (5) shall be made to a judge of the Nunavut Court of Appeal, and an appeal of that judge's decision shall be made to the Nunavut Court of Appeal in accordance with section 839 of the Criminal Code.

Appeal to the Supreme Court of Canada

(10) No appeal lies under subsection (1) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information or indictment to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada.

No appeal from youth sentence on review

(11) No appeal lies from a youth sentence under section 59 or any of sections 94 to 96.
2002, c. 1, s. 37; 2012, c. 1, s. 171; 2019, c. 25, s. 370.

– YCJA

Standard of Appellate Review

This page was last substantively updated or reviewed *May 2021*. (Rev. # 79478)

General Principles

The "standard of review" represents the "margin or tolerance" of "deviation" in the judge's findings.[1]

Meaning of Deference on Review

The concept of deference by an appellate court is "aimed at recognizing and upholding the division of labour (adjudicative authority) as between first instance and appellate ... courts".[2]

Categories

All reviewable decisions made by a judge can be seen as answering one of three categories of questions:[3]

1. questions of law: what is the correct legal test to be applied
2. questions of fact: what took place between the parties
3. questions of mixed law and fact: whether the facts satisfy the correct legal tests[4]

Questions of law and questions of fact

All questions of law are to be reviewed on a standard of "correctness".[5]

A question of law inquire into the "correct legal test" to be applied for a particular legal issue or the "the application of a legal standard" to facts.[6] This also includes the interpretation of a legal standard[7] and the application of a standard to settled facts.[8] However, where the facts are in dispute, it is most likely a question of mixed fact and law.[9]

Questions of fact

All questions of fact are reviewed on a standard of "palpable and overriding error".

All findings of facts are questions of fact.[10]

The standard of "palpable and overriding error have been broken down into two components. "Palpable" means that the error is obvious. The logic must be obviously flawed. This would include findings of fact without any evidence or logical errors.[11] "Overriding" means that the error "affects the outcome of the case". That is to say, but for one or more palpable errors, the outcome would have been different.[12]

Questions of mixed fact and law

Where the question is neither purely a question of law or question of fact, then it is considered a question of "questions of mixed law and fact".

Exercises of Discretion

The appellate court owes deference to exercises of discretion. However, where the exercise is unreasonable, then no deference is required.[13]

1. *R v Skinner*, 2016 NSCA 54 (CanLII), NSJ No 255, *per* Saunders JA, at para 17("The phrase “standard of review” is simply a label used to explain the margin or tolerance for deviation allowed during appellate review,

depending upon the category of issue or question challenged on appeal. It is a convenient way to describe the view-finder, the lens, through which we, as appellate judges examine the error alleged to have occurred in the court below.")

2. *R v Sauverwald*, 2020 ABCA 388 (CanLII), AJ No 1170, *per curiam*, at para 13 ("Deference is a system-functional concept aimed at recognizing and upholding the division of labour (adjudicative authority) as between first instance and appellate or review courts. Deference relates to fact finding and to exercises of discretion. By comparison, the rule of law requires the appeal court to make a de novo evaluation of whether the flaws in the trial process did in actuality occasion an unfair trial and consequently a miscarriage of justice regardless of innocent intentions: ...")
3. *Housen v Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235, *per* Iacobucci and Major JJ, at paras 8, 10 to 12, 26, 31, 39, 72, and 101
4. see also *Saint-Jean v Mercier*, 2002 SCC 15 (CanLII), [2002] 1 SCR 491, *per* Gothier J
5. *Housen v Nikolaisen*, *supra*, at para 8
   R v Mooney, 2005 NLCA 49 (CanLII), 66 WCB (2d) 296, *per* Rowe JA, at para 18
6. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 SCR 982, *per* Bastarache J, at para 37
   Saint-Jean v Mercier, 2002 SCC 15 (CanLII), [2002] 1 SCR 491, *per* Gothier J, at para 33
   R v Araujo, 2000 SCC 65 (CanLII), [2000] 2 SCR 992, *per* LeBel J, at para 18
   Shepherd, *supra*
   R v Brooks, 2000 SCC 11 (CanLII), [2000] 1 SCR 237, *per* Bastarache J
7. *R v Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 SCR 330, *per* Major J, at para 21
8. *R v Mara*, 1997 CanLII 363 (SCC), [1997] 2 SCR 630, *per* Sopinka J, at paras 18 to 19
9. *R v Grouse*, 2004 NSCA 108 (CanLII), 189 CCC (3d) 357, *per* Cromwell JA, at para 44
10. *R v Shepherd*, 2009 SCC 35 (CanLII), [2009] 2 SCR 527, *per* McLachlin CJ and Charron J
11. *Benheim v St. Germain*, 2016 SCC 48 (CanLII), [2016] 2 SCR 352, *per* Wagner J, at para 38
12. *Benheim*, *ibid.*
13. *R v Haaretz.com v Goldhar*, 2018 SCC 28 (CanLII), [2018] 2 SCR 3, *per* Côté J, at para 49
    R v Victoria, 2018 ONCA 69 (CanLII), 359 CCC (3d) 179, *per curiam*, at para 81
    R v Imola, 2019 ONCA 556 (CanLII), 439 CRR (2d) 352, *per curiam*, at para 17 ("We are of the view that the trial judge erred in declining to hear the application. Trial judges have considerable discretion to manage the cases before them and an appellate court will not lightly interfere with that discretion. However, deference is not owed to unreasonable exercises of discretion")

Questions of Law

- Appeal of an Error of Law

Questions of Fact

Findings of fact are given deference on appeal.[1] The court of appeal should not substitute their own view of the evidence with the findings of facts of the trial judge.[2] Findings of fact, whether adjudicative, social, or legislative are reviewed on a standard of "palpable and overriding error".[3]

Where a palpable and overriding error has been found, the judge may intervene with its view of the evidence as well as draw inferences based on that evidence.[4]

The following have been found to be questions of fact and so reviewable on the palpable and overriding error:

- findings of fact[5], including:
  - findings of fact relating to Charter breaches[6]
- Findings of credibility[7]
- whether an inference can be drawn from established facts[8]
- whether an officer had an honest subjective belief in the existence of a ground[9]
- assessing the weight given to an item of evidence or evidence as a whole in determining whether it meets the standard of proof[10]

A judge's assessment of evidence, such as whether a judge can rely on a document for the truth of its contents, is reviewed on a standard of palpable and overriding error that the finding of fact played an essential part in the reasoning.[11]

Reviewing inferences drawn from facts it is not sufficient that a different inference can be drawn from the facts.[12]

1. *R v D'Onofrio*, 2013 ONCA 145 (CanLII), *per curiam*, at para 1
   R v Yi, 2007 ONCA 185 (CanLII), *per curiam*, at para 1
   R v JF, 2016 ONCA 900 (CanLII), *per curiam*, at para 7
   R v Goulet, 2011 ABCA 230 (CanLII), 277 CCC (3d) 557, *per* Slatter JA, at para 7 ("The sentencing judge's findings of fact are entitled to deference.")
   R v Skinner, 2016 NSCA 54 (CanLII), NSJ No 255, *per* Saunders JA, at para 23("...a judge's decisions on questions of fact are not evaluated on a standard of correctness. A high degree of deference is accorded. Even though opinions may differ with regards to particular factual rulings, they will not likely be disturbed because the margin or tolerance for deviation is wide enough to accommodate other outcomes which are reasonable and find support in the evidence. Recalling my analogy, striking the outer rings on the target will suffice and appellate intervention will not be warranted.")
2. *R v Magagna*, 2003 CanLII 655 (ON CA), 173 CCC (3d) 188, *per curiam*, at para 12
3. *R v Canfield*, 2020 ABCA 383 (CanLII), 395 CCC (3d) 483, *per curiam*, at para 14
   Canada (Attorney General) v Bedford, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101, *per* McLachlin CJ, at para 56
4. *L(H) v Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 SCR 401, *per* Fish J
5. *R v Biccum*, 2012 ABCA 80 (CanLII), 286 CCC (3d) 536, *per curiam*, at para 10
   R v Fan, 2017 BCCA 99 (CanLII), 352 CCC (3d) 280, *per* Dickson JA, at para 47
   R v Caron, 2011 BCCA 56 (CanLII), 269 CCC (3d) 15, *per* Frankel JA, at para 26
   R v Clark, 2005 SCC 2 (CanLII), [2005] 1 SCR 6, *per* Fish J, at para 9
6. *R v Schmidt*, 2011 ABCA 216 (CanLII), 527 WAC 265, *per curiam*, at para 14
7. *R v Brooks*, 2000 SCC 11 (CanLII), [2000] 1 SCR 237, *per* Bastarache J
8. *R v Thomas*, 1952 CanLII 7 (SCC), [1952] 2 SCR 344, *per* Cartwright J
   Clark, *supra*, at para 9
   R v Morin, 1992 CanLII 40 (SCC), [1992] 3 SCR 286, *per* Sopinka J, at p. 297 ("a different theory of the facts and the inferences that could be drawn from those facts" are not a question of law)
9. {*Biccum*, *supra*, at para 10
10. *R v Powell*, 2010 ONCA 105 (CanLII), 251 CCC (3d) 475, *per* Juransz JA, at para 40
    R v AA, 2015 ONCA 558 (CanLII), 327 CCC (3d) 377, *per* Watt JA, at para 65

11. *R v Lohrer*, 2004 SCC 80 (CanLII), [2004] 3 SCR 732, *per* Binnie J, at para 1
R v Lee, 2010 ABCA 1 (CanLII), 251 CCC (3d) 346, *per curiam* (2:1), at para 8
R v O'Neil, 2012 ABCA 162 (CanLII), 545 WAC 351, *per curiam*
12. *HL v Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 SCR 401, *per* Fish J, at para 74

Reviewing Findings of Credibility

Matters of credibility are given considerable deference. [1] The trial judge has a "significant advantage" of being able to see and hear the evidence.[2] It is assessed not just of "what was said, but how it was said."[3]

Unless there is a "palpable and overriding error" in the findings of fact by the judge in assessing credibility, the findings should not be overturned.[4]

Sufficiency of reasons in determining credibility are also accorded deference.[5]

1. *R v Gagnon*, 2006 SCC 17 (CanLII), [2006] 1 SCR 621, *per* Bastarache and Abella JJ, at para 20 (... "It is very difficult for a trial judge 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. That is why this court decided..., that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.")
2. see *R v W(R)*, 1992 CanLII 56 (SCC), [1992] 2 SCR 122, *per* McLachlin J, at p. 131
Gagnon, *supra*
R v Ceal, 2012 BCCA 19 (CanLII), 315 BCAC 138, *per* D Smith JA, at para 24
R v François, 1994 CanLII 52 (SCC), [1994] 2 SCR 827, *per* McLachlin J
R v Horton, 1999 BCCA 150 (CanLII), 133 CCC (3d) 340, *per* Esson JA
R v McLean, 2010 BCCA 341 (CanLII), 290 BCAC 75, *per* Ryan JA, at para 51
R v Ramos, 2020 MBCA 111 (CanLII), *per* Mainella JA, at para 74
3. *R v Howe*, 2005 CanLII 253 (ON CA), 192 CCC (3d) 480, *per* Doherty JA, at para 46
4. *Ceal*, *ibid.*, at para 25
R v Jacobs, 2015 BCCA 83 (CanLII), *per* Neilson JA, at para 44
Gagnon, *supra*, at para 20
5. see *R v Dinardo*, 2008 SCC 24 (CanLII), [2008] 1 SCR, *per* Charron J, at para 26

Question of Mixed Fact and Law

A question that is of mixed fact and law will be considered on a standard of "palpable and overriding error".[1]

Where the judge has considered all evidence required by law and comes to the wrong conclusion. This will be an error of mixed fact and law.[2]

However, where the issue may appear to be of mixed fact and law but relates to a failure to consider one or more factual findings, such error will normally be treated as a question of fact and not a mixed question.[3]

Where the question involves "the application of a legal standard to a set of facts", then it is a mixed question of fact and law.[4]

The following have also been considered questions of "mixed fact and law":

- A defence appeal of conviction to withdraw a guilty plea[5]
- Voluntariness of a statement[6]

1. *Housen v Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235, *per* Iacobucci and Major JJ, at paras 8 to 37
2. *Hunter v Southam*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145, *per* Dickson J, at paras 41 to 45
3. *Southam*, *supra*, at para 39
4. *Housen v Nikolaisen*, *supra*, at para 27
   contra: *R v Goulet*, 2011 ABCA 230 (CanLII), 277 CCC (3d) 557, *per* Slatter JA, at para 7 ("While the sentencing judge's factual findings are entitled to deference, the application of a legal standard to the facts of the case is a question of law")
5. *R v Miller*, 2011 NBCA 52 (CanLII), 965 APR 302, *per* Richard JA, at para 6
6. *R v Petri*, 2003 MBCA 1 (CanLII), 171 CCC (3d) 553, *per* Kroft JA, at para 35

See Also

- Grounds of Appeal from Sentence#Standard of Review

Grounds of Appeal from Verdicts

< Procedure and Practice < Appeals

Crown Appeal

The Crown can generally appeal where there is an error in law.

The sufficiency of the evidence is a question of fact and not a question of law from which the Crown can appeal.[1]

Failure to Draw Inferences

Failure to draw inferences of intent or guilt from the facts is an error of fact.[2]

"Material Error" test

For an error of law to be sufficient to set aside an aquittal, the appellate court must be satsified that the error "might reasonably be thought... to have had a material bearing on the acquittal".[3] Put differently, it is necessary to show that the verdict would "not necessarily have been the same had the errors not occurred".[4]

It is not necessary that the Crown prove that the result would "necessarily" have been different but for the error of law.[5]

Unreasonable Verdict

There is no right to appeal by Crown for "unreasonable verdict".[6] This includes unreasonable assessements of credibility.[7]

Burden

The burden is on the Crown to satisfy the court with a "reasonable degree of certainty" such that the outcome "may well have been affected by it".[8]

Summary Appeal Under s. 813 on Grounds Other Than Error of Law

The Crown has some limited ability appeal under s. 813 on the basis of questions of fact, including where teh verdict was unreasonable.[9]

1. *R v Sunbeam Corp.*, 1968 CanLII 33 (SCC), [1969] SCR 221, *per* Ritchie J, at pp. 230-238
   R v Lampard, 1969 CanLII 695 (SCC), [1969] SCR 373, *per* Cartwright CJ, at pp. 379-381
   R v Whynot, 1983 CanLII 3495 (NSCA), 9 CCC (3d) 449, *per* Hart JA, at pp. 450-451
   R v Schuldt, 1985 CanLII 20 (SCC), [1985] 2 SCR 592, *per* Lamer J, at pp. 610-611
   R v Roman, 1989 CanLII 113 (SCC), [1989] 1 SCR 230, *per curiam*, at pp. 231-232
   R v B(G), 1990 CanLII 115 (SCC), [1990] 2 SCR 57, *per* Wilson J, at pp. 69-71
   R v Blundon, 1993 CanLII 7785 (NL CA), 84 CCC (3d) 249, *per* Cameron JA, at pp. 276-280
   R v Tortone, 1993 CanLII 57 (SCC), [1993] 2 SCR 973, *per* Major J, at pp. 985-987
   R v Kent, 1994 CanLII 62 (SCC), [1994] 3 SCR 133, *per* Major J, at pp. 141-143
2. *Lampard*, *supra Sunbeam*, *supra*
3. *R v Graveline*, 2006 SCC 16 (CanLII), [2006] 1 SCR 609, *per* Fish J, at para 14
   R v Goldfinch, 2019 SCC 38 (CanLII), 435 DLR (4th) 1, *per* Karakatsanis J, at para 135
   R v Barton, 2019 SCC 33 (CanLII), *per* Moldaver J, at para 160
4. *R v Sutton*, 2000 SCC 50 (CanLII), [2000] 2 SCR 595, *per* McLachlin CJ, at para 2 ("The parties agree that acquittals are not lightly overturned. The test as set out in Vézeau v The Queen, ..., requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not occurred.") *R v Vézeau*, 1976 CanLII 7 (SCC), [1977] 2 SCR 277, *per* Martland J
5. *Gravline*, *ibid.*, at para 14 ("The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.")
6. *R v RGB*, 2012 MBCA 5 (CanLII), 287 CCC (3d) 463, *per* Freedman and Chartier JJA, at para 8
7. *RGB*, *ibid.*, at para 9
8. *R v Morin*, 1988 CanLII 8 (SCC), [1988] 2 SCR 345, *per* Sopinka J
   Gravline, *supra*, at para 15
9. *R v Kendall*, 2005 CanLII 21349 (ON CA), [2005] OJ No 2457, *per* Cronk JA (2:1), at para 46 ("Under s. 813 of the Criminal Code, the Crown may appeal from an order that stays proceedings on an information or dismisses an information. Unlike in indictable matters, the Crown's right of appeal in summary proceedings is not limited to questions of law alone and the Crown may appeal on questions of fact, including on the basis of an allegation that the verdict is unreasonable")

Available Grounds

- Appeal of an Error of Law (676(1)(a))
  - including Insufficient Reasons (Judge-alone only)
  - including Misapprehension of Evidence (Judge-alone only)
  - including Jury Instruction

Remedies

- Remedies on Acquittal Appeal (686(4))

Defence Appeal

Part XVIII of the Criminal Code addresses the power and procedure for appeals. Appeals of indictable offences are appealed to the provincial Court of Appeal. The Defence can appeal both issues of fact and law.(ss. 675 and 676)

The powers of the Court of Appeal to interfere with a conviction on an appeal are stated under s.686:

> **Powers**
>
> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
> (iii) on any ground there was a miscarriage of justice;
>
> [*omitted (b)*]
> (c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or
> (d) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in section 672.45 [*disposition hearings*] in any manner deemed appropriate to the court of appeal in the circumstances.
> (e) [Repealed, 1991, c. 43, s. 9]
>
> [*omitted (2), (3), (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
> R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).

– CCC

As noted in the language of s. 686, these standards apply equally to an appeal from a finding of NCR or finding against fitness to stand trial.

Available Grounds

- Unreasonable Verdict (686(1)(a)(i))
  - including Reasonable Apprehension of Bias (Judge-alone only)
  - including Insufficient Reasons (Judge-alone only)
  - including Jury Instruction
- Appeal of an Error of Law (686(1)(a)(ii))
  - including Insufficient Reasons (Judge-alone only)
  - including Misapprehension of Evidence (Judge-alone only)
  - including Jury Instruction
- Appeal on Miscarriage of Justice (686(1)(a)(iii))
  - including Reasonable Apprehension of Bias (Judge-alone only)
  - including Insufficient Reasons (Judge-alone only)
  - including Misapprehension of Evidence (Judge-alone only)
  - including Jury Instruction
  - including Jury Selection:

Unreasonable Verdict

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General Principles

Under s. 686(1)(a)(i), the defence may appeal a conviction where there was an "unreasonable or cannot be supported by the evidence". This is one of several grounds of appeal based on evidence. It states:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,...
> [*omitted (ii) and (iii)*]
>
> [*omitted (b), (c), (d) and (e)*]
>
> [*omitted (2), (3), (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8*]
> R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).
>
> – CCC

Unreasonable verdict (or "unreasonable acquittal") is not a ground of appeal known in law.[1]

The "unreasonable verdict" ground of appeal is known as a "powerful safeguard against wrongful convictions".[2]

In an unreasonable verdict appeal, the appellate court engages in a review of the facts to determine reasonableness, which includes some reweighing of the evidence.[3]

The finding of "unreasonable verdict" so as to intervene should be "exceedingly rare".[4]

The review is an "independent" assessment of facts.[5] It is done "through the lens of judicial experience", which can highlight certain frailties of evidence that may not have been fully appreciated by the trial judge.[6] The review is supposed to be an additional "safeguard against conviction of the innocent".[7]

The review of a judge's reasons is not supposed to be a "line-by-line treature hunt for error".[8]

The court of appeal must give "great deference" to the fact-finding role of the jury. It should not turn a jury trial into "trial by appellate court on the written record".[9]

Basis of Unreasonable Verdicts

Case law has developed three main types of unreasonableness which can form the grounds of an appeal:[10]

1. "the evidence as a whole is such that a reasonable jury, properly instructed and acting judicially, could not have reached the verdict"
2. "fact findings on material matters of a decisive character are clearly wrong" or
3. "whether the reasoning process used by the judge to get from the evidence to the verdict does not make sense in the way described ...in logic"

1. *R v Biniaris*, 2000 SCC 15 (CanLII), [2000] 1 SCR 381, *per* Arbour J, at para 33

R v Al-Rawi, 2018 NSCA 10 (CanLII), 359 CCC (3d) 237, *per* Beveridge JA, at paras 16

to 17
2. *R v WH*, 2013 SCC 22 (CanLII), [2013] 2 SCR 180, *per* Cromwell J, at para 34 (“While appellate review for unreasonableness of guilty verdicts is a powerful safeguard against wrongful convictions, it is also one that must be exercised with great deference to the fact-finding role of the jury. Trial by jury must not become trial by appellate court on the written record”).
3. *R v PLS*, 1991 CanLII 103 (SCC), [1991] 1 SCR 909, *per* Sopinka J ("In an appeal founded on s. 686(1)(a)(i) the court is engaged in a review of the facts.")
4. *R v Sinclair*, 2011 SCC 40 (CanLII), [2011] 3 SCR 3, *per* Fish J (dissenting on different issue), at para 22
R v CP, 2019 ONCA 85 (CanLII), 373 CCC (3d) 244, *per* MacPherson JA (2:1), at para 43
5. *R v Baltovich*, 2004 CanLII 45031 (ON CA), , (2004), 191 CCC (3d) 289, *per curiam*, at para 154
6. *R v Biniaris*, 2000 SCC 15 (CanLII), [2001] SCR 381, *per* Arbour J, at paras 40 to 41
7. *R v Burke*, 1996 CanLII 229 (SCC), [1996] 1 SCR 474, *per* Sopinka J, at para 6
8. *R v AS*, 2016 SKCA 166 (CanLII), *per* Jackson JA, at para 23
9. *WH*, *supra*, at para 34 (“While appellate review for unreasonableness of guilty verdicts is a powerful safeguard against wrongful convictions, it is also one that must be exercised with great deference to the fact-finding role of the jury. Trial by jury must not become trial by appellate court on the written record”).
10. *R v G(DJ)*, 2012 ABCA 336 (CanLII), 539 AR 116, *per* Hunt JA, at para 8
R v Fleig, 2014 ABCA 97 (CanLII), 572 AR 161, *per curiam*
R v Roasting, 2016 ABCA 138 (CanLII), 10 WWR 537, *per curiam*, at paras 13 to 14

"Properly Instructed Jury" Test

Unreasonable Verdict (Yebes/Biniaris Test)

The standard of review for unreasonable verdict is where the verdict is one that "no properly instructed jury, acting judicially, could reasonably have rendered".[1]

Considerations

A verdict that is unreasonable must be one where the judge "revealed he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached.[2]

The applicable test for unreasonable verdict "requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyze, and within the limits of appellate disadvantage, weigh the evidence."[3] Or to put it another way: "whether on the whole of the evidence the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered"[4]

The test does not concern itself with whether the verdict was the *only* reasonable verdict, but whether it was *a* reasonable verdict.[5]

Section 686(1)(a)(i) requires the reviewing court to "engage in a thorough re-examination of the evidence" to decide whether "on all the evidence, the verdict was a reasonable one." The verdict must be one that was open to the jury to consider. It is not an error for the judge to simply take a different view of the evidence than the jury.[6]

A court of appeal must not merely substitute its view for that of the jury but in applying the Yebes test is entitled to review, analyze and, within the limits of appellate disadvantage, weigh the evidence. [7]

The test applies equally to a jury and a judge sitting alone. In the latter case, the review may be easier because the appellate court will be able to examine the reasons provided by the judge, which may reveal a flaw in the evaluation of the evidence. Such a deficiency in the analysis may appear where a judge was not alive to an applicable legal principle or entered a verdict inconsistent with the factual conclusions reached. [8]

A reviewing court must articulate the basis upon which it finds that the conclusions reached by a jury were unreasonable. A "lurking doubt" or "vague unease" based on the court's review is not sufficient justification for a finding of unreasonableness but may trigger increased appellate scrutiny.[9]

A jury does not provide reasons for its verdict. To justify a finding of unreasonableness regarding the verdict of a properly instructed jury, the appeal court will not be able to point to express deficiencies in analysis. It must fall back upon and articulate inferences drawn from a review of the evidence to support its conclusion that the jury, in arriving at its guilty verdict, could not have been acting judicially. [10]

Jury instructions attempt to convey accumulated judicial experience to the jury. Still, in certain rare cases, the totality of the evidence and the peculiar factual circumstances will lead an experienced, legally trained, jurist to conclude that the fact-finding exercise applied at trial must have been flawed in light of the unreasonable results it produced. [11]

Acting judicially, in this context, means not only acting dispassionately in applying the law and adjudicating on the basis of the law and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. The reviewing court's assessment must, in other words, proceed through "the lens of judicial experience" to identify and articulate, as precisely as possible, those features of the case which suggest that the verdict was unreasonable. There may be several causes of concern, none of which, in isolation, might have required a particular warning to the jury. [12]

The reviewing court "must articulate the basis upon which it concludes that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence."[13]

Reading Judgement as a Whole

The reasons should be read as a whole, and not held to a standard of perfection nor should it be the equivalent of jury instructions.[14] The reasons for judgement should never be "read or analyzed as if they were instructions to a jury".[15]

It is inappropriate to "simply plucking colloquial elements" from a trial judge's "thorough reasons" or to "cherry pick" infelicitous phrases.[16]

A judge's decision should not be analyzed by "dissecting them into small pieces and examining each piece in isolation".[17]

Acquittal

An error of the trial judge in finding an acquittal, once found, can only result in a new trial being ordered where the error had "a material bearing on the acquittal"[18]

Errors in Judgement

A mere misstatement at "one point should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on the evidence."[19]

Deference

Courts are given great deference when considering whether findings are supported by the evidence.[20]

The reviewing court should avoid re-visit the trial judge's assessments of the evidence including "discrepancies and then “cherry pick” bits and pieces that may be favourable to the accused.".[21]

Circumstantial Cases

On a circumstantial case, the reasonableness of the case will depend on "inferences reasonably available from the totality of the evidence" and whether the "Crown’s ultimate burden to demonstrate that guilt is the only reasonable inference to be drawn from the totality of that evidence".[22]

An allegation that the judge failed to consider other reasonable inferences flowing from the evidence, the appellate judge must consider whether the trial judge's attempts to "draw the line" between reasonable doubt and speculation ws unreasonable.[23]

Credibility Cases

Where the verdict turns on findings of credibility, a court reviewing the jury verdict must ask "whether the jury’s verdict is supportable on any reasonable view of the evidence".[24]

In making this assessment the appellate court must remember that the trier of fact is best situated to assess inconsistencies of witnesses as well as their motive to lie.[25]

Jury Verdict

Review of a jury verdict is constrained by two "well-established boundaries". First, the court must give "due weight to the advantage of the jury as [they] saw and heard the evidence as it unfolded". The judge should not act as the "13th juror" and should not act on "vague unease", "lurking doubt", or even a "reasonable doubt".[26] Second, the reviewing court may assess "within the limits of appellate disadvantage" and weigh the evidence and consider whether "judicial fact-finding precludes the conclusion reached by the jury".[27]

When a properly instructed jury returned a verdict and that is perceived "to be unreasonable conviction, the only rational inference,... is that the jury, and arriving at that guilty verdict, was not acting judicially" resulting in an overturning of the verdict.[28]

1. *R v Biniaris*, 2000 SCC 15 (CanLII), [2001] SCR 381, *per* Arbour J, at para 36
   R v Li, 2013 ONCA 81 (CanLII), 296 CCC (3d) 408, *per* Watt JA, at para 123
   R v Sinclair, 2011 SCC 40 (CanLII), [2011] 3 SCR 3, *per* Fish J, at para 4 (dissent) and para 44, *per* LeBel J (concur.)
   R v Jackson, 2007 SCC 52 (CanLII), [2007] 3 SCR 514, *per* Fish J, at para 2
2. *Binaris*, *supra*, at para 37
3. *Biniaris*, *supra*, at para 36
4. *R v Yebes*, 1987 CanLII 17 (SCC), [1987] 2 SCR 168, *per* McIntyre J
   See also *RP*, *supra*
5. *R v Portillo*, 2003 CanLII 5709 (ON CA), 174 OAC 226, 176 CCC (3d) 467, *per* Doherty JA
6. *R v AG*, 2000 SCC 17 (CanLII), [2000] 1 SCR 439, *per* L’Heureux-Dube J, at para 6
7. *Biniaris*, *supra*

8. *Biniaris*, *supra*
9. *Biniaris*, *supra*, at para 38("It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This “lurking doubt” may be a powerful trigger for thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury. In other words, if, after reviewing the evidence at the end of an error-free trial which led to a conviction, the appeal court judge is left with a lurking doubt or feeling of unease, that doubt, which is not in itself sufficient to justify interfering with the conviction, may be a useful signal that the verdict was indeed reached in a non-judicial manner.")
10. *Biniaris*, *supra*
11. *Biniaris*, *supra*
12. *Biniaris*, *supra*
13. *AG*, *supra*, at para 6
14. *R v Rhyason*, 2007 SCC 39 (CanLII), [2007] 3 SCR 108, *per* Abella J, at para 10
    R v Sheppard, 2002 SCC 26 (CanLII), [2002] 1 SCR 869, *per* Binnie J, at para 55
    see also, *R v Gagnon*, 2006 SCC 17 (CanLII), [2006] 1 SCR 621, *per* Bastarache and Abella JJ, at para 19
    R v REM, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, *per* McLachlin CJ, at para 16 (“read as a whole, in the context of the evidence, the issues and the arguments at trial, together with ‘an appreciation of the purposes or functions for which they are delivered’”)
    R v Villaroman, 2016 SCC 33 (CanLII), [2016] 1 SCR 1000, *per* Cromwell J, at para 15
    R v Laboucan, 2010 SCC 12 (CanLII), [2010] 1 SCR 397, *per* Charron J, at para 16
    R v CLY, 2008 SCC 2 (CanLII), [2008] 1 SCR 5, *per* Abella J, at para 11
15. *R v Morrissey*, 1995 CanLII 3498 (ON CA), , 22 OR (3d) 514, *per* Doherty JA, at p. 525
    Villaroman, *supra*, at para 15
16. *R v Davis*, 1999 CanLII 638 (SCC), [1999] 3 SCR 759, *per* Lamer CJ (inappropriateness of “simply plucking colloquial elements [from a] trial judge's thorough reasons”)
17. *R v Morrissey*, 1995 CanLII 3498 (ON CA), , [1995] O.J. No. 639 (CA), *per* Doherty JA, at para 28 ("[I]t is wrong to analyze a trial judge's reasons by dissecting them into small pieces and examining each piece in isolation as if it described, or was intended to describe, a legal principle applied by the trial judge. Reasons for judgment must be read as a whole.")
18. *R v Graveline*, 2006 SCC 16 (CanLII), [2006] 1 SCR 609, *per* Fish J, at para 14
19. *R v CRB*, 1990 CanLII 142 (SCC), [1990] 1 SCR 717, *per* McLachlin J, at p. 737
20. *R v RW*, 1992 CanLII 56 (SCC), [1992] 2 SCR 122, *per* McLachlin J
    R v Burke, 1996 CanLII 229 (SCC), [1996] 1 SCR 474, *per* Sopinka J
    R v WH, 2013 SCC 22 (CanLII), [2013] 2 SCR 180, at para 26
21. *R v Dow*, 2013 NSCA 111 (CanLII), *per* Bryson JA, at paras 8, 12
22. *R v Wills*, 2014 ONCA 178 (CanLII), 308 CCC (3d) 109, *per* Doherty JA, at para 33
23. *R v Villaroman*, 2016 SCC 33 (CanLII), [2016] 1 SCR 1000, *per* Cromwell J, at para 71
    R v MacDonald, 2020 NSCA 69 (CanLII), *per* Derrick JA, at paras 30 to 31
    R v Roberts, 2020 NSCA 20 (CanLII), *per* Bryson JA, at para 19
24. *R v Charlton*, 2019 ONCA 400 (CanLII), 146 OR (3d) 353, *per* Harvison Young JA, at para 61
    R v WH, 2013 SCC 22 (CanLII), [2013] 2 SCR 180, at para 2
25. *Charlton*, *ibid.*, at para 61
    R v François, 1994 CanLII 52 (SCC), [1994] 2 SCR 827, at pp. 835-37
    R v Beaudry, 2007 SCC 5 (CanLII), [2007] 1 SCR 190, at paras 4, 63
26. *WH*, *supra*
27. *WH*, *supra*
28. *R v Effert*, 2011 ABCA 134 (CanLII), 502 AR 276, *per curiam*

Clearly Wrong Findings (Beaudry test)

A verdict may also be unreasonable if the trial judge draws an inference or makes an essential finding of fact essential to the verdict that:[1]

1. is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding; or
2. is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge.

1. *R v Flores*, 2013 MBCA 4 (CanLII), 288 Man R (2d) 173, *per* Monnin J
   See *R v Sinclair*, 2011 SCC 40 (CanLII), [2011] 3 SCR 3, *per* LeBel J, at paras 19, 21
   R v Beaudry, 2007 SCC 5 (CanLII), [2007] 1 SCR 190, *per* Charron J, at paras 97 to 98
   Sinclair, *supra*, at para 44
   R v Li, 2013 ONCA 81 (CanLII), 296 CCC (3d) 408, *per* Watt JA, at para 123
   R v RP, 2012 SCC 22 (CanLII), [2012] 1 SCR 746, *per* Deschamps J, at para 12

Misapprehension of Evidence

- Misapprehension of Evidence

Remedy

In most cases, the proper remedy for an unreasonable verdict resulting in a conviction is an acquittal.

To determine if an acquittal is an appropriate remedy the reviewing court must consider whether "verdict one that a properly instructed jury could reasonably have rendered" If the answer is "no" then the verdict is unreasonable.[1]

1. *R v Newton*, 2017 ONCA 496 (CanLII), 349 CCC (3d) 508, *per* Laskin JA, at para 26

See Also

- Trial Verdicts
- Sufficiency of Reasons

Appeal of an Error of Law

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General Principles

Under s.675(1)(a)(ii) and 686(1)(a)(ii), the *defence* may appeal a conviction on error of law. Under s. 676(1)(a), the *Crown* may appeal an aquittal on an error of law.

Where there has been an error of law, such as the improper admission evidence, and the evidence may have influenced the trier of fact in reaching its verdict, the conviction must be quashed, irrespective of whether the admissible evidence supports a conviction.[1]

However, the Court may dismiss an appeal and deny any remedy under s. 686(1)(a)(ii), where the court "is of the opinion that no substantial wrong or miscarriage of justice has occurred"(s.686(1)(b)(iii)).

Proper Analysis of Judge's Reasons

The reason for a trial judge should be not be "read or analyzed as if they were an instruction to a jury".[2] The reasons should be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with 'an appreciation of the purposes or functions for which they are delivered".[3]

Crown Appeal of Factual Determinations

A crown can appeal factual determinations as errors of law in the following circumstances:[4]

- trial judge found facts in the absence of evidence;
- trial judge erred with respect to the legal effect of the facts;
- trial judge assessed evidence based on a wrong legal principle; or,
- trial judge failed to consider all of the relevant evidence.

Dismissal of Crown Appeal With Error of Law

In Crown appeals, reversible errors of law require the appellant to establish not only an error but that "the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal". But does not need to go so far as to convince the court that "the verdict would necessarily have been different" [5]

This is similar to the curative proviso (686(1)(b)(iii)) on an accused appeal, except that the burden remains on the Crown throughout.

Distinguished from Question of Mixed Fact and Law or Question of Fact

see Standard of Appellate Review

1. *Colpits v The Queen*, 1965 CanLII 2 (SCC), [1965] SCR 739
2. *R v Villaroman*, 2016 SCC 33 (CanLII), [2016] 1 SCR 1000, *per* Cromwell J, at para 15
   R v Morrissey, 1995 CanLII 3498 (ON CA), 22 OR (3d) 514, *per* Doherty JA, at p. 525
3. *Villaroman*, *ibid.*, at para 15
   R v Laboucan, 2010 SCC 12 (CanLII), [2010] 1 SCR 397, *per* Charron J, at para 16
   R v REM, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, *per* McLachlin CJ, at para 16
   see also *R v CLY*, 2008 SCC 2 (CanLII), [2008] 1 SCR 5, *per* Abella J, at para 11
4. *R v JMH*, 2011 SCC 45 (CanLII), [2011] 3 SCR 197, *per* Cromwell J
   R v Percy, 2020 NSCA 11 (CanLII), *per* Beveridge JA, at para 37
5. see *R v Graveline*, 2006 SCC 16 (CanLII), [2006] 1 SCR 609, *per* Fish J, at para 14
   R v Duguay, 2007 NBCA 65 (CanLII), 50 CR (6th) 378, *per* Deschênes JA, at paras 26 to 27

Matters Appealed as Questions of Law

A Crown appeal of an acquittal, errors in law include:[1]

1. making a finding of fact for which there was no evidence;
2. where the legal effect of findings of fact or undisputed fact raises a question of law;
3. an assessment of the evidence based on a wrong legal principle; and
4. a failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence.

The following have been found to be questions of law and so reviewable on the standard of correctness:

- an assessment of the evidence using the wrong legal principle[2]
- failure to consider all evidence in relation to the issue of guilt[3]
- Failure to consider admitted evidence;[4]
- the interpretation of a "legal standard" [5]
- interpretation of statute[6]
- the reasonableness of grounds, such as in forming grounds of detention[7]
- a judge adds or deducts a requirement to a controlling legal test.[8]
- whether the trial judge failed to deal with the substance of a critical issue[9]
- the weighing and assessing of one or more items of evidence on the basis of an erroneous legal principle[10]

1. see *R v JMH*, 2011 SCC 45 (CanLII), [2011] 3 SCR 197, *per* Cromwell J, at paras 24 to 32
2. *JMH*, *ibid.*, at paras 24 to 32
3. *JMH*, *ibid.*, at paras 24 to 32
4. *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9, *per* Sopinka J at 20
5. *R v Araujo*, 2000 SCC 65 (CanLII), [2000] 2 SCR 992, *per* Lebel J, at para 18
6. *R v Fedossenko*, 2014 ABCA 314 (CanLII), 584 AR 90, *per curiam* (2:1), at para 2
7. *R v Moore*, 2012 BCCA 400 (CanLII), *per* Saunders JA
8. e.g. *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 (SCC), [1997] 1 SCR 748, *per* Iacobucci J, at para 39
   R v Hillgardener, 2010 ABCA 80 (CanLII), 252 CCC (3d) 486, *per curiam*, at para 19
9. *R v REM*, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, *per* McLachlin CJ, at para 57
10. *R v AA*, 2015 ONCA 558 (CanLII), 327 CCC (3d) 377, *per* Watt JA, at para 65

Different Level of Scrutiny

It is an error of law to apply a different level of scrutiny (sometimes called "uneven scrutiny") upon defence evidence than crown evidence.[1] There is no deference applied in the same way as that of credibility determinations.[2] Some Courts have recognized this as a "back door" to re-evaluate credibility and so it should be a "difficult argument" to make.[3]

The legal threshold for proving different level of scrutiny is considered "very high" and "difficult to make successfully".[4]

The appellant cannot "simply ... show that a different trial judge might have made a different assessment of credibility, or that the trial judge failed to make some comment that might have been made in assessing the credibility of the complainant and/or the accused ... the appellant must be able to point to something in the reasons for judgment of the trial judge, or potentially elsewhere in the trial record, that ... make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant".[5]

An uneven scrutiny argument cannot be used as a "veiled invitation to reassess the trial judge's credibility assessment".[6]

It is not enough that a different judge would have made a different assessment or that he did not "say something" regarding a certain aspect of his assessment, or that he failed to spell out the legal principles.[7]

The appellant must "must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant".[8]

The appellant must meet a threashold of showing "something sufficiently significant" in the reasons or record that established faulty methodology in deciding credibility.[9]

1. *R v Phan*, 2013 ONCA 787 (CanLII), 313 OAC 352, *per* Epstein JA, at paras 29 to 35
2. *Phan*, *ibid.*, at para 31
3. *Phan*, *ibid. R v Aird*, 2013 ONCA 447 (CanLII), 307 OAC 183, *per* Laskin JA, at para 39
4. *R v Cloutier*, 2011 ONCA 484 (CanLII), 272 CCC (3d) 291, *per* Weiler JA, at paras 86, 93 to 94
   R v Jones, 2013 ONCA 245 (CanLII), OJ No 1786, *per curiam*, at para 8
   R v Schell, 2013 ABCA 4 (CanLII), 542 AR 1, *per curiam*, at paras 34-35{{{3}}}
   R v Da Costa, 2014 ONSC 1000 (CanLII), OJ No 704, *per* Campbell J, at para 9
5. *R v Howe*, 2005 CanLII 253 (ON CA), 192 CCC (3d) 480, *per* Doherty JA, at para 59
   De Costa, *ibid.*, at para 9
6. *R v Aird*, 2013 ONCA 447 (CanLII), 307 OAC 183, *per* Laskin JA, at para 39
   R v SP, 2021 ONCA 233 (CanLII), *per curiam*, at para 27 *R v CGH*, 2020 ABCA 362 (CanLII), *per curiam*, at para 24
   R v Ahmad, 2021 ABQB 518 (CanLII), *per* Richardson J, at para 69 ("Claims of uneven scrutiny are frequently made and can be used to camouflage a complaint that is nothing more than a blatant attack on the trial judge's credibility findings:")
7. *Howe*, *supra*, at paras 58 to 59
8. *Howe*, *ibid.*, at para 59
9. *Ahmad*, *supra*, at para 71 ("Appellant must meet the threshold of demonstrating "something sufficiently significant" in the reasons or the record establishing that a trial judge employed faulty methodology in deciding credibility: ")
   R v Quartey, 2018 ABCA 12 (CanLII), 43 CR (7th) 359, *per curiam* (2:1), at para 42, aff'd 2018 SCC 59 (CanLII)
   R v CJG, 2018 ABCA 130 (CanLII), AJ no 418, *per curiam*, at para 6
   R v Wanihadie, 2019 ABCA 402 (CanLII), 99 Alta LR (6th) 56, *per curiam*, at para 36
   R v Strathdee, 2020 ABCA 306 (CanLII), AJ No 913, *per curiam*, at para 9
   R v Mavros, 2020 ABCA 436 (CanLII), *per curiam*, at para 44

Curative Proviso

Despite any finding of an error of law under s. 686(1)(a)(ii), the court may still dismiss the appeal under the curative proviso under s. 686(1)(b)(iii).

See Also

- Standard of Appellate Review

Appeal on Miscarriage of Justice

This page was last substantively updated or reviewed *January 2021*. (Rev. # 79478)

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General Principles

Under s.686(1)(a)(iii), the defence may appeal a conviction based on a miscarriage of justice:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> [*omitted (i) and (ii)*]
> (iii) on any ground there was a miscarriage of justice;
>
> [*omitted (b), (c), (d) and (e)*]
>
> [*omitted (2), (3), (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
> R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F).
>
> – CCC

A miscarriage of justice may arise in the following circumstances:

- a misapprehension of "significant evidence"[1]
- Sufficiency of Reasons
- improper questioning during cross-examination[2]
- invalid guilty plea[3]
- Ineffective or Incompetent Counsel

1. *R v Morrissey*, 1995 CanLII 3498 (ON CA), 97 CCC (3d) 193, *per* Doherty JA

2. *R v MFT*, 2012 BCCA 428 (CanLII), *per* Neilson JA, at paras 38 to 46 - improper cross-examination found but no prejudice arose so appeal failed
3. *R v Wiebe*, 2012 BCCA 519 (CanLII), 331 BCAC 208, *per* Ryan JA, at para 22

Trial Irregularities

Trial irregularities may amount to an appealable miscarriage of justice where "the cumulative impact of the irregularities outlined above so disrupted the balance between the rights of the accused and those of the prosecution such that 'a well-informed, reasonable person considering the whole of the circumstances would have perceived the trial as being unfair or as appearing to be so'"[1] The considerations will vary on a case-by-case basis.[2]

Unforced Errors

When assessing errors of a trial. The reviewing court must take into account the "autonomy of an accused," which "includes suffering the consequences of his own mistakes."[3]

1. *R v Spier*, 2012 ONCA 798 (CanLII), 293 CCC (3d) 17, *per* Rouleau JA, at paras 32 and 85
2. *Spier*, *ibid.*, at para 32 ("The gravity of the irregularities and the impact of these on trial fairness and the appearance of fairness are to be evaluated on a case-by-case basis.)"
3. *R v Sauverwald*, 2020 ABCA 388 (CanLII), AJ No 1170, *per curiam*, at para 139

Missing Transcript

Not all instances where portions of the trial transcript will warrant a new trial.[1] Generally, it must be established that there was "a serious possibility that there was an error in the missing portion of the transcript, or that the omission deprived the appellant of a ground of appeal" before a new trial will be ordered.[2]

1. *R v Hayes*, 1989 CanLII 108 (SCC), [1989] 1 SCR 44, *per* L'Heureux-Dube J
2. *Hayes*, *ibid.*
see also *R v SR*, 1993 CanLII 930 (BC CA), 26 B.C.A.C. 149, *per* Hollinrake JA, at para 27
R v Noble, 1996 CanLII 8344 (BC CA), 106 CCC (3d) 161, *per* McEachern JA (2:1), at para 15
R v Dobis, 2002 CanLII 32815 (ON CA), 163 CCC (3d) 259, *per* MacPherson JA, at para 19(Ont. C.A.)
Template:CnaLIIRP, *per* Hoyt JA, at para 5(CA)
R v Le (T.D.), 2011 MBCA 83 (CanLII), 275 CCC (3d) 427, *per* Scott CJ, at paras 265 to 324

Sufficiency of Reasons

Issues of sufficiency of reasons can arise from an appeal under 686(1)(a) based on error of law, miscarriage of justice, or unreasonable verdict.

Ineffective Counsel

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General Principles

Any time counsel fails to provide effective representation the reliability of the verdict and trial fairness suffer and may result in a miscarriage of justice.[1]

The proper test for overturning a verdict due to ineffectiveness of counsel requires that: [2]

1. the counsel's performance was deficient (through act or omission) such that counsel made serious errors amounting to incompetence; and
2. the "deficient" performance prejudiced the defence in a way that deprived the accused of a fair trial and created a miscarriage of justice.

A claim for ineffective assistance or incompetent counsel has two components. There must be performance that is incompetent (performance component) and the performance must result in a "miscarriage of justice" (the prejudice component). [3] Thusly, the applicant must prove:[4]

1. the facts that underpin the claim on a balance of probabilities;
2. the act or omission that was believed to be incompetent assistance by counsel (performance);
3. the incompetent assistance caused a miscarriage of justice by undermining either appearance of a fair trial or reliability of the verdict (prejudice).

The second step of analysis analysis is sometimes called the "performance component". The third step is called the "prejudice component".[5]

The process of analysis follows an unusual process. Once the first step is satisfied, the court should then go to the third step to determine whether there is prejudice. If no prejudice is found, the court should not go onto the second step to consider performance.[6] This would appear to effectively shortcut the analysis to avoid dissecting counsel's performance when it is not necessary.

The factual underpinning will usually require a fresh evidence application.[7]

The test sets a "high bar" that is not easily met.[8]

Absent a possible injustice flowing from the incompetency of counsel there can be no appeal.[9]

Principles of Fundamental Justice

The "principles of fundamental justice" under section 7 of the Charter include the "right to effective assistance of counsel" in the criminal justice system.[10]

Burden and Standard of Proof

The onus is upon the accused. There is a strong presumption in favour of competence.[11]

On the performance component on analysis there is a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance"[12] The performance is considered on a standard of reasonableness.[13] It is not one of perfection.[14] There is no place for hindsight.[15]

Advice and representation cannot be rendered unreasonable on account of conviction.[16]

The applicant must prove all elements that make up a finding of ineffective counsel on a standard of balance of probabilities.[17]

Timing of Allegation

The standard for ineffective counsel will not be the same on appeal as it will be if raised during the course of the trial.[18] Where it is brought during the trial the approach should be analyzed with the same framework as a mistrial.[19]

Standard of Appellate Review

An appellate review of counsel's conduct is deferential as there is a "broad spectrum of professional judgment" that is reasonable. Consequently, simply because others would have acted differently is not enough.[20]

1. *R v GDB*, 2000 SCC 22 (CanLII), [2000] 1 SCR 520, *per* Major J, at para 1
   R v Joanisse, 1995 CanLII 3507 (ON CA), 102 CCC (3d) 35, *per* Doherty JA (3:0) p. 57 leave to appeal refused, [1996] SCCA No 347 ("Where counsel fails to provide effective representation, the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers. In some cases the result will be a miscarriage of justice.")
2. *R v Garofoli*, 1988 CanLII 3270 (ON CA), 41 CCC (3d) 97, *per* Martin JA -- appealed to 1990 CanLII 52 (SCC) on other grounds
   R v Schofield (G.R.), 1996 CanLII 8709 (NSCA), 429 APR 175, *per* Chipman JA (3:0)
   R v Strauss (D.W.), 1995 CanLII 702 (BCCA), 100 CCC (3d) 303, *per* Macfarlane JA (3:0)
   Adopted from the US case of *Strickland v Washington*, 104 S. Ct. 2052 (1984) ("A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ...has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' ... . Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.")
   R v Prebtani, 2008 ONCA 735 (CanLII), 243 OAC 207, *per* Rosenberg JA, at paras 3to 4
   R v Hartling, 2020 ONCA 243 (CanLII), 150 OR (3d) 224, *per* Benotto JA
3. *R v Gardiner*, 2010 NBCA 46 (CanLII), 934 APR 179, *per* Richard JA (3:0), at para 2

4. *R v Archer*, 2005 CanLII 36444 (ON CA), 202 CCC (3d) 60, *per* Doherty JA (3:0), at para 119
   R v G(DM), 2011 ONCA 343 (CanLII), 275 CCC (3d) 295, *per* Watt JA (3:0), at para 100
   R v B(J), 2011 ONCA 404 (CanLII), *per curiam* (3:0), at para 2
   R v Le (T.D.), 2011 MBCA 83 (CanLII), 275 CCC (3d) 427, *per* Scott CJ, at para 178
   R v Kim, 2011 SKCA 74 (CanLII), 272 CCC (3d) 15, *per* Smith JA (3:0)
   R v Joanisse, 1995 CanLII 3507 (ON CA), 102 CCC (3d) 35, *per* Doherty JA (3:0), at para 69 leave to appeal refused, [1996] SCCA No 347
   R v White, 1997 CanLII 2426 (ON CA), 99 OAC 1, 114 CCC (3d) 225, *per* Laskin and Charron JA (3:0), at paras 63 to 65, 114 CCC (3d) 225; leave to appeal denied, 117 CCC (3d) vi (SCC)
   R v Eroma, 2013 ONCA 194 (CanLII), OJ No 1411, *per curiam* (3:0)
   R v MacDonald, 2018 ABCA 138 (CanLII), AJ No 448, *per curiam*, at para 13
   R v B(M), 2009 ONCA 524 (CanLII), 68 CR (6th) 55, *per* Cronk and Armstrong JA (3:0), at paras 8 to 9
   R v Rockwood, 1989 CanLII 197 (NSCA), , 91 N.S.R.(2d) 305; 233 APR 305 (CA), *per* Chipman JA (3:0) ("The appellant who contends that he has not received this protection must therefore establish: (a) that counsel at the trial lacked competence, and (b) that it is reasonably probable that but for such lack of competence, the result of the proceedings would have been different.")
   R v White, 2016 NSCA 20 (CanLII), *per* Bryson JA, at para 52 ("an appellant must show that his counsel's acts or omission were incompetent and that a miscarriage of justice resulted")
   Hartling, *supra*, at para 73
   R v Eid, 2020 ONCA 649 (CanLII), *per curiam*
   R v KKM, 2020 ONCA 736 (CanLII), *per* Doherty JA, at para 55
   R v Stark, 2017 ONCA 148 (CanLII), 347 CCC (3d) 73, *per* Lauwers JA, at paras 12 to 14
   R v Qiu, 2010 ONCA 736 (CanLII), 268 OAC 352, *per* Lang JA, at paras 6 to 8
5. *Hartling*, *supra*, at para 74
6. *Hartling*, *supra*, at para 74
   R v Girn, 2019 ONCA 202 (CanLII), 373 CCC (3d) 139, *per* Watt JA, at para 92
7. *Le*, *supra* , at para 258
8. *Hartling*, *supra*, at para 74
   R v Cherrington, 2018 ONCA 653 (CanLII), OJ No 4012, at para 25
9. *R v Ensor* , [1989] 1 W.L.R. 497 (CA) (UK), Lord Lane, C.J.
10. *R v GDB*, 2000 SCC 22 (CanLII), [2000] 1 SCR 520, *per* Major J (5:0), at para 24, ("Today the right to effective assistance of counsel extends to all accused persons. In Canada that right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, s. 650(3) of the *Criminal Code* of Canada and ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.")
    R v Au-Young, 2010 BCCA 367 (CanLII), 289 BCAC 54, *per* Bennett JA, at para 30
11. *R v LW*, 2006 CanLII 7393 (ON CA), OJ No 955, *per* Armstrong JA (3:0), at para 50
    GDB, *supra*, at para 27 ("Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.")
    Archer, *supra*
12. *GBD*, *supra*, at para 27 *Hartling*, *supra*, at para 74
13. *Hartling*, *supra*, at para 74
    Cherrington, *supra*, at para 26
    GBD, *supra*, at para 27
14. *R v Faudar*, 2021 ONCA 226 (CanLII), *per* Tulloch JA, at para 105
15. *Hartling*, *supra*, at para 74
    Cherrington, *supra*, at para 26
    GBD, *supra*, at para 27
16. *KKM*, *supra*, at para 63

appellant must draw the link between the alleged incompetence and the prejudice suffered")

18. *R v GC*, 2018 ONCA 392 (CanLII), 146 WCB (2d) 332, *per curiam* (3:0), at para 3
19. *GC*, *ibid.*, at para 3
    See also Mistrials
20. *R v Hobbs*, 2020 ABCA 156 (CanLII), AJ No 479, *per curiam*, at para 22 (" An appellate court's review of trial counsel's performance is deferential owing to the broad spectrum of professional judgment that might be considered reasonable. Appellate courts should not be quick to conclude that a defence lawyer's conduct was deficient because they would have conducted the defence differently")
    R v MacDonald, 2018 ABCA 138 (CanLII), AJ No 448, *per curiam*, at para 12 ("appellate court's review of trial counsel's performance is deferential owing to the broad spectrum of professional judgment that might be considered reasonable. Appellate courts should not be quick to conclude that a defence lawyer's conduct was deficient because they would have done differently")
    White (ONCA), *supra*, at para 64

17. *R v Dunbar*, 2003 BCCA 667 (CanLII), 191 BCAC 223, *per curiam* (3:0), at para 24 ("...the appellant must establish, on a balance of probabilities, both that the representation provided by trial counsel was incompetent and that the incompetent representation resulted in a miscarriage of justice. The

Procedure

The claimant will usually need to adduce fresh evidence by affidavit or oral testimony that sets out the deficiencies in trial counsel. The trial counsel will then be permitted to respond to the allegations. [1]

A court should not "blindly" accept an appellant's affidavit of evidence without any evidence from the trial counsel or trial record suggesting something is wrong.[2]

Unless the transcript confirms the allegations, the appeal counsel should present evidence from trial counsel. Where the transcript raises concerns of competence, the court should order evidence be taken from the trial counsel. If the court is satisfied from the surrounding circumstances and trial transcript that there is no valid concern, then the court can dismiss the appeal at a preliminary stage for failing to establish a factual foundation. In effect, an affidavit from the appellant does not necessarily establish a prima facie case. [3]

Some courts of appeal have protocols for handling appeals on incompetent counsel.[4]

Criticism has been directed at appellants who simply file the trial transcripts and perform a review on the record without any evidence of trial counsel's evidence of motivation or strategy.[5]

1. *R v O'Keefe (No. 2)*, 2012 NLCA 25 (CanLII), NJ No 167, *per* Harrington JA (3:0), at para 14

    R v Freake, 2012 NLCA 10 (CanLII), 989 APR 305, *per* Welsh and Rowe JA (3:0)

R v Le (T.D.), 2011 MBCA 83 (CanLII), 275 CCC (3d) 427, *per* Scott CJ, at para 161
2. *R v Munson*, 2012 MBCA 111 (CanLII), *per* MA Monnin JA
3. *Le (T.D.)*, *supra*, at para 178
4. *Munson*, *supra* see appendix
5. *R v Ramos*, 2020 MBCA 111 (CanLII), *per* Mainella JA, at para 134 (appealed to SCC on other grounds)
R v Joanisse, 1995 CanLII 3507 (ON CA), 102 CCC (3d) 35, *per* Doherty JA at p. 58 (CCC)

Prejudice

The third branch of the GDB test is the "prejudice component".[1] If not prejudice is found there is no need to continue to the second "performance component".[2]

There are two recognized ways to establish prejudice:[3]

1. the appellant must establish that there is a reasonable probability that the verdict would have been different had he received effective legal representation; or
2. he must show that his counsel's conduct deprived him of a fair trial.

A "reasonable probability" means there is a "probability sufficient to undermine confidence in the outcome".[4]

1. *R v Faudar*, 20201 ONCA 226 (CanLII), *per* Tulloch JA, at para 106
2. *Faudar*, *ibid.* at para 106
GDB, at para. 29(*complete citation pending*)
R v Hartling, 2020 ONCA 243 (CanLII), 150 OR (3d) 224, *per* Benotto JA, at para 74
3. *Faudar*, *supra*, at para 106
4. *Fraudar*, *supra*, at para 107
R v Joanisse, 1995 CanLII 3507 (ON CA), 102 CCC (3d) 35, *per* Doherty JA (3:0), at paras. 74, 79-80(*complete citation pending*)
R v Archer, 2005 CanLII 36444 (ON CA), 202 CCC (3d) 60, *per* Doherty JA (3:0), at para 120
R. v. Davies, 2008 ONCA 209, 234 O.A.C. 291, at para. 37

Miscarriage of Justice

The focus of analysis on an allegation of ineffective counsel should be upon whether ther is a "reasonable possibility" that a miscarriage of justice at trial.[1]

A miscarriage of justice can either be a a produce of procedural unfairness or an unreliable result.[2]

Unreliable Evidence

Most instances of miscarriage of justice will be based on "unreliable verdict".[3]

Unreliability requires that the appellant show that there was "a reasonable possibility that, but for the incompetence, the verdict could have been different".[4]

Procedural Unfairness

Procedural unfairness arises where counsel has "made certain decisions that should have been made by the accused person". This usually relates to the core parts of the proceedings that relate to the accused's "fundamental rights to control his or her own defence".[5] Those fundamental rights consist of:[6]

- how to plead;
- waiver of the right to a jury trial; and
- whether to testify.

1. *R v GC*, 2018 ONCA 392 (CanLII), 146 WCB (2d) 332, *per curiam* (3:0), at para 3
   R v Stark, 2017 ONCA 148 (CanLII), 347 CCC (3d) 73, *per* Lauwers JA (3:0), at paras 14 to 15
2. *R v GDB*, 2000 SCC 22 (CanLII), [2000] 1 SCR 520, *per* Major J (5:0), at para 28 ("Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.")
   Stark, *supra*, at para 14
3. *Stark*, *ibid.*, at para 15
4. *Stark*, *ibid.*, at para 15
5. *Stark*, *ibid.*, at para 16
   R v Swain, 1991 CanLII 104 (SCC), [1991] 1 SCR 933, *per* Lamer CJ, at para 35
6. *Stark*, *supra*, at para 17

Performance of Counsel

Should the claimant make out the prejudice component of the GDB test, then the analysis turns to the "performance component" of analysis.[1]

On this component, there is a "strong presumption" that the counsel's conduct "fell within the wide parameters of reasonable professional assistance.[2]

1. *R v Faudar*, 2021 ONCA 226 (CanLII), *per* Tulloch JA, at para 108
2. *Faudar*, *ibid.*, at para 108
   R v GDB, 2000 SCC 22 (CanLII), [2000] 1 SCR 520, *per* Major J (5:0), at para 27
   R v Hartling, 2020 ONCA 243 (CanLII), 150 OR (3d) 224, *per* Benotto JA, at para. 74(*complete citation pending*)

Decision to Testify

Trial counsel must be capable of providing advice on the advantages and disadvantages of testifying.[1] There may be a miscarriage of justice where proper advice testify had "reasonable possibility" of affecting the verdict.[2]

Where counsel plans trial strategy around the accused testifying and then at the close of the Crown case, the accused changes his mind, there is no way to force the client to follow the initial instructions.[3]

Failure to Testify

Counsel's disregard of the accused's choice on whether to testify will generally result in a miscarriage of justice.[4] Where it is established that the accused would have testified except for the refusal of counsel to let him do so would be a miscarriage.[5] The key element is the finding of whether the accused actually would have testified but for the advice.[6]

Simply advising against testifying without making the choice for the accused will not be enough.[7]

Where it is in dispute that counsel made the choice for the accused not to testify, there is presumption that counsel know[8]

Evidence such as the likely damage to the accused's case should they have testified can go to the assessment of credibility.[9]

Counsel's refusal to listen to instructions by accused to testify at trial has a strong likelihood of resulting in a miscarriage of justice.[10]

1. *R v Disher*, 2020 ONCA 710 (CanLII), *per* Gillese JA
2. *Disher*, *ibid.*
3. *R v Brigham*, 1992 CanLII 3812 (QC CA), 79 CCC (3d) 365, *per* Fish JA at pp. 381-383 (CCC)
   R v Joanisse, 1995 CanLII 3507 (ON CA), 102 CCC (3d) 35, *per* Doherty JA
4. *R v Archer*, 2005 CanLII 36444 (ON CA), 202 CCC (3d) 60, *per* Doherty JA (3:0)
   R v GDB, 2000 SCC 22 (CanLII), [2000] 1 SCR 520, *per* Major J, at para 34
5. See *R v Eroma*, 2013 ONCA 194 (CanLII), OJ No 1411, *per curiam* (3:0)
   R v Cubillan, 2018 ONCA 811 (CanLII), 49 CR (7th) 339, *per* van Rensburg JA (3:0), at paras 14 to 15
6. e.g. see *R v Benham*, 2013 BCCA 276 (CanLII), 340 BCAC 26, *per* Frankel JA (3:0)
7. e.g. *R v Qiu*, 2010 ONCA 736 (CanLII), 268 OAC 352, *per* Lang JA (3:0) - accused claimed to not understand decision due to poor interpreter
   R v WEB, 2012 ONCA 776 (CanLII), 309 CCC (3d) 44, *per curiam* (3:0) - lawyer recommended and client agreed at the time not to testify
8. *Qiu*, *supra* , at para 15
9. *Qiu*, *supra*
10. *Eroma*, *supra*

Tactics and Strategy

The Courts are generally deferential to counsel in their conduct and given them wide latitude with defence strategy.[1] It is understood that different defence counsel will use different trial strategies and tactics, all of which are reasonable. No two lawyers will defend a case in the same way. The art of advocacy is is "highly individualized".[2]

The law should not encourage the practice of an accused to engage a "supine oaf" to "carry out unwise instructions and defense of an overwhelming case." Merely in attempt to set up an argument for incompetent counsel.[3]

Counsel has "implied authority" to make tactical decisions on behalf of the accused.[4]

Appellants are not entitled to a new trial simply "to see if a different tactic will work better".[5]

Reviewing courts should not be engaging in "Monday morning quarterbacking" upon the trial tactics chosen.[6]

It is a misapprehension of counsel's role to advance all evidence and argument suggested by the accused or to obtain approval before taking action in trial.[7]

The accused is not entitled to any control over the form of the examinations done by counsel.[8]

In some situations, the refusal to interview proposed defence witnesses may lead to a miscarriage.[9]

Where experienced accused is aware of deficiencies of counsel and yet expressed satisfaction with counsel, it may lead to finding that the accused intentionally set it up as a ground of appeal.[10]

A refusal to seek a challenge for cause at the jury selection after the accused reasonably raises the need for it can be a denial of the "statutory right to challenge potential jurors".[11]

Quality of Examinations

It is recognized that a cross-examination is a difficult component of trial work and "slips" will occur. There are also a wide variety of legitimate techniques and approaches.[12]

Relevant to the reviewing court's consideration is the trial counsel's explanation for the strategy for the examination.[13]

A mere failure to cross-examine certain witnesses, without more, is speculative of whether examination would have changed the outcome.[14]

An examination that does not satisfy the Rule in Brown v Dunn which results in the defence being prevented from adducing contradictory evidence can be a miscarriage.[15] Similarly, a failure to cross a complainant on the issues of trial while instead focusing on "peripheral" matters may cause a miscarriage.[16]

Counsel who neglects or refuses to use prior statements to cross-examine the complainant on a credibility-based case can be found to breach his duty of competence.[17]

Concessions

Inappropriate concessions, especially when against instructions of accused, may raise a miscarriage.[18] For example, the failure to object to the playing of a recorded statement of the accused which contained bad character evidence can be enough.[19] There can also be problems agreed to admission of prejudicial voir dire evidence.[20]

1. *R v Kelly* 52 OAC 241 (ONCA)(*no CanLII links)
   R v Jim, 2003 BCCA 411 (CanLII), [2003] BCJ No 1663 (CA), *per* Hall JA (3:0)
2. *R v LW*, 2006 CanLII 7393 (ON CA), [2006] OJ No 955, *per* Armstrong JA, at para 50
3. *R v Biscette*, 1995 ABCA 234 (CanLII), 99 CCC (3d) 326, *per* Côté JA (2:1), at para 37
4. *R v GBD*, 2000 SCC 22 (CanLII), [2000] 1 SCR 520, *per* Major J, at para 35

5. *R v Meer*, 2015 ABCA 141 (CanLII), 323 CCC (3d) 98, *per curiam* (2:1), at para 32
6. *R v Lomage*, 1991 CanLII 7228 (ON CA), , 2 OR (3d) 621, *per* Finlayson JA, at para 17
   R v SGT, 2010 SCC 20 (CanLII), [2010] 1 SCR 688, *per* Charron J (5:2), at para 36
   R v LCT, 2012 ONCA 116 (CanLII), 252 CRR (2d) 223, *per* O'Connor JA (3:0), at para 54
7. *R v DiPalma*, [2002] OJ No 2684 (ONCA)(*no CanLII links)
   R v Samra, 1998 CanLII 7174 (ON CA), 129 CCC (3d) 144, *per* Rosenberg JA (3:0)
8. *R v Faulkner*, 2013 ONSC 2373 (CanLII), 282 CRR (2d) 95, *per* Code J
9. e.g. *R v Fraser*, 2011 NSCA 70 (CanLII), 273 CCC (3d) 276, *per* Saunders JA (3:0)
10. *Meer*, *supra*, at paras 33 to 34
11. *Fraser*, *supra*, at paras 59 to 76
12. *R v White*, 1997 CanLII 2426 (ON CA), 114 CCC (3d) 225, *per* Laskin and Weiler JJA (3:0), at para 116
13. *White*, *ibid.*, at para 116
14. *R v RL*, 2013 ONCA 504 (CanLII), *per* Cronk JA (3:0)
    R v Dugas, 2012 NSCA 102 (CanLII), 322 NSR (2d) 72, *per* Oland JA
15. *R v Gardiner*, 2010 NBCA 46 (CanLII), 934 APR 179, *per* Richard JA (3:0)
16. *R v JB*, 2011 ONCA 404 (CanLII), *per curiam* (3:0)
    R v Schmerl, [2012] OJ No 4358(*no CanLII links)
17. *R v Close*, 2005 NSSC 351 (CanLII), 760 APR 294, *per* Kennedy J, - counsel failed to use a letter for impeachment of the complainant on a case of domestic violence.
18. *R v Loi*, 2013 ONSC 1202 (CanLII), OJ No 779, *per* Campbell J
19. *R v Michaud*, 2011 NBCA 74 (CanLII), 970 APR 170, *per* Deschênes JA (3:0)
20. *R v Smith*, 2007 SKCA 71 (CanLII), 223 CCC (3d) 114, *per* Jackson JA (3:0)

Counsel's Performance

Where counsel's performance is at issue, the applicant must establish that his conduct fell outside of the "wide range of reasonable professional assistance" and that there was "a reasonable possibility that the result at trial would have been different but for his counsel's alleged mistakes".[1]

The level of competence expected is on a reasonableness standard for the particular case at the time.[2] Different counsel may have run a trial in a different manner.[3] The court cannot use the benefit of hindsight in their analysis.[4]

Factors

A failure to review the facts of the case and the accused's version of events until the day of trial can be a factor affecting trial fairness.[5]

Lack of Preparation

A lack of preparation can result in a miscarriage of justice where counsel ends up failing to properly challenge the Crown's case.[6]

Counsel cannot excuse the lack of preparation on account of the limited legal aid hours given.[7]

Ignored or Overlooked Evidence

Counsel who failed to interview a treating doctor to a head injury shortly prior to giving a confession resulted in a miscarriage of justice.[8]

A failure to bring evidence supporting a Carter defence.[9]

1. *R v Joanisse*, 1995 CanLII 3507 (ON CA), [1995] OJ No 2883, *per* Doherty JA (3:0), at paras 71, 79 to 80
2. *Joanisse*, *ibid.*, at pp. 60-61
3. *R v Faudar*, 2021 ONCA 226 (CanLII), *per* Tulloch JA, at para 105
4. *R v LW*, 2006 CanLII 7393 (ON CA), [2006] OJ No 955, *per* Armstrong JA (3:0), at para 50
5. *R v IBB*, 2009 SKPC 76 (CanLII), 339 Sask R 7, *per* Whalen J, at paras 64 to 73
6. *R v JL*, 2016 ONCA 221 (CanLII), *per curiam* (3:0), at para 12
   R v DMG, 2011 ONCA 343 (CanLII), 275 CCC (3d) 295, *per* Watt JA (3:0)
7. e.g. *R v Smith*, 2007 SKCA 71 (CanLII), 223 CCC (3d) 114, *per* Jackson JA, at para 26
8. *R v Carr*, 2010 ABCA 386 (CanLII), 493 AR 223, *per curiam* (3:0)
9. *R v Critchlow*, 2011 ONSC 5177 (CanLII), *per* Desotti J

Informing the Client

Defence counsel's "failure to advise an accused about the available mode of trial may constitute incompetence leading to a miscarriage of justice in the appropriate case."[1]

Preparing client to what to expect when testifying is a necessary step in informing the client on the process and should be done at a time that "reasonably coincide[s]" with the trial itself.[2]

1. *R v Chica*, 2016 ONCA 252 (CanLII), 348 OAC 12, *per* Cronk JA (3:0), at para 19
   R v Stark, 2017 ONCA 148 (CanLII), 347 CCC (3d) 73, *per* Lauwers JA (3:0), ("the right to elect the mode of trial under s 536 of the *Criminal Code* is one of those fundamental rights that counsel cannot take from a client and on which the client is entitled to be adequately advised by counsel.")
2. *R v Simpson*, 2018 NSCA 25 (CanLII), *per curiam* (3:0), at para 46

Guilty Pleas

The failure to properly prepare for trial or develop a strategy while the client maintains his innocence before counsel entered into a plea agreement can amount to a miscarriage of justice due to lack of competence.[1]

Claims of being pressured by counsel should be subject to cross-examination and consideration of credibility.[2]

1. see *R v DMG*, 2011 ONCA 343 (CanLII), 275 CCC (3d) 295, *per* Watt JA (3:0)
2. e.g. *R v Ogden*, 2013 NSCA 25 (CanLII), 327 NSR (2d) 203, *per* MacDonald CJ and *R v Stockely*, 2009 NLCA 38 (CanLII), 888 APR 56, *per* Roberts JA

Case Digests

- Ineffective Counsel (Cases)
- Fresh Evidence

Misapprehension of Evidence

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General Principles

On a judge-alone trial, an appeal on the misapprehension of evidence refers to one of three failures on the part of the trial judge in a judge-alone trial:[1]

- a "failure to consider evidence relevant to a material issue";
- a "mistake as to the substance of the evidence"; or
- a "failure to give proper effect to the evidence".

Not every misapprehension of evidence will be a reversable error.[2] The error must result in an unreasonable verdict, an incurable error in law or a miscarriage of justice.[3]

The reversible error must:[4]

- "go to the substance" of the case and cannot simply be a "detail";
- It must be "material" and not "peripheral" to the reasoning of the case;
- the error must "play an essential part in the reasoning process", and not simply be narrative.

The consideration of whether the misapprehension affected the verdict must be made "in light of the fundamental principle that a verdict be based exclusively on the evidence adduced at trial".[5]

Recommended Analysis

The first step in the analysis must be to consider the "reasonableness of the verdict". If it is unreasonable, the accused is entitled to an acquittal.[6] If the verdict is not unreasonable, the next step is to determine whether there was a "miscarriage of justice" which would entitle the accused to a quashed verdict and a new trial.[7] Finally, if there is no miscarriage of justice the final step is to determine whether the misapprehension amounted to an error of law, which, if proven, places a burden on the Crown to establish that there was no miscarriage of justice warranting a new trial.[8]

The test requires re-examination of the evidence which includes some degree fo reweighing and considering the effect of evidence.[9]

It is insufficient to rely on "vague unease, or a lingering or lurking doubt".[10]

Interpretation

The appellant cannot simply “cherry pick” incorrect sentences without considering the full context.[11]

Magnitude of Error

Appeal for misapprehension of evidence requires that the error be must be "material, not peripheral, to the reasoning of the trial judge" and must "play an essential part in the reasoning process resulting in a conviction". [12]

A failure to give the evidence the meaning urged by counsel does not amount to a misapprehension.[13]

An allegation that the trial judge merely interpreted the evidence differently from a party does not amount to a misapprehension.[14]

Biniaris Test vs Lohrer Test

The Biniaris Test related to the reasonableness of a verdict. [15] The differences between the two tests are that:[16]

- the "Lohrer test applies when the attack is on a discrete finding of fact and it appears the conclusion of the trial judge on that fact is unsupported by any evidence, or perhaps that it is against the overwhelming weight of the evidence on that point";
- the Biniaris test "applies when the attack is on the overall strength of the case, and not any discrete finding of fact that is said to be plainly inconsistent with the uncontradicted evidence".

1. *R v Morrissey*, 1995 CanLII 3498 (ON CA), 97 CCC (3d) 193, *per* Doherty JA, at para 83 (misapprehension is the "failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence."
   R v MacIsaac, 2013 NLCA 26 (CanLII), 335 Nfld & PEIR 199, *per* Rowe JA, at paras 16 to 18
   R v Stennett, 2021 ONCA 258 (CanLII), *per* Watt JA, at para 50
2. *R v Butler*, 2013 ONSC 2403 (CanLII), 44 MVR (6th) 281, *per* Durno J, at para 63
   R v Vant, 2015 ONCA 481 (CanLII), 324 CCC (3d) 109, *per* Watt JA, at para 108
3. *R v GG*, 1995 CanLII 8922 (ON CA), 97 CCC (3d) 362, *per* Laskin JA, at para 59
   Morrissey, *supra*
   See s. 686(1)(a)(iii) regarding defence appeals on miscarriages
4. *R v Lohrer*, 2004 SCC 80 (CanLII), [2004] 3 SCR 732, *per* Binnie J, at paras 1 to 4 ("The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge.")
5. *Vant*, *supra*, at para 108
   Morrissey, *supra*, at para 93
6. *Vant*, *supra*, at para 109
   Stennett, *supra*, at para 51 ("...the reviewing court considers first the reasonableness of the verdict rendered by the trier of fact. If the verdict is not unreasonable, then the reviewing court must decide whether the misapprehension of evidence caused a miscarriage of justice. If the appellant fails on this ground as well, the court must inquire whether the misapprehension amounted to an error of law, and if so, whether that error occasioned the appellant a substantial wrong or miscarriage of justice: ...")
7. *Vant*, *supra*, at para 109
   Stennett, *supra*, at para 51
8. *Vant*, *supra*, at para 109
   Stennett, *supra*, at para 51
9. *R v Lemaigre*, 2016 SKCA 132 (CanLII), *per* Caldwell JA, at para 21
10. *Lemaigre*, *ibid.*, at para 21
11. *R v Davis*, 1999 CanLII 638 (SCC), [1999] 3 SCR 759, *per* Lamer CJ, at para 103 (“It is not sufficient to “cherry pick” certain infelicitous phrases or sentences without enquiring as to whether the literal meaning was effectively neutralized by other passages”)

12. *R v Lee*, 2010 ABCA 1 (CanLII), 23 Alta LR (5th) 76, *per curiam* (2:1), at paras 8 to 9
R v Loher, 2004 SCC 80 (CanLII), [2004] 3 SCR 732, *per* Binnie J, at paras 1, 2
R v Morrissey, 1995 CanLII 3498 (ON CA), 97 CCC (3d) 218, *per* Doherty JA, at paras 218 and 221
see *R v Izzard*, 2013 NSCA 88 (CanLII), *per* Beveridge JA
Butler, *supra*, at para 63
13. *R v DB*, 2012 ONCA 301 (CanLII), *per* Doherty JA
Butler, *supra*, at para 63
14. *R v Lee*, 2010 SCC 52 (CanLII), [2010] 3 SCR 99, *per curiam*, at para 4
15. see Unreasonable Verdict
16. *Movchan*, *supra*, at para 24

Overall Strength Test (Biniaris Unreasonable Verdict Test)

Central Element Test (Lohrer Miscarriage of Justice test)

It is an error of law for a trial judge to fail to consider the totality of the evidence.[1] The failure must have "played an essential part, not just in the narrative of the judgment, but in the reasoning process resulting in the conviction".[2] This is grounds of appeal relates to the misapprehension of evidence.

The Lohrer test arises from an expansion of the misapprehension analysis beyond application of power s. 686(1)(a)(i) and to expand the analysis to apply s. 686(1)(a)(iii) power for miscarriage of justice.[3]

The Lohrer test was also articulated as follows:[4]

1. a misapprehension of the evidence will only vitiate a conviction if the error was a central element of the judge's reasoning on which the conviction is based; and
2. the means of determining whether the error was a central element of the judge's reasoning is to consider whether striking it from the judgment would leave the trial judge's reasoning on unsteady ground.

"Unfair Trial" analysis

The misapprehension may reverse the verdict where the misapprehension renders the trial unfair, resulting in a miscarriage.[5] Reviewing courts look at "the nature and extent of the misapprehension and its significance to the verdict rendered at trial". If the error plays "an essential part" in the reasons then it will constitute a miscarriage.[6] The unfair trial analysis is a "stringent standard".[7]

The misapprehension is not a miscarriage where it goes to "the detail" of the evidence (as opposed to the substance) and is not simply part of the narrative of the judgement.[8] The misapprehension cannot be peripheral.[9]

The error is one where if it was struck from the judgement would leave the reasoning on "unsteady grounds".[10] It must be a "central element" to the trial judge's reasoning.[11]

1. *R v Lohrer*, 2004 SCC 80 (CanLII), [2004] 3 SCR 732, *per* Binnie J
2. *Lohrer*, *ibid.*, at para 2
   R v Movchan, 2016 ABQB 317 (CanLII), 39 Alta LR (6th) 347, *per* Yungwirth J, at paras 22 to 25
3. *R v Lemaigre*, 2016 SKCA 132 (CanLII), *per* JA, at para 22 ("...in R v Lohrer, ... the Supreme Court has recognised, in the circumstances of a case such as this one, that an appellate court may go beyond its power under s. 686(1)(a)(i) to exercise its power under s. 686(1)(a)(iii) of the Criminal Code where the appellate court concludes that there has been a misapprehension of the evidence requiring a new trial.")
4. *R v Kaemmer*, 2019 BCCA 136 (CanLII), *per* Hunter JA, at para 28
   see also *R v Wei*, 2016 BCCA 75 (CanLII), *per* Fenlon JA
5. *Stennett*, *supra*, at para 52
   R v Gauthier, 2021 ONCA 216 (CanLII), *per* Harvison Young JA, at para 53
6. *Stennett*, *supra*, at para 52
7. *Stennett*, *supra*, at para 52
   R v Khan, 2014 ONCA 795 (CanLII), *per curiam*
8. *Gauthier*, *supra*, at para 54 ("...the misapprehension must go to the substance, rather than the detail, of the evidence and that the error must play an essential part in not just the narrative of the judgment but in the reasoning process resulting in a conviction.")
9. *McGuinty v 1845035 Ontario Inc. (McGuinty Funeral Home)*, 2020 ONCA 816 (CanLII), *per* Hushcroft JA at para 39
10. Sinclair, 2011 SCC 40 (CanLII), [2011] 3 S.C.R. 3, at para. 56, Lebel J
    R v Hemsworth, 2016 ONCA 85 (CanLII), 334 CCC (3d) 534, *per* Epstein JA, at para 40
11. *R v Marshall*, 2017 ONCA 801 (CanLII), *per* Epstein JA, at para 55

Consequence of Misapprehension Findings

Where there is a finding of a reversible misapprehension of evidence it does not matter whether the rest of the evidence could support a conviction. The error "amounts to an unfair trial" and requires quashing of the conviction.[1]

1. *R v Barber*, 2018 ONSC 4940 (CanLII), *per* Andre J, at para 17

   R v Lohrer, 2004 SCC 80 (CanLII), [2004] 3 SCR 732, *per* Binnie J, at para 1

See Also

- Unreasonable Verdict
- Appeal on Miscarriage of Justice
- Appeal of an Error of Law

Sufficiency of Reasons

< Procedure and Practice < Appeals

General Principles

As a point of practice, the judge's decision should set out the contending positions of the parties on the facts and the law and explain the judge's conclusions on the facts and law.[1]

The accused may appeal from a verdict on the basis that that reasons of the Court were insufficient. The sufficiency of reasons is not a "standalone" ground of appeal. Rather it is a component to a ground of appeal for "reasonable verdict" under s. 686(1)(a)(i) or for a "miscarriage of justice" under s. 686(1)(a)(iii).[2]

Purpose of Reasons

The goal of giving reasons is to "show why the judge reached his or her conclusion".[3]

There is also the legal presumption that judges know the law and apply it correctly.[4] The need for reasons is balanced against the danger of "slow[ing] the system of justice immeasurably."[5] Judges give oral reasons on a daily basis, frequently limiting their reasons to the essential points. A reviewing court cannot "require them to explain in detail the process they followed to reach a verdict."[6]

Generally, reasons are needed to address any confused or contradictory evidence on an important issue.[7]

Burden

The burden is upon the appellant to show that the judge gave insufficient reasons.[8]

Standard of Proving Insufficiency

The standard of review with respect to the insufficiency of reasons is on the standard of "adequacy". The reasons will be adequate " if, when read in their entire context, they fulfill the threefold purpose of informing the parties of the basis of the verdict, providing public accountability and permitting meaningful appeal."[9]

The "core question in determining whether the trial judge's reasons are sufficient is whether the reasons, read in context, show why the judge decided as he did.".[10]

The judge must only demonstrate "he came to grips with the issues thus defined by the defence".[11]

To form a valid ground of appeal the appellant must show that 1) the reasons were insufficient and 2) that the deficiency created "prejudice to the exercise of his or her legal right to an appeal in a criminal case"[12]

No Need to be Comprehensive

The judge is not required to "answer every argument, reconcile every frailty in the evidence, refer to all the conflicting evidence, and set out every finding made in reaching a verdict".[13]

There is no need to reference in the written judgement every item of evidence that was adduced.[14]

Just because the judge failed to address every consideration they made does not mean they failed to consider other reasons or did not exercise discretion judiciously.[15]

Judicial Copying

Judicial copying is a "long-standing" and acceptable practice. However, if the copying would "lead a reasonable person, and taking into account all relevant circumstances, to conclude that the decision-making process was fundamentally unfair" on account of the judge not putting their mind to the facts, arguments, issues at play and make an "impartial" and "independent" decision, then the decision can be set aside.[16]

Failure to attribute sources, by itself, does not rebut the presumption of judicial impartiality and integrity.[17] Rebuttal requires that a reasonable person, apprised of the circumstances, would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial and independent judgement.[18]

1. *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 (CanLII), [2013] 2 SCR 357, *per* McLachlin CJ
2. see *R v Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 SCR 869, *per* Binnie J
   R v Wigle, 2009 ONCA 604 (CanLII), 252 OAC 209, *per* Lang JA
3. *Sheppard*, *supra*
4. *R v JR*, 2014 QCCA 869 (CanLII), 11 CR (7th) 409, *per* Hesler JA, at para 26
   R v Burns, 1994 CanLII 127 (SCC), [1994] 1 SCR 656, *per* McLachlin J
5. *Burns*, *ibid.*
6. *R v Boucher*, 2005 SCC 72 (CanLII), [2005] 3 SCR 499, *per* Deschamps J
7. *R v DR*, 1996 CanLII 207 (SCC), [1996] 2 S.C.R 291, *per* Major J, at para 55
8. *Sheppard*, *supra*, at para 54
   JR, *supra*, at para 26
9. *R v Oddleifson*, 2010 MBCA 44 (CanLII), 256 CCC (3d) 317, *per* Chartier JA, at para 30
10. *R v Vuradin*, 2013 SCC 38 (CanLII), [2013] 2 SCR 639, *per* Karakatsanis J (5:0)
11. *R v Ali*, 2015 BCCA 333 (CanLII), 326 CCC (3d) 408, *per* Stromberg-Stein JA, at para 14
    Sheppard, *supra*, at para 25
12. *Sheppard*, *supra*, at para 33 (“not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case”)
13. *Ali*, *supra*, at para 13
    R v M. E-H., 2015 BCCA 54 (CanLII), 319 CCC (3d) 352, *per* MacKenzie JA, at para 68
14. *R v Tse*, 2013 BCCA 121 (CanLII), *per curiam*, at para 56
    R v Blacklaws, 2012 BCCA 217 (CanLII), 285 CCC (3d) 132, *per* Newbury JA aff'd at 2013 SCC 8 (CanLII), *per* McLachlin CJ
    Dinardo, *supra*, at para 30
15. *R v Cote*, 2016 ABCA 387 (CanLII), *per* Veldhuis JA, at para 13
    R v Anderson, 2013 ABCA 160 (CanLII), 553 AR 72, *per curiam*, at para 13
    R v Beals, 1993 CanLII 5636 (NSCA), , [1993] NSJ No 436, *per* Hallett JA, at paras 16 and 29
16. *Cojocaru*, *supra*
17. *Cojocaru*, *supra*
18. *Cojocaru*, *supra*

Delivery of Decisions

When a decision is lengthy, the trial judge may read a summary in court before the accused and then provide a more comprehensive and detailed copy in the written version that is filed on the record.[1] However, it is the reasons given to the accused orally that are the "operative reasons" or "essential reasons".[2] A failure to include sufficient reasons in the oral decision could run afoul of s. 650 and s. 7 and 11(d) of the *Charter of Rights and Freedoms*. [3] The essential or operative parts of the reasons must include (a) the charges, (b) the verdict on each charge (c) some explanation for the result.[4]

Sufficiency of reasons could be in the range of 9 paragraphs summarizing a 33 page decision.[5]

1. *R v Lawrence*, 2020 ABCA 268 (CanLII), *per curiam*, at to 24 paras to 24{{{3}}}
2. *Lawrence*, *ibid.*, at paras 21 and 23
3. *Lawrence*, *supra*, at para 23
4. *Lawrence*, *supra*, at para 24
5. e.g. see *Lawrence*, *supra*

Necessary Elements

Reasons for judgement will be sufficient where the reasons "read in context, show why the judge decided as he did" on the appropriate counts.[1]

The judge is required to give reasons for his or her decision on verdict.[2]

A judgement is sufficient if when "read in context, show why the judge decided as he or she did".[3]

Appellate review must take a "functional approach" when considering the sufficiency of reasons.[4] A functional approach requires examination fo the evidence and submissions of counsel.[5]

In a case that turns on determination of credibility, the reasons should be "considered in light of the deference afforded to trial judges on credibility findings".[6] Intervention on this basis for credibility cases should be "rare".[7] Absent a "palpable and overriding error by the trial judge" the perception of the judge should be respected.[8]

There is no obligation upon judges to address every argument made by counsel. [9] Nor must the judge articulate consideration of every part of the evidence.

The Criminal Code specifically mandates judges to give reasons on certain circumstances, such as when determining the admissibility of a complainant's prior sexual history [10]; ordering the production of prior personal information (s. 278.8(1)); and when imposing a sentence [11].

The reason must "sufficiently intelligible" to permit appellate review.[12]

A verdict must be based exclusively on admissible evidence heard at trial. If a trial judge has misapprehended the evidence, including resorting to material not before him or her, and the errors "play an essential part in the reasoning process resulting in a conviction then ... the accused's conviction is not based exclusively on the evidence and is not a "true" verdict". [13]

Credibility

On findings concerning credibility focus on analysis "should be directed at whether the reasons respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel"[14] This however does not require "reasons to be so detailed that they allow an appeal court to retry the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel."[15] Credibility cases require that the court sufficiently articulate how credibility concerns have been resolved. Failure to do so may be a reversible error.[16]

Credibility assessments should be accorded a high degree of deference.[17]

1. *R v Vuradin*, 2013 SCC 38 (CanLII), [2013] 2 SCR 639, *per* Karakatsanis J, at para 15
2. *R v Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 SCR 869, *per* Binnie J, at para 55
   Pitts v Ontario, 1985 CanLII 2053 (ONSC), 51 OR (2d) 302, *per* Reid J, at p. 311
   R v Kendall, 2005 CanLII 21349 (ON CA), , [2005] O.J. No. 2457 (CA), *per* Cronk JA
3. *Vuradin*, *supra*, at para 12
   R v REM, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, *per* McLachlin CJ, at para 17
   R v AA, [2015] O.J. No. 4016(*no CanLII links) , at para 116
4. *Vuradin*, *supra*, at para 10
5. *R v Soltan*, 2019 ONCA 8 (CanLII), *per curiam*, at para 3
6. *R v Dinardo*, 2008 SCC 24 (CanLII), [2008] 1 SCR 788, *per* Charron J, at para 26
7. *Dinardo*, *ibid.*, at para 26
8. *R v Gagnon*, 2006 SCC 17 (CanLII), [2006] 1 SCR 621, *per* Bastarache and Abella JJ, at para 20
9. *Dinardo*, *supra*, at para 30
10. see s. 276.2(3)
11. see s. 726.2
12. *R v JJRD*, 2006 CanLII 40088 (ON CA), 215 CCC (3d) 252, *per* Doherty JA, at para 35
13. *R v Morrissey*, 1995 CanLII 3498 (ON CA), 97 CCC (3d) 193, *per* Doherty JA, at p. 541
    R v Lohrer, 2004 SCC 80 (CanLII), [2004] 3 SCR 732, *per* Binnie J, at paras 2 to 3
14. *Dinardo*, *supra*, at para 25
15. *Dinardo*, *supra*, at para 30
    also referenced in *REM*, *supra*
16. *Dinardo*, *supra*, at para 26
    R v Braich, 2002 SCC 27 (CanLII), [2002] 1 SCR 903, *per* Binnie J, at para 23
17. *R v AA*, 2015 ONCA 558 (CanLII), [2015] O.J. No. 4016, *per* Watt JA, at para 116

Inconsistent Verdicts

Where the judge or jury provides verdicts that are "irreconcilable such that no reasonable jury, properly instructed, could possibly have rendered them on the evidence" then the verdict is unreasonable.[1]

1. *R v Pittiman*, 2006 SCC 9 (CanLII), [2006] 1 SCR 381, *per* Charron J, at para 10

Timing of Reasons

Reasons for decision may not be valid where the delay between the ruling and the release of reasons are such that "a reasonable person could not be satisfied that the reasons for judgment actually reflect the reasoning process that led to the decision".[1]

All reasons released "are presumed to reflect the reasoning that led him [the trial judge] to his decision".[2] The presumption is rebuttable by factors including the passage of time which causes "a reasonable person would apprehend that the written reasons are, in effect, an after-the-fact justification for the verdicts rather than an articulation of the reasoning that led to the decision".[3]

1. *R v Teskey*, 2007 SCC 25 (CanLII), [2007] 2 SCR 267, *per* Charron J
   R v Cunningham, 2011 ONCA 543 (CanLII), 274 CCC (3d) 338, *per* Doherty JA - reasons given 2 years after ruling
2. *Teskey*, *supra*, at para 19
3. *Teskey*, *supra*, at paras 21, 23

Standard of Review

The reasons are to be examined in a functional test.[1] "The requirement of reasons is tied to their purpose and the purpose varies with the context"[2] The functional and substantive manner means taking the reasons, "as a whole, in the context of the evidence, arguments, and the live issues at trial, with an appreciation of the purposes or functions for which reasons are given. There must be a logical connection between the verdict and the reasons. [3]

The purpose of the reviewing court is to "isolate those situations where deficiencies in the trial reasons will justify appellate intervention and either an acquittal or a new trial".[4]

When considering sufficiency, it is not the decision alone that should be considered but rather "what the trial judge has stated in the context of the record, the issues and the submissions of counsel at trial".[5]

Where an oral and written decision contains inconsistent findings and reasons to key findings, a new trial may be warranted.[6]

A trial judge's reasons should be reviewed on a "standard of adequacy".[7] The reasons are adequate if, as a whole, accomplish three purposes:[8]

1. informing the parties of the basis of the verdict,
2. providing public accountability and
3. permitting a form of appeal.

Failure to evaluate a complainant's evidence in light of independent contradictory evidence is a reverseable error.[9]

Inadequate reasons alone does not warrant appeal unless the deficiency creates a "prejudice to the exercise of his or her legal right to an appeal in a criminal case."[10]

There are three categories of cases where prejudice is caused by deficient reasons:[11]

1. Allegation of unreasonable verdict cases;
2. Allegation of error of law cases; and
3. Miscarriage of justice cases.

Insufficient reasons are an error of law when they prevent any meaningful appellate review. [12]

1. *R v Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 SCR 869, *per* Binnie J
2. *R v Dinardo*, 2008 SCC 24 (CanLII), [2008] 1 SCR 788, *per* Charron J, at para 24
3. *Sheppard*, *supra*
   R v TS, 2012 ONCA 289 (CanLII), 284 CCC (3d) 394, *per* Watt JA, at para 45
   R v REM, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, *per* McLachlin CJ, at paras 16, 35, 55
4. *Sheppard*, *supra*, at para 21
5. *REM*, *supra*, at para 37
6. *R v Ball*, 2012 ABCA 184 (CanLII), 557 WAC 102, *per curiam*
7. *R v Flores*, 2013 MBCA 4 (CanLII), 288 Man R (2d) 173, *per* Monnin JA
8. *Flores*, *ibid.*
   REM, *supra*
   See also *R v Oddleifson (J.N.)*, 2010 MBCA 44 (CanLII), 256 CCC (3d) 317, *per* Chartier JA

9. *R v Hanson (K.J.)*, 2010 ABQB 128 (CanLII), 491 AR 257, *per* Hughes J
10. *R v Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 SCR 869, *per* Binnie J, at para 33 ("A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case.")
11. *Sheppard*, *supra*
12. *Sheppard*, *supra*

See Also

- Trial Verdicts

Grounds of Appeal from Sentence

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< Procedure and Practice < Appeals

General Principles

An accused has the authority to appeal sentence under s. 675(1)(b) (indictable offences) and 813 (summary offences).[1]

The sentencing judge is in the best position to determine the fit and proper sentence. This is especially true after trial. Accordingly, "substantial deference" is required. [2]

Intervention requires that there be an error in principle, a failure to consider a relevant factor, or an error considering aggravating or mitigating factors.[3]

Where there is an error in considering factors, the error must have had an impact on the sentence.[4] Similarly, the judge's particular choice of weighing one factor over another is not appealable unless it is "unreasonable".[5]

The judge's deviation from the proper range alone is not enough to warrant an appeal. The sentence must be "demonstrably unfit" or "clearly unreasonable".[6]

Jurisdiction

Appeals of sentence for indictable offences are to the Court of Appeal. Appeals of summary offences are to the Superior Court.

Precedential Value of Sentencing Cases

It has been recommended that counsel should be cautious when using appellate decisions on sentence where sentencing guidelines or principles have not been outlined.[7] The appellate decision can be valuable where the court finds that the sentence was out of the range. However, if the court simply

affirms that the sentence is reasonable as it should not be interpreted as meaning that, for example, a much more severe sentence would have been unfit.[8]

1. See Right of Appeal of Verdicts or Sentences for Indictable Offences and Right of Appeal of Verdicts or Sentences for Summary Offences
2. *R v Adan*, 2019 ONCA 709 (CanLII), *per* Watt JA, at para 103 ("sentencing judges are in the best position to determine a just and appropriate sentence that pays heed to the sentencing objectives and principles set out in the Criminal Code. It is especially so where the sentence is imposed after a contested trial. Accordingly, appellate courts accord substantial deference to sentencing decisions when exercising their powers of review under s. 687(1) of the Criminal Code")
3. *Adan*, *ibid.*, at para 104 ("...[A]n appellate court is entitled to intervene under s. 687(1) of the Criminal Code where the sentencing judge erred in principle, failed to consider a relevant factor, or erred in considering an aggravating or mitigating factor, but only if it appears from the sentencing judge's decision, read as a whole, the error impacted had an impact on the sentence ultimately imposed")
4. *Adan*, *ibid.*, at para 106 ("While it is an error to consider an element of the offence an aggravating factor, such an error must have had an impact on the sentence imposed to permit appellate intervention")
5. *Adan*, *ibid.*, at para 106 ("Likewise, a sentencing judge's decision to weigh aggravating and mitigating factors in a particular way does not, in itself, permit appellate intervention unless the weighing is unreasonable")
6. *Adan*, *ibid.*, at para 105 ("the mere fact that a judge deviates from the proper sentencing range does not, on its own, justify appellate intervention. The choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot, on its own, constitute a reviewable error. Apart from errors of law or principle that impact the sentence, appellate intervention is only warranted where the sentence imposed is demonstrably unfit, that is to say, clearly unreasonable")
7. *R v Martial*, 2018 ABCA 201 (CanLII), *per curiam*, at paras 14 to 19
8. *Martial*, *ibid.*, at paras 18 to 19

Standard of Review

The power to review sentence on an indictable offence is found in s. 687:

> **Powers of court on appeal against sentence**
>
> 687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> (b) dismiss the appeal.
>
> **Effect of judgment**
>
> (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

> R.S., c. C-34, s. 614.
>
> – CCC

The Court's authority to consider "fitness of sentence" within s. 687 is limited to:[1]

- errors in principle;
- failure to consider a relevant factor;
- over-emphasis of appropriate factor; or
- sentences that are "demonstrably unfit" or "clearly unreasonable".

To have grounds of appeal the appellant must be able to answer at least one or more of the following questions in the affirmative: [2]

1. Is the sentence the result of an error of law?
2. Did the sentencing judge err in principle in the exercise of his or her discretion?
3. Is the sentence clearly unreasonable having regard to the fundamental purpose and objective of sentencing (s. 718) as well as the principles enunciated in section 718.1 and 718.2 of the Criminal Code?
4. Is the sentence a substantial and marked departure from the sentence customarily imposed for similarly situated offenders committing similar crimes?

Deference to Discretion

The decision on sentence is an act of discretion.[3] It is discretion best exercised by the trial judge given their "familiarity with the facts and the accused".[4] Consequently, the standard of review is one of deference. [5] This deference does not change whether the sentence was after conviction or guilty plea.[6]

The deferential standard of review on sentence does *not* apply if no reasons for sentence are given.[7]

The standard is a "deferential one, and the decision of a sentencing judge is not to be interfered with lightly".[8]

Generally, a Court will only interfere where it is "demonstrably unfit".[9] This standard is also described as "clearly unreasonable".[10]

Error Must Have Impact on Sentence

An appellate court may *only* intervene on sentence where the error of principle had "an impact on the sentence".[11]

1. *R v CAM*, 1996 CanLII 230 (SCC), [1996] 1 SCR 500, (1996) 105 CCC 327, *per* Lamer

CJ, at para 90 Sentence can only where there is an "error in principle, failure to consider a relevant factor, or an overemphasis of relevant factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.")
R v Shropshire, 1995 CanLII 47 (SCC), [1995] 4 SCR 227, (1995) 102 CCC 193, *per* Iacobucci J, at para 46
R v LM, 2008 SCC 31 (CanLII), [2008] 2 SCR 163, *per* LeBel J, at para 14
R v Scott, 2013 NSCA 28 (CanLII), 327 NSR (2d) 256, *per* Beveridge JA (2:1), at paras 7 to 10
R v Proulx, 2000 SCC 5 (CanLII), [2000] 1 SCR 61, *per* Lamer CJ, at para 123
R v Nasogaluak, 2010 SCC 6 (CanLII), [2010] 1 SCR 206, *per* LeBel J, at para 46
R v Murphy, 2015 NSCA 14 (CanLII), *per* Scanlan JA, at para 15
R v Knockwood, 2009 NSCA 98 (CanLII), 900 APR 156, *per* Saunders JA, at para 22

2. *R v Long*, [2001] NBJ No 347 (NBCA)(*no CanLII links)
R v RP, 2001 NBCA 115 (CanLII), 636 APR 179, *per* Drapeau JA, at para 11
R v Steeves, 2010 NBCA 57 (CanLII), 77 CR (6th) 341, *per* Drapeau CJ, at para 25
3. *R v McCurdy*, [2003] 210 NSR (2d) 33(*no CanLII links) at 36
4. *R v Imona-Russel*, 2019 ONCA 252 (CanLII), 145 OR (3d) 197, *per* Lauwers JA, at para 17
R v Rezaie, 1996 CanLII 1241 (ON CA), 112 CCC (3d) 97, *per* Laskin JA, at paras 17 to 21
R v Shropshire, 1995 CanLII 47 (SCC), [1995] 4 SCR 227, paras. 46-50
R v M. (CA), 1996 CanLII 230 (SCC), [1996] 1 SCR 500, at paras. 90-92
R v Lacasse, 2015 SCC 64 (CanLII), [2015] 3 SCR 1089, *per* Wagner J(*complete citation pending*) at paras. 11, 49-51(*complete citation pending*)
5. *R v Shropshire*, 1995 CanLII 47 (SCC), [1995] 4 SCR 227, (1995) 102 CCC 193, *per* Iacobucci J at 209 (cited to CCC)
CAM, *supra* at 374
R v Knickle, 2009 NSCA 59 (CanLII), 246 CCC (3d) 57, *per* Roscoe JA, at para 11
R v James, 2013 MBCA 14 (CanLII), 105 WCB (2d) 491288, *per* MacInnes JA, at para 18
6. *CAM*, *supra*, at p. 374
7. *R v Guha*, 2012 BCCA 423 (CanLII), 98 CR (6th) 177, *per* D Smith JA, at para 22 ("However, the absence of any reasons for the imposition of a sentence negates a deferential approach on review as the reviewing court is unable to assess how the sentencing judge determined the fitness of the sentence")
8. *M(CA)*, *supra*, at para 91
9. *R v Brown*, 2004 NSCA 51 (CanLII), 701 APR 393, *per* Roscoe JA
Knickle, *supra*, at para 11
10. *R v W(G)*, 1999 CanLII 668 (SCC), [1999] 3 SCR 597, *per* Lamer CJ, at para 19
11. *R v Lacasse*, 2015 SCC 64 (CanLII), [2015] 3 SCR 1089, *per* Wagner J, at para 11

Error in Law or Principle

Where there is an error in principle the court of appeal has a "clean slate" to re-consider sentence without deference to the sentencing judge.[1] This "clean slate" principle will not apply where the error of principle was *not* determinative to or did not have an "impact" upon the sentence.[2]

1. *R v Rezaie*, 1996 CanLII 1241 (ON CA), 112 CCC (3d) 97, *per* Laskin JA
R v Hawkins, 2011 NSCA 7 (CanLII), 265 CCC (3d) 513, *per* Beveridge JA
R v Bernard, 2011 NSCA 53 (CanLII), 275 CCC (3d) 545, *per* Saunders JA, leave ref'd [2011] SCCA No 38
2. *R v Lacasse*, 2015 SCC 64 (CanLII), [2015] 3 SCR 1089, *per* Wagner J, at paras 44, 164

Failure to Apply Factors

Where the Court of Appeal "would have weighed the relevant factors differently" is not enough to be a ground of appeal of sentence.[1]

Where the judge "unreasonably emphasized a sentencing factor over another, the error likely, although not necessarily, will have led the judge to impose an unfit sentence."[2]

1. *R v Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1 SCR 206, *per* LeBel J, at para 46 ("Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. ...however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently")
2. *R v Allen*, 2012 BCCA 377 (CanLII), 293 CCC (3d) 455, *per* Ryan JA, at para 32

Range

Ranges are to be heeded but "they are guidelines rather than hard and fast rules." A judge can order a sentence outside the range as long as it accords with the principles and objectives.[1]

Ranges are not to be used as "straitjackets". They are merely "historical portraits" of the exercise of prior discretion.[2]

Merely being able to point out the existence of a different sentence for a similar offence is not enough to be outside of the range, manifestly unfit, or excessive.[3]

1. *R v Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1 SCR 206, *per* LeBel J, at para 44
   R v JJW, 2012 NSCA 96 (CanLII), 292 CCC (3d) 292, *per* Oland JA, at para 15 ("That discretion is fettered in part by case law that has, in some circumstances, set down ranges so as to give effect to the parity principle. However, ranges are only guidelines and a sentencing falling outside the regular range is not necessarily unfit.")
   R v Lacasse, 2015 SCC 64 (CanLII), [2015] 3 SCR 1089, *per* Wagner J, at para 58 ("There will always be situations that call for a sentence outside a particular range; although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded.")
2. *Lacasse*, *supra*, at paras 57 and 69
3. *R v Eisan*, 2015 NSCA 65 (CanLII), *per* Beveridge JA, at para 28

Remedies for Appeals from Sentence

Once a appellate court finds that the sentence was inappropriate the Court may sentence the accused anew taking into account any part of a sentence already served.

Re-Incarcerating the Offender or Staying Sentence

Where a sentence has been found to be inadequate, the court may consider several options on correcting the sentence. The Court may impose a new sentence as seen fit. Alternatively, the Court may decline to re-incarcerate. Instead the court may simply dismiss the appeal after "identifying the sentence that should have been imposed and explaining why the respondent should not be re-incarcerated" or the Court may "impose the appropriate sentence but stay the execution of the remaining custodial part of that sentence". The latter is seen as more appropriate.[1]

If a stay is considered, it must not injure the public confidence in the administration of justice.[2] It should also be considered as an "exceptional" remedy to a sentence appeal.[3]

Consideration will include the duration of control that the courts have had over the accused and the duration of his jeopardy.[4] His personal background, including the accomplishments in rehabilitation, will also be considered.[5]As well as his exposure to prison prior to the appeal.[6]

1. *R v Smickle*, 2014 ONCA 49 (CanLII), 306 CCC (3d) 351, *per curiam*, at para 10
2. See *R v Arcand*, 2010 ABCA 363 (CanLII), 264 CCC (3d) 134, *per curiam*, at para 304
3. *R v MacDonald*, 2014 NSCA 102 (CanLII), *per* MacDonald CJ leave refused 2015 CanLII 23007 (SCC), *per curiam*, at para 57
   R v Best, 2012 NSCA 34 (CanLII), 998 APR 243, *per* MacDonald CJ, at para 35
4. e.g. *MacDonald*, *supra*, at para 57
5. *R v Butler*, 2008 NSCA 102 (CanLII), 239 CCC (3d) 97, *per* Bateman JA, at paras 18 to 20, 39 to 40
6. *Butler*, *ibid.*, at para 40
   R v Hamilton, 2004 CanLII 5549 (ON CA), 186 CCC (3d) 129, *per* Doherty JA

Appeal of Ancillary Orders

SOIRA Order: only if there is an error in principle, a failure to consider a relevant factor, an overemphasis on appropriate factors, or a clearly unreasonable decision can a SOIRA order be appealed.[1]

The Crown has no authority to appeal the ordering of a particular length of SOIRA as it does not fit the meaning of "sentence" in s. 673.[2]

Forfeiture Orders

A forfeiture order made under s. 491(1)(b) is part of a sentence and so is appeallabe as a sentence under s.675(1)(b).[3]

1. *R v Redhead*, 2006 ABCA 84 (CanLII), 384 AR 206, *per curiam*, at para 13
2. *R v JJW*, 2012 NSCA 96 (CanLII), 292 CCC (3d) 292, *per* Oland JA, at paras 53 and 54
   R v Chisholm, 2012 NBCA 79 (CanLII), 292 CCC (3d) 132, *per* Drapeau CJ
3. *R v Montague*, 2014 ONCA 439 (CanLII), 120 OR (3d) 401, *per* Feldman JA

See Also

- Appellate Evidence#Post-Sentence Evidence -- concerning new evidence, including post-sentence report, at appellate level

Appeals Other Than Verdicts or Sentences

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Introduction

Interlocutory Orders

As appeals are only available by statute, there is no authority to appeal an interlocutory order from either a provincial court.[1] Any appeal from an interlocutory order must occur at the end of the whole proceedings.[2]

1. e.g. see *R v Dobson*, 2016 NBCA 18 (CanLII), 129 WCB (2d) 420, *per curiam*
R v Anderson, 2017 BCCA 153 (CanLII), DTC 5065, *per* Frankel JA

2. *R v Primeau*, 1995 CanLII 143 (SCC), [1995] 2 SCR 60, *per* Sopinka and Iacobucci JJ, at paras 11 to 12
R v Scott, 2015 MBCA 80 (CanLII), 124 WCB (2d) 214, *per* Hamilton JA, at para 4

Crown Appeal of a Stay of Proceedings or Quashing of Charges

> **Right of Attorney General to appeal**
>
> 676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> > (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;
> > (b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;
> > (c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or
> > (d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.
>
> [*omitted (1.1), (2), (3), (4), (5) and (6)*]
> R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.
> [*Underline added*]
>
> – CCC

Stay for Unreasonable Delay

The decision to stay a proceeding for delay is a question of law and subject to review on the standard of correctness.[1]

1. *R v KN*, 2018 BCCA 246 (CanLII), 362 CCC (3d) 288, *per* Fenlon JA, at para 13
   R v Widdifield, 2014 BCCA 170 (CanLII), 354 BCAC 237, *per* Frankel JA, at para 76
   R v Conway, 1989 CanLII 66 (SCC), [1989] 1 SCR 1659, *per* L'Heureux-Dubé J at 1676
   See also Right to a Trial Within a Reasonable Time

Costs

A party may appeal a judgement of costs against them under s. 676.1 with leave of the court:

> **Appeal re costs**
>
> 676.1 A party who is ordered to pay costs may, with leave of the court of appeal or a judge of a court of appeal, appeal the order or the amount of costs ordered.
> 1997, c. 18, s. 94.
>
> – CCC

In order to appeal a costs order against the Crown, the appellant must obtain leave from the court on the basis of having an "arguable case", an issue that is "important" and there is no "prejudice or bar" to hearing the appeal.[1]

1. see *R v Griffin*, 2011 ABCA 197 (CanLII), 272 CCC (3d) 1, *per curiam*, at para 17

Prerogative Writs

> **Appeal in mandamus, etc.**
>
> 784 (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of mandamus, certiorari or prohibition.
>
> **Application of Part XXI**

(2) Except as provided in this section, Part XXI [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*] applies, with such modifications as the circumstances require, to appeals under this section.

Refusal of application, and appeal

(3) Where an application for a writ of habeas corpus ad subjiciendum is refused by a judge of a court having jurisdiction therein, no application may again be made on the same grounds, whether to the same or to another court or judge, unless fresh evidence is adduced, but an appeal from that refusal shall lie to the court of appeal, and where on the appeal the application is refused a further appeal shall lie to the Supreme Court of Canada, with leave of that Court.

Where writ granted

(4) Where a writ of habeas corpus ad subjiciendum is granted by any judge, no appeal therefrom shall lie at the instance of any party including the Attorney General of the province concerned or the Attorney General of Canada.

Appeal from judgment on return of writ

(5) Where a judgment is issued on the return of a writ of habeas corpus ad subjiciendum, an appeal therefrom lies to the court of appeal, and from a judgment of the court of appeal to the Supreme Court of Canada, with the leave of that Court, at the instance of the applicant or the Attorney General of the province concerned or the Attorney General of Canada, but not at the instance of any other party.

Hearing of appeal

(6) An appeal in habeas corpus matters shall be heard by the court to which the appeal is directed at an early date, whether in or out of the prescribed sessions of the court.
R.S., 1985, c. C-46, s. 784; 1997, c. 18, s. 109.

– CCC

Section 784(1) creates a right of appeal from decisions "granting or refusing the relief sought in proceedings by way of mandamus, certiorari or prohibition".[1] This right of appeal is not to be interpreted in a "restrictive" manner and should should permit appeals "relating to the same issue" that is statutorily mandated.[2]

1. *R v Ciarniello*, 2006 CanLII 29633 (ON CA), 81 OR (3d) 561, *per* Sharpe JA, leave refused, [2006] SCCA No 424
2. *Ciarniello*, *ibid.*, at para 24

Appeal

10 (1) Where a court, judge, justice or provincial court judge summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal

(a) from the conviction; or
(b) against the punishment imposed.

Idem

(2) Where a court or judge summarily convicts a person for a contempt of court not committed in the face of the court and punishment is imposed in respect thereof, that person may appeal

(a) from the conviction; or
(b) against the punishment imposed.

Part XXI applies

(3) An appeal under this section lies to the court of appeal of the province in which the proceedings take place, and, for the purposes of this section, the provisions of Part XXI [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*] apply, with such modifications as the circumstances require.
R.S., 1985, c. C-46, s. 10; R.S., 1985, c. 27 (1st Supp.), s. 203.
[*annotation(s) added*]

– CEA

Public Interest Privilege

Appeal to court of appeal

37.1 (1) An appeal lies from a determination under any of subsections 37(4.1) to (6) [*disclosure-related provisions*]

(a) to the Federal Court of Appeal from a determination of the Federal Court; or
(b) to the court of appeal of a province from a determination of a trial division or trial court of a superior court of the province.

Limitation period for appeal

(2) An appeal under subsection (1) [*appeal to court of appeal*] shall be brought within 10 days after the date of the determination appealed from or within any further time that the court having jurisdiction to hear the appeal considers appropriate in the circumstances.
2001, c. 41, ss. 43, 141.

– CEA

Appeal Mid-Trial

An appeal on s. 37 findings can be done mid-trial where the trial judge orders disclosure. Otherwise, the appeal under s. 37.1 must be done after trial.[1]

Appeal to Supreme Court of Canada

Limitation periods for appeals to Supreme Court of Canada

37.2 Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made under subsection 37.1(1) [*appeal to court of appeal*] shall be made within 10 days after the date of the judgment appealed from or within any further time that the court having jurisdiction to grant leave to appeal considers appropriate in the circumstances; and
(b) if leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within the time specified by the court that grants leave.

2001, c. 41, s. 43.

– CEA

Stay of Proceedings or Quashing an Indictment

Crown appeals of a stay of proceedings can be made under s. 676(1)(c) which states:[2]

676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

[*omitted (a) and (b)*]

> (c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment;
> [*omitted (d)*]
>
> [*omitted (1.1), (2), (3), (4), (5) and (6)*]
> R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.
>
> – CCC

A stay of proceeding that is done by a court other than the "trial court", such as by a judge before an election is made, is not appealable.[3]

A reversal of a discretionary stay is available where "the trial judge exercised this discretion unreasonably or erred in principle, which includes erring in law."[4]

1. *R v Tingley*, 2015 NBCA 51 (CanLII), 1163 APR 1
2. *R v Pan*, 2012 ONCA 581 (CanLII), *per* Laskin JA, at para 12
3. *R v Waugh*, 2009 NBCA 23 (CanLII), 246 CCC (3d) 116, *per* Drapeau CJ
4. *Pan*, *supra* at para 12

Appeal of Voir Dire

A voir dire hearing can happen at any point during a proceeding before the final decision on guilt. Parties may have a right to appeal the ruling of a voir dire, however, the proceeding will generally not be put on hold pending a ruling of the appeal.

A guilty plea after a voir dire will usually extinguish any right to appeal.[1]

As best practice, to preserve the right to appeal, the accused shall admit the facts alleged by the Crown and invite the judge to convict.[2]

1. *R v Chuhaniuk*, 2010 BCCA 403 (CanLII), 261 CCC (3d) 486, *per* Frankel JA, at para 45
   R v Carter, 2003 BCCA 632 (CanLII), 190 BCAC 178, *per* Finch CJ
   R v Bowman, 2008 BCCA 410 (CanLII), 261 BCAC 285, *per* Lowry JA
   R v Webster, 2008 BCCA 458 (CanLII), 238 CCC (3d) 270, *per* Frankel JA
   cf. *R v Liberatore*, 2014 NSCA 109 (CanLII), 318 CCC (3d) 441, *per* Fichaud JA
2. *R v Duong*, 2006 BCCA 325 (CanLII), 142 CRR (2d) 261, *per* Rowles JA, at para 8
   cf. *Liberatore*, *supra*

Appeal of a Charter Voir Dire

When reviewing a denial of a Charter application the reviewing court should:[1]

1. review the "decision to ensure that the correct legal principles were stated and there was no misdirection on their application";
2. review the "evidentiary foundation forming the basis of the judge's decision...to see if there was an error."
3. review the "application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the legal test."

The statement of law and principles by the judge are reviewed as a question of law and is subject to the standard of review of correctness.[2] Facts in a Charter voir dire are to be reviewed as a question of law of a standard of "palpable and overriding error".[3] The application of the facts to the law are reviewed on a standard of "correctness".[4]

1. *R v Richard (DR)*, 2013 MBCA 105 (CanLII), 299 Man R (2d) 1, *per* Cameron JA, at para 48
2. *Richard*, *ibid.*, at para 48
3. *Richard*, *ibid.*, at para 48
4. *Richard*, *ibid.*, at para 48

Other Appeals

- SOIRA Orders#Appeal From Order
- Forfeiture of Offence-related Property#Appeals
- Forfeiture of Offence-related Property Under the CDSA#Appeals
- Forfeiture of Proceeds of Crime#Appeal of Forfeiture Orders
- DNA Orders#Appeals
- Special Issues for Seizure of Property#Appeals From Orders Under Section 490
- Statutory Publication Ban on Court Proceedings#Appeals by Media of Publication Ban Orders
- Mandamus, Certiorari, and Prohibition
- Appellate Review of an LTO or DO Designation

Remedies on Conviction Appeal

< Procedure and Practice < Appeals

General Principles

Where an error has been found by the appellate court, the court must address the question of what remedy, if any, should be applied.

Appeals against conviction or verdict under s. 686 that are successful may be subject to a remedies including a stay of proceedings, a new verdict, or a new trial. Alternatively, the appellate court has limited ability to dismiss the appeal despite the existence of an error. The court may dismiss certain claims in situations such as where the error would not have changed the verdict or where there was no miscarriage of justice or there was a lack of prejudice.

Applicable Remedies

Where a defence appeal is allowed the court may either order a new trial or enter a verdict of acquittal. (s.686(2))

The court has discretion to enter a verdict of acquittal where:

- the accused has already served part or all of a fit sentence
- where there is no longer sufficient evidence to support a conviction
- where it would be unfair to the accused to have another trial

686
[*omitted (1)*]

Order to be made

(2) Where a court of appeal allows an appeal under paragraph (1)(a) [*remedy on accused verdict appeal – allow*], it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or
(b) order a new trial.

[*omitted (3), (4), (5), (5.01), (5.1) and (5.2)*]

Where appeal allowed against verdict of unfit to stand trial

(6) Where a court of appeal allows an appeal against a verdict that the accused is unfit to stand trial, it shall, subject to subsection (7) [*appeal court may set aside verdict of unfit to stand trial*], order a new trial.

Appeal court may set aside verdict of unfit to stand trial

(7) Where the verdict that the accused is unfit to stand trial was returned after the close of the case for the prosecution, the court of appeal may, notwithstanding that the verdict is proper, if it is of the opinion that the accused should have been acquitted at the close of the case for the prosecution, allow the appeal, set aside the verdict and direct a judgment or verdict of acquittal to be entered.

Additional powers

(8) Where a court of appeal exercises any of the powers conferred by subsection (2) [*powers of court – quash conviction*], (4) [*appeal from acquittal*], (6) [*where appeal allowed against verdict of unfit to stand trial*] or (7) [*appeal court may set aside verdict of unfit to stand trial*], it may make any order, in addition, that justice requires.
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).
[*annotation(s) added*]

– CCC

The Court of Appeal has no power under section 686 to substitute any verdict with a new verdict of "not guilty by reason of mental disorder". It can only order a new trial. However, the scope of the trial can be limited to specific issues only under section 686 (4).[1]

Section 686(8) Limitation

Section 686(8) cannot be in conflict with the primary order or otherwise limit the accused's rights.[2]

1. *R v Luedecke*, 2008 ONCA 716 (CanLII), 236 CCC (3d) 317, *per* Doherty JA
2. *R v Hinse*, 1995 CanLII 54 (SCC), [1995] 4 SCR 597, at paras 30 to 31, *per* Lamer CJ
   R v Thomas, 1998 CanLII 774 (SCC), [1998] 3 SCR 535, *per* Lamer CJ, at paras 17, 26
   R v Imola, 2019 ONCA 556 (CanLII), 439 CRR (2d) 352, *per curiam*, at para 27 ("Section 686(8) has a broad remedial purpose. However, because this is a supplementary power, an order made under this subsection cannot be at variance with the primary order or limit the accused's rights")

Ordering a New Trial

Where a new trial is ordered the provisions of s.686(5) and (5.1) apply:

> 686
> [*omitted (1), (2), (3) and (4)*]
>
> **New trial under Part XIX** [***Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)***]
>
> (5) Subject to subsection (5.01) [*trial under Part XIX – Nunavut*], if an appeal is taken in respect of proceedings under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] and the court of appeal orders a new trial under this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*], the following provisions apply:
>
> > (a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;
> > (b) if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, be held before a judge or provincial court judge, as the case may be, acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], other than a judge or provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or provincial court judge who tried the accused in the first instance;
> > (c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an

indictment in writing setting forth the offence in respect of which the new trial was ordered; and
(d) notwithstanding paragraph (a), if the conviction against which the accused appealed was for an offence mentioned in section 553 [*absolute jurisdiction offences*] and was made by a provincial court judge, the new trial shall be held before a provincial court judge acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], other than the provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the provincial court judge who tried the accused in the first instance.

[*omitted (5.01)*]

Election if new trial a jury trial

(5.1) Subject to subsection (5.2) [*election if new trial a jury trial — Nunavut*], if a new trial ordered by the court of appeal is to be held before a court composed of a judge and jury,

(a) the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury or a provincial court judge;
(b) the election shall be deemed to be a re-election within the meaning of subsection 561(5) [*right to re-elect from superior with prelim – notice and transmitting record*]; and
(c) subsection 561(5) [*right to re-elect from superior with prelim – notice and transmitting record*] applies, with such modifications as the circumstances require, to the election.

[*omitted (3), (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).
[*annotation(s) added*]

– CCC

Where a new trial is ordered and the result of the new trial is a conviction, the sentence given after the original trial will still be in effect.

Ordering a New Trial (Nunavut)

See Criminal Law in the Canadian Territories

Appellate Powers to Dismiss an Appeal from Conviction

General Principles

Section 686(1)(b) entitles the court to dismiss an accused's appeal in certain circumstances. An appeal can be dismissed where:

- there is no error in the proceedings (686(1)(b)(ii))
- there was an improper conviction on only certain counts such that the appeal against the remaining counts can be dismissed (686(1)(b)(i))
- there were errors of law but it did not result in a "substantial wrong or miscarriage of justice" (686(1)(b)(iii) - sometimes referred to as the "curative proviso")
- there were procedural irregularities but the accused suffered no prejudices (686(1)(b)(iv))

Conviction on Other Grounds (686(1)(b)(i) and (3))

Section 686(1)(b)(i) permits the appellate court to dismiss an appeal despite there being an error in the trial judge ruling, where "the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment".

Powers

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

[*omitted (a)*]
(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
[*omitted (ii), (iii) and (iv)*]

[*omitted (c), (d) and (e)*]

[*omitted (2), (3), (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).

– CCC

Court May Substitute Incorrect Verdict for Correct One and Re-Assess Sentence

686
[*omitted (1) and (2)*]

Substituting verdict

(3) Where a court of appeal dismisses an appeal under subparagraph (1)(b)(i) [*dismissal for proper conviction on another count*], it may substitute the verdict that in its opinion should have been found and

> (a) affirm the sentence passed by the trial court; or
> (b) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

[*omitted (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).

[*annotation(s) added*]

– CCC

Absence of Error Under s. 686(1)(a) of the Code (686(1)(b)(ii))

Section 686(1)(b)(ii) permits the judge to dismiss the appeal "the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a)," which consists of errors for unreasonable verdict, error on a question of law, or where there is a miscarriage of justice.

Powers

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

> [*omitted (a)*]
> (b) may dismiss the appeal where
>
> > [*omitted (i)*]
> > (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a) [*being unreasonable verdict, error of law, or miscarriage of justice*],
> > [*omitted (iii) and (iv)*]

[*omitted (c), (d) and (e)*]

[*omitted (2), (3), (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).
[*annotation(s) added*]

– CCC

No Substantial Wrong or Miscarriage of Justice (686(1)(b)(iii))

Section 686(1)(b)(iii), known as the "curative proviso", permits the appeal court to dismiss an appeal despite a finding of an error of law in favour of the appellant where there has been "no substantial wrong or miscarriage of justice". The proviso may be applied where "the outcome of the trial, irrespective of the error, would necessarily have been the same."[1]

Powers

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

[*omitted (a)*]
(b) may dismiss the appeal where

[*omitted (i) and (ii)*]
(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) [*basis of wrong decision on a question of law*] the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
[*omitted (iv)*]

[*omitted (c), (d), (e)*]

[*omitted (2), (3), (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s.

> 282(E).
> [*annotation(s) added*]
>
> – CCC

There are two categories of error that will be subject to the proviso:[2]

1. where there is "an error so harmless or minor that it could not have had any impact on the verdict."; or
2. where there are "serious errors that would otherwise justify a new trial or an acquittal, but for the fact that the evidence against the accused was so overwhelming that any other verdict would have been impossible to obtain."

When Is It Raised

The court cannot, on its own motion, rely on the curative proviso.[3]

There is no obligation that the Crown must "specifically request" the court to rely on the proviso to uphold the conviction. The court in "rare cases" may not be constrained by the Crown's failure to raise the proviso.[4]

Traditionally, the court would only be able to rely on the proviso if there was a specific notice of this by the Crown.[5] The modern approach permits reliance on the provision by implication.[6]

Burden and Standard

Either of these criteria must be established on a balance of probabilities.[7]

The burden is on the Crown to prove the applicability of the curative proviso.[8]

Evidence

In establishing that the case was "overwhelming", the onus is upon the Crown to meet this "high standard"[9] which has been described as "substantially higher" than beyond a reasonable doubt. This standard reflects the fact an appellate court cannot easily consider the effect on the outcome.[10] In order to deprive an accused of a proper trial, the deprivation must be minimal such that the invariable result would be another conviction.[11]

Requirements

The evidence must be "powerful" with "no realistic possibility" that a new trial would be different.[12] There should be "no reasonable possibility that the verdict would have been different."[13]

Court Cannot Raise Issue

The Crown must specifically raise the curative proviso on their own. It is an error of law for the court to otherwise rely on it.[14]

1. *R v O'Brien*, 2011 SCC 29 (CanLII), [2011] 2 SCR 485, *per* Abella J, at paras 33, 34
2. *R v Van*, 2009 SCC 22 (CanLII), [2009] 1 SCR 716, *per* LeBel J, at paras 34 to 36
   R v Khan, 2001 SCC 86 (CanLII), [2001] 3 SCR 823, *per* Arbour J
   R v Trochym, 2007 SCC 6 (CanLII), [2007] 1 SCR 239, *per* Deschamps J
   R v Sekhon, 2014 SCC 15 (CanLII), [2014] 1 SCR 272, *per* Moldaver J, at para 53
3. *R v Herritt*, 2019 NSCA 92 (CanLII), 384 CCC (3d) 25, at paras 138 to 142
4. *Herritt*, *ibid.*, at paras 138 to 142
5. *R v Settle*, 2021 ABCA 221 (CanLII), *per* Watson JA, at para 11
   R v McMaster, 1996 CanLII 234 (SCC), [1996] 1 SCR 740, *per* CJ, at para 37 ("In conclusion, I am of the view that the trial judge's misdirection on the law of intoxication constituted an error of law. The respondent has not raised s. 686(1)(b)(iii) of the Code in argument. ... "[t]he Crown has the burden of showing that this provision is applicable …. This Court cannot apply it proprio motu.")
6. *Settle*, *supra* at para 11
7. *O'Brien*, *supra*, at para 34
8. *Van*, *supra*, at para 34
9. *O'Brien*, *supra*, at para 33
10. *O'Brien*, *supra*, at para 48
11. *R v S(PL)*, 1991 CanLII 103 (SCC), 64 CCC (3d) 193, *per* Sopinka J, at p. 916
12. *R v Jolivet*, 2000 SCC 29 (CanLII), [2000] 1 SCR 751, *per* Binnie J, at para 46
13. *R v Bevan*, 1993 CanLII 101 (SCC), [1993] 2 SCR 599, *per* Major J, at pp. 616-618
    R v Merz, 1999 CanLII 1647 (ON CA), 140 CCC (3d) 259, *per* Doherty JA, at pp. 178-180
14. *R v Bisson*, 2010 ONCA 556 (CanLII), 258 CCC (3d) 338, *per* Epstein JA

Lack of Prejudice (686(1)(b)(iv))

Under s. 686(1)(b)(iv), the Court may dismiss a defence appeal despite irregularities at trial. The section states:

> **Powers**
>
> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> [*omitted (a)*]
> (b) may dismiss the appeal where
>
> [*omitted (i), (ii) and (iii)*]
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[*omitted (c), (d), (e)*]

[*omitted (2), (3), (4), (5), (5.01), (5.1), (5.2), (6), (7), (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).
[*annotation(s) added*]

– CCC

The purpose of s. 686(1)(b)(iv) is to "expand the remedial powers of the court to engage with jurisdictional errors"(cleaned up).[1]

In this context, "prejudice" refers to the prejudice suffered upon the accused's ability to defend himself, to receive a fair trial, and to the appearance of the administration of justice.[2]

Dismissal is particularly appropriate where there is no appearance of unfairness and counsel did not object.[3]

Private interactions between the trial judge and prospective jurors may lack prejudice in where there is no appearance of unfairness.[4]

The phrase "trial court had jurisdiction over the class of offence" refers to the three classes of offences: s. 469 offences, non-469 electable offences, and summary conviction offences.[5]

Errors in Jury Selection

The curative proviso can be applied to jury selection errors where the appellate court is of the opinion that the accused "suffer no prejudice". The proviso does not require a properly constituted jury panel.[6]

1. *R v Esseghaier*, 2021 SCC 9 (CanLII), 454 DLR (4th) 179, *per* Moldaver and Brown JJ, at para 46
2. *R v Kakegamic*, 2010 ONCA 903 (CanLII), 265 CCC (3d) 420, *per* Doherty JA
3. *R v Sinclair*, 2013 ONCA 64 (CanLII), 300 CCC (3d) 69, *per* Rouleau JA
4. *Sinclair*, *supra*
5. *Esseghaier*, *supra*
6. *Esseghaier*, *supra*

Remedies on Acquittal Appeal

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General Principles

Under s. 686 and 834(1)(a) the Court of appeal order one of several remedies to an unlawful acquittal.

> 686
> [*omitted (1), (2) and (3)*]
>
> **Appeal from acquittal**
>
> (4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may
>
> (a) dismiss the appeal; or
> (b) allow the appeal, set aside the verdict and
>
> (i) order a new trial, or
> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.
>
> [*omitted (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
> R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).
>
> – CCC

Before s. 686(4)(b)(i) can be applied there must be an error of law.[1] Once an error of law is established, the appellate must also establish that there is a "nexus between the legal error and the verdict entered".[2]

1. *R v Anthes Business Forms et al.*, 1975 CanLII 54 (ON CA), 26 CCC (2d) 349, *per* Gale CJ
2. *R v Bear (C.W.)*, 2013 MBCA 96 (CanLII), 299 Man R (2d) 175, *per* Steel JA, at para 82

Entering a Conviction

Section 686(4)(b)(ii) states:

686
[*omitted (1), (2) and (3)*]

Appeal from acquittal

(4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may

[*omitted (a)*]
(b) allow the appeal, set aside the verdict and

[*omitted (i)*]
, or
(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

[*omitted (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).

– CCC

This section authorizes a Court of Appeal to substitute a verdict of guilt "with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law".[1]

A conviction can be entered under s. 686(4)(b)(ii) if the appellate court is satisfied that the trial judge made all the "[a]ll the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue".[2]

A appellate-level court will only set aside an acquittal and enter a conviction when "the trial judge's findings of fact, viewed in light of the applicable law, supported a conviction beyond a reasonable doubt".[3] This should only be "in the clearest of cases".[4]

1. see also *R v Tran*, 2008 ABCA 209 (CanLII), 58 CR (6th) 246, *per* Hunt JA
2. *R v Cassidy*, 1989 CanLII 25 (SCC), [1989] 2 SCR 345, *per* Lamer J, at para 16 ("an appellate court may overturn an acquittal and enter a conviction rather than ordering a new trial where the Crown satisfies the Court that, had there been a proper application of the law, the verdict would not have been the same, and further demonstrates that the accused should have been found guilty but for the error of law. All the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue")

3. *R v McRae*, 2013 SCC 68 (CanLII), [2013] 3 SCR 931, *per* Cromwell and Karakatsanis JJ, at para 39
   R v Katigbak, 2011 SCC 48 (CanLII), [2011] 3 SCR 326, *per* McLachlin CJ and Charron J, at para 50
4. *McRae*, *supra*, at para 39
   R v Audet, 1996 CanLII 198 (SCC), [1996] 2 SCR 171, *per* La Forest J, at para 48

Ordering a New Trial

For the Crown to succeed in seeking a new trial, it "must show that the trial judge erred and that this error 'might reasonably be thought ... to have had a material bearing on the acquittal'".[1]

Burden

The onus on the crown is a "heavy one".[2]

Proof of Alternative Outcome

It is *not* necessary to show "that the verdict would necessarily have been different".[3]

A new trial will be ordered under s. 686(4)(b)(i) where the "verdict would not necessarily have been the same if the trial judge had properly directed the jury"[4] or, in the case of a judge-alone trial, that had "the trial Judge properly instructed himself, his judgment of acquittal would not necessarily have been the same".[5] In judge-alone this is measured on an objective, not subjective, standard.[6]

Prosecution To be Done Differently

A new trial is not permitted where the Crown relies on the fact that the prosecution should have been done differently.[7]

Consequences of Ordering New Trial

A successful appeal from a stay of proceedings due to delay can be "remitted for continuation before the original trial judge" under s. 686(8).[8]

1. *R v Youvarajah*, 2013 SCC 41 (CanLII), [2013] 2 SCR 720, *per* Karakatsanis J, at para 32
2. *Youvarajah*, *supra*, at para 32
3. *R v Graveline*, 2006 SCC 16 (CanLII), [2006] 1 SCR 609, *per* Fish J, at para 14
   Youvarajah, *supra*, at para 32
4. *R v Vezeau*, 1976 CanLII 7 (SCC), [1977] 2 SCR 277, *per* Martland J
5. *R v Anthes Business Forms et al.*, 1975 CanLII 54 (ON CA), 26 CCC (2d) 349, *per* Gale CJ
6. *R v Melo*, 1986 CanLII 4706 (ON CA), 29 CCC (3d) 173, 15 OAC 6 (CA), *per* Morden JA, at p. 182
   R v Collins, 1993 CanLII 8632 (ON CA), 79 CCC (3d) 204, *per* Arbour JA
7. *Youvarajah*, *supra*, at para 46 ("Crown counsel was not precluded by the trial judge from calling further witnesses or from posing further questions to D.S. The Crown cannot ask for a new trial on the basis that the prosecution should have been conducted differently.")
8. *R v Yelle*, 2006 ABCA 276 (CanLII), 213 CCC (3d) 20, *per* Martin JA

Election

686
[*omitted (1), (2), (3) and (4)*]

New trial under Part XIX

(5) Subject to subsection (5.01) [*trial under Part XIX – Nunavut*], if an appeal is taken in respect of proceedings under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] and the court of appeal orders a new trial under this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*], the following provisions apply:

(a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;
(b) if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, be held before a judge or provincial court judge, as the case may be, acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], other than a judge or provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or provincial court judge who tried the accused in the first instance;
(c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and
(d) notwithstanding paragraph (a), if the conviction against which the accused appealed was for an offence mentioned in section 553 [*absolute jurisdiction offences*] and was made by a provincial court judge, the new trial shall be held before a provincial court judge acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], other than the provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the provincial court judge who tried the accused in the first instance.

New trial under Part XIX — Nunavut

(5.01) If an appeal is taken in respect of proceedings under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] and the Court of Appeal of Nunavut orders a new trial under Part XXI [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*], the following provisions apply:

(a) if the accused, in the notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;
(b) if the accused, in the notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, and without a further preliminary inquiry, be held

before a judge, acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], other than a judge who tried the accused in the first instance, unless the Court of Appeal of Nunavut directs that the new trial be held before the judge who tried the accused in the first instance;
(c) if the Court of Appeal of Nunavut orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and
(d) despite paragraph (a), if the conviction against which the accused appealed was for an indictable offence mentioned in section 553 [*absolute jurisdiction offences*], the new trial shall be held before a judge acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], other than the judge who tried the accused in the first instance, unless the Court of Appeal of Nunavut directs that the new trial be held before the judge who tried the accused in the first instance.

Election if new trial a jury trial

(5.1) Subject to subsection (5.2) [*election if new trial a jury trial — Nunavut*], if a new trial ordered by the court of appeal is to be held before a court composed of a judge and jury,

(a) the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury or a provincial court judge;
(b) the election shall be deemed to be a re-election within the meaning of subsection 561(5) [*right to re-elect from superior with prelim – notice and transmitting record*]; and
(c) subsection 561(5) [*right to re-elect from superior with prelim – notice and transmitting record*] applies, with such modifications as the circumstances require, to the election.

Election if new trial a jury trial — Nunavut

(5.2) If a new trial ordered by the Court of Appeal of Nunavut is to be held before a court composed of a judge and jury, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury. The election shall be deemed to be a re-election within the meaning of subsection 561.1(1) [*right to re-elect with consent – Nunavut*], and subsection 561.1(6) [*notice when no preliminary inquiry or preliminary inquiry completed — Nunavut*] applies, with any modifications that the circumstances require, to the election.
[*omitted (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F).
[*annotation(s) added*]

– CCC

When a new trial is ordered under s. 686(5), the accused does not have a right to re-elect the mode of trial.[1]

However, an ordered re-trial from a judge and jury verdict may re-elect to a trial by judge alone with the consent of the Crown.[2]

1. *R v Sagliocco*, 1979 CanLII 516 (BC CA), 51 CCC (2d) 188, *per* Craig JA, at para 20
2. *R v Cook*, 2002 BCCA 225 (CanLII), 164 CCC (3d) 540, *per* Mackenzie JA

Limiting New Trial Issues

Under s. 686(8) when the Court of Appeal orders a new trial they may also order that the trial issues be narowed.[1]

On a successful appeal on the basis of the issue of entrapment, the court of appeal may quash the conviction but affirm the verdict of guilt and return it to trial on the sole issue of post-verdict entrapment.[2]

The Court of appeal may send a matter back for retrial on the sole issue "of whether [the accused's] automatism should lead to an acquittal or an NCR-MD verdict".[3]

1. "s. 686
   ...
   (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires."
   R v Luedecke, 2008 ONCA 716 (CanLII), 236 CCC (3d) 317, *per* Doherty JA, at para 131
2. *R v Pearson*, 1998 CanLII 776 (SCC), [1998] 3 SCR 620, *per* Lamer CJ and Major J, at para 16 ("conviction is quashed, the verdict of guilt is affirmed, and the new trial is to be limited to the post-verdict entrapment motion.")
3. *Luedecke*, *supra*, at para 136

Remedies on Sentence Appeal

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General Principles

Section 687 governs available remedies on a sentence appeal to the province's Court of Appeal (either under s. 675(1)(b) or 676(1)(d)). The section states:

> **Powers of court on appeal against sentence**
>
> 687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> (b) dismiss the appeal.

Effect of judgment

(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.
R.S., c. C-34, s. 614.

– CCC

An appeal from a sentence in a summary conviction proceeding is identical to an appeal in an indictable matter. [1]

Generally, remedies on a sentence appeal does not include remitting a matter to the trial court for re-sentencing.[2]

Remedy Where Insufficient Record on Offender Circumstances

The appellate panel may order a further pre-sentence report and may include a request to address certain specific issues where they find that the record is insufficient to determine a fit and proper sentence.[3]

Remedy Where No Settled Facts

A finding that the sentencing judge erred in accepting facts for the purpose of sentencing does not permit the appellate court to send the matter back to a sentencing judge for re-sentencing. [4] An available option includes appointing a special commissioner under s. 683(1) to conduct a *Gardiner* hearing a report back to the appellate court on the facts decided.[5]

1. By operation of section 822(1) of the Criminal Code summary conviction appeal adopts the same procedure by reference to the provisions of 687(1)
2. *R v Pahl*, 2016 BCCA 234 (CanLII), 336 CCC (3d) 221, *per* Frankel JA, at para 85
   R v Kakekagamick, 2006 CanLII 28549 (ON CA), 211 CCC (3d) 289, *per* LaForme JA, at para 60
   R v Cromwell, 2005 NSCA 137 (CanLII), 202 CCC (3d) 310, *per* Bateman JA, at para 25
3. *R v Macintyre-Syrette*, 2018 ONCA 259 (CanLII), 46 CR (7th) 78, *per* Juriansz JA, at para 25
4. *Pahl*, *supra*, at paras 83 to 89
5. *Pahl*, *supra*, at para 90 - however, dissenting judge suggests sentencing based only on non-contentious facts

Appeal Procedure

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General Principles

Steps of Appeal

Appeals are begun with the filing of a Notice of Appeal or Notice of Application for Leave to Appeal, depending on the statutory jurisdiction. This notice must be within the set period of time established by the local provincial rules of court.

Counsel must then compile the record of proceedings and file it with the appellate court. Once the record is filed the parties can file their factums setting out the facts and the argument on the issues of appeal.

Summary Conviction Court vs Court of Appeal

Summary conviction appeals are to be taken according to Part XXVII of the Code, and be heard by a judge of the Superior Court of the province.[1] Under s. 822, the Summary Conviction Appeal Court is to follow the same rules as the Court of Appeal as set out in s. 683 to 689 when dealing with an appeal from s. 813. The main difference is that under s. 822(4), the SCAC may order a trial *de novo* where the applicant can show that there was a "denial of natural justice" or "substantial deficiency in the trial transcript".[2]

"Court of Appeal"

> **Definitions**
>
> 673 In this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*],
> **"court of appeal"** means the court of appeal, as defined by the definition court of appeal in section 2 [*general Code definitions*], for the province or territory in which the trial of a person by indictment is held; (cour d'appel)
> ...
> R.S., 1985, c. C-46, s. 673; R.S., 1985, c. 27 (1st Supp.), ss. 138, 203, c. 23 (4th Supp.), s. 4, c. 42 (4th Supp.), s. 4; 1992, c. 1, s. 58; 1993, c. 45, s. 10; 1995, c. 22, s. 5, c. 39, ss. 155, 190; 1996, c. 19, s. 74; 1999, c. 5, ss. 25, 51, c. 25, ss. 13, 31(Preamble); 2002, c. 13, s. 63; 2005, c. 22, ss. 38, 45; 2006, c. 14, s. 6; 2013, c. 11, s. 2; 2018, c. 16, s. 220, c. 21, s. 21; 2019, c. 25, s. 278.
> [*annotation(s) added*]
>
> – CCC

1. *R v PRF*, 2001 CanLII 21168 (ON CA), OR (3d) 475, *per* Rosenberg JA (3:0), at para 5 s. 812(1) designates superior court judges from each province
2. Exception exists for s. 683(3) and s. 686(5) *R v Pomeroy*, 2007 BCCA 142 (CanLII), 218 CCC (3d) 400, *per* Donald JA (3:0), at para 25

Leave to Appeal

The process of requesting "leave" from a reviewing court is "a form of gatekeeping ... to identify those judgments or orders that are of sufficient importance to warrant a further level of review".[1]

In practice, sometimes leave is granted "at large" while other times the leave is only "granted on a defined issue".[2]

The decision to grant leave does not require to give an explanation on the question for which leave was granted.[3]

In answering a question for which leave was granted. The reviewing court is not required to only answer the question and may expand its reasons beyond the question.[4] However, the factums should not go beyond the question asked without leave of the Court.[5]

1. *R v Johannesson*, 2017 ABCA 33 (CanLII), *per* Slatter JA, at para 3
2. *Johannesson*, *ibid.*, at para 3
3. *Johannesson*, *ibid.*, at para 4
4. *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, *per* L'Heureux-Dubé J, at para 12 *Johannesson*, *supra*, at para 4
5. *Johannesson*, *supra*, at para 6

Notice to Appeal

The first step when undertaking an appeal is notice to the necessary persons and entities.

Notice of Jurisdiction

While it is not a necessary prerequisite, the appellant should include a reference to the jurisdictional basis for appeal in their notice.[1]

Issues of Appeal

Making New Arguments on Appeal

The Crown as respondent is entitled to raise any argument to support a conviction so long as it is based on the trial record.[2]

Generally, a respondent can "raise any argument which supports the order of the court below". They are not limited to those arguments made before the trial judge.[3]

Appellate Court Raising Issues Not Raised by Counsel

It is inappropriate for the appellate court to raise any issues not raised by either Crown or Defence.[4] This is not a hard and fast rule, however. It has been suggested that judges have "a duty to review the complete trial record and ensure that all relevant issues were argued."[5]

Appellate courts have the discretion to raise new issues not raised by either party where it is in the interests of justice to do so. The discretion must be exercised with caution.[6]

Accused Raising New Charter Issues on Appeal

The accused may only raise a Charter issue on appeal that was not raised at trial where the following has been met: [7]

1. there must be a sufficient evidentiary record to resolve the issue.
2. it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial.
3. the court must be satisfied that no miscarriage of justice will result from the refusal to raise such new issue on appeal.

1. *R v Montesano*, 2019 ONCA 194 (CanLII), *per curiam*, at para 23 (" In future cases it may be helpful to include in the notice of appeal a brief reference to the jurisdictional basis for the appeal so that the scope of appellate relief available is readily ascertainable. We consider such a course a matter of good practice, not a condition precedent to a valid notice of appeal.")
2. *R v SH*, 2019 ONCA 669 (CanLII), 377 CCC (3d) 335, *per* Simmons JA (2:1), at para 29 *R v C(WB)*, 2000 CanLII 5659 (ON CA), 142 CCC (3d) 490, *per* Weiler JA
3. *R v Keegstra*, 1995 CanLII 91 (SCC), [1995] 2 SCR 381, *per* Lamer CJ (9:0)
4. *R v T(SG)*, 2010 SCC 20 (CanLII), [2010] 1 SCR 688, *per* Charron J (5:2), at paras 36 to 7
5. Commission on the Donald Marshall, Jr., Prosecution, at p. 22 [1]
6. *R v Mian*, 2014 SCC 54 (CanLII), [2014] 2 SCR 689, *per* Rothstein J (7:0)
7. *R v Brown*, 1993 CanLII 114 (SCC), [1993] 2 SCR 918, [1993] SCJ No 82, *per* L'Heureux-Dubé J, at para 20 dissenting on other grounds

Issues Not Raised at Trial

There is a general prohibition to new issues on appeal. This is in order to protect the "overarching societal interest in the finality of litigation in criminal matters".[1] Without such a limitation finality would be an "illusion" and there would be no limits on issues to raised which would undermine respect for the administration of justice.[2]

Generally speaking, appellate courts should be particular cautious or resistant to consider new issues raised only on appeals.[3] The appellate courts are disadvantaged by the lack of any prior consideration by lower courts.[4]

Crown counsel are generally not permitted to raise issues that were not advanced at trial.[5]

In certain cases, such as applications for privileged information, the failure to raise the issue at trial subsequent to a lost voir dire has been found to be fatal to a potential appeal.[6]

Discretion to Allow New Issue

The Court of Appeal has the discretion to allow new issues. The decision must be "guided by the balancing of the interests of justice as they affect all parties".[7]

The Court should consider:[8]

1. whether the issue is actually new
2. "whether the evidentiary record and the interests of justice support granting an exception to the general rule against raising new issues on appeal"

The "interests of justice" include considering "whether entertaining the issue for the first time on appeal might lead to a different ultimate outcome for the parties".[9] A Court "may hear a new issue on appeal if refusing leave would risk an injustice."[10]

Failure to raise issues at trial for tactical reasons should weigh heavily against allowing new issues to be raised.[11] </ref>

New Charter Issues

In order to raise a Charter issue on appeal where it was no argued previously, there must be 1) sufficient evidence to deal with the issue, 2) satisfied that the failure to raise the issue previously was not merely a tactical issue, 3) there is no miscarriage of justice from raising the new issue.[12]

In Alberta, the applicant can advance a Charter issue on appeal not raised at trial where:[13]

1. [T]he Charter issue must not be an issue which the defence could have raised at trial and chose not to, and
2. The necessary evidence to rule on the Charter issue must be before the court.

Positions Not Taken at Trial

Defence counsel will not generally be permitted to challenge rulings or decisions that were predicated on positions taken by the trial counsel and were changed on appeal.[14] While counsel are not "locked in" to the trial position, they should not be permitted to directly contradict their position taken at trial.[15]

Raised by Court

Nevertheless, appellate courts have "jurisdiction to invite submissions on an issue neither party has raised".[16]

A "new issue" arises when "the issue was not raised by the parties, cannot reasonably be sad it stem from the issues as framed by the parties, and therefore would require that the parties be given notice of the issue in order to make informed submissions."[17]

1. *R v Brown*, 1993 CanLII 114 (SCC), [1993] 2 SCR 918, *per* L'Heureux-Dubé J (dissent), at pp. 923-924
   R v Warsing, 1998 CanLII 775 (SCC), [1998] 3 SCR 579, *per* L'Heureux-Dubé J (dissenting in part), at para 16
   Kaiman v Graham, 2009 ONCA 77 (CanLII), 245 OAC 130, *per* Weiler JA (3:0), at [http://canlii.ca/t/228tk#par18 paras 18 to 19]
   R v Roach, 2009 ONCA 156 (CanLII), 246 OAC 96, *per* Doherty JA (3:0), at para 6
   R v Reid, 2016 ONCA 524 (CanLII), 338 CCC (3d) 47, *per* Watt JA (3:0), at paras 38 to 39
2. *Brown*, *supra*
3. e.g. *R v Potvin*, 1993 CanLII 113 (SCC), [1993] 2 SCR 880, *per* Sopinka J, at p. 916
   R v Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42 (CanLII), [2002] 2 SCR 559, *per* Iacobucci J (7:0), at paras 58 to 59
   R v Tse, 2012 SCC 16 (CanLII), [2012] 1 SCR 531, *per* Moldaver and Karakatsanis J (9:0), at para 57
4. *Giguere v Chambre des notaires du Quebec*, 2004 SCC 1 (CanLII), [2004] 1 SCR 3, *per* Gonthier J (6:1), at para 34
5. *R v Varga*, 1994 CanLII 8727 (ON CA), [1994] OJ No 1111 (CA), *per* Doherty JA (3:0), at paras 25, 26, 38 and 40
6. *R v Blair*, 2000 CanLII 16821 (ON CA), *per curiam* (3:0)

7. *Kaiman v Graham*, 2009 ONCA 77 (CanLII), 245 OAC 130, *per* Weiler JA, at para 18
   R v Ahmed, 2019 SKCA 47 (CanLII), 10 WWR 99, *per* Barrington-Foote J, at para 15
8. *R v Gill*, 2018 BCCA 144 (CanLII), 26 MVR (7th) 138, *per* Fitch JA, at para 12
   Ahmed, *supra*, at para 15
9. *Gill*, *supra*, at para 12
   Ahmed, *supra*, at para 15
10. *Gill*, *supra*, at para 12
11. *Ahmed*, *supra*, at para 16
    R v Brown, 1993 CanLII 114 (SCC), [1993] 2 SCR 918, at p. 927 (SCR), *per* L'Heureux-Dubé J. dissenting, but not on this point
    R v Reid, 2016 ONCA 524 (CanLII), 338 CCC (3d) 47, *per* Watt JA, at para 43
    R v Dignard, 2017 MBCA 123 (CanLII), *per* Beard JA, at para 7
    R v Downey, 2015 NBCA 25 (CanLII), 1134 APR 315, *per* Baird JA, at para 12
12. *R v Brown*, 1993 CanLII 114 (SCC), [1993] 2 SCR 918, *per* J, at para 20
    R v Black, 2010 NBCA 36 (CanLII), 255 CCC (3d) 62, *per* Bell JA, at para 3
13. *R v Fertel*, [1993] AJ No 767(*no CanLII links) , at para 21 citing *R v Brown*, 1993 CanLII 114 (SCC), [1993] 2 SCR 918, *per* J
    see also *R v Jacobs*, 2014 ABCA 172 (CanLII), 312 CCC (3d) 45, *per curiam* (3:0)
14. *R v Moore*, 2017 ONCA 947 (CanLII), 357 CCC (3d) 500, *per* Trotter JA, at para 15
15. *R v Kimberley*, 2001 CanLII 24120 (ON CA), (2001), 56 OR (3d) 18, *per* Doherty JA, at para 56
16. *R v Mian*, 2014 SCC 54 (CanLII), [2014] 2 SCR 689, *per* Rothstein J, at para 28
17. *Mian*, *ibid.*, at para 35

Intervenors

A party may apply to intervene in an appeal where: [1]

1. whether the intervention will unduly delay the proceedings;
2. possible prejudice to the parties if intervention is granted;
3. whether the intervention will widen the lis between the parties;
4. the extent to which the position of the intervenor is already represented and protected by one of the parties; and
5. whether the intervention will transform the court into a political arena.

These factors are balanced against each other and the interests of convenience, efficiency, and social purpose of moving the matter forward. The decision is ultimately a discretionary one.

Alternatively, the test has also been framed as having only two requirements:[2]

1. the proposed intervenor can show a particular interest in the outcome of the appeal, or
2. where the intervenor can bring forward some special expertise, perspective, or information that will assist the Court

Limitations on Interveners

Intervenor status in criminal cases is expected to be granted sparingly. [3]

They should generally not be permitted to raise new issues or enhance the record beyond what is already there.[4]

1. *R v Ross*, 2012 NSCA 8 (CanLII), 987 APR 305, *per* Fichaud JA, at para 12 John Sopinka & Mark A. Gelowitz in The Conduct of an Appeal, 2nd ed. (Canada: Butterworths,

2000), at p. 258-59
R v Fraser, 2010 NSCA 106 (CanLII), 940 APR 281, *per* Beveridge JA, at para 12

2. *R v Newborn*, 2018 ABCA 256 (CanLII), *per* Slatter JA
Papaschase Indian Band v Canada (Attorney General), 2005 ABCA 320 (CanLII), 380 AR 301, *per* Fraser CJ, at para 2
R v Vallentgoed, 2016 ABCA 19 (CanLII), 612 AR 72, *per* Veldhuis JA, at paras 5 to 6
3. *Newborn*, *supra*, at para 3
R v JLA, 2009 ABCA 324 (CanLII), 464 AR 310, *per* Watson JA, at para 2
R v Neve, 1996 ABCA 242 (CanLII), 108 CCC (3d) 126, *per* Irving JA (2:1), at para 16
4. *Newborn*, *supra*, at para 3

Mootness

An appeal may be dismissed on account of the issue of the appeal being "moot".

The general rule is that a court should *not* hear appeals where there is "no live controversy between the parties".[1]

The Court of Appeal has the discretion to hear a moot appeal in "exceptional cases".[2]

Discretion has been exercised on matters that require guidance or clarity from an appellate level of court.[3]

There are certain matters, such as bail, that have been considered "evasive of appellate review" are also to be factored into the decision to exercise discretion.[4]

1. *Tamil Co-operative Homes Inc v Arulappah*, 2000 CanLII 5726 (ON CA), 192 DLR (4th) 177, *per* Doherty JA (3:0), at para 13
2. *R v NG*, 2008 ONCA 330 (CanLII), *per curiam* (3:0)
Borowski v Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 SCR 342, at p. 353, 47 CCC (3d) 1, *per* Sopinka J (7:0), at p. 9
New Brunswick (Minister of Health and Community Services) v G(J), 1999 CanLII 653 (SCC), [1999] 3 SCR 46, 177 DLR (4th) 124, *per* Lamer CJ
M v H, 1999 CanLII 686 (SCC), [1999] 2 SCR 3, 171 DLR (4th) 577, at pp. 44-45
3. *R v Myers*, 2019 SCC 18 (CanLII), [2019] 2 SCR 105, *per* Wagner CJ, at para 14
4. *Myers*, *ibid.*, at para 14
R v Oland, 2017 SCC 17 (CanLII), [2017] 1 SCR 250, *per* Moldaver J, at para 17 ("...as bail pending appeal was, by its temporary nature, evasive of appellate review, this was an appropriate case to resolve the conflicting jurisprudence...")

Death of Appellant

Traditionally, an appeal matter should not survive the death of the accused.[1] An appeal is abated even if the case has been argued and the decision reserved.[2] There is some discretion to continue despite the death of the accused.[3]

To continue the court should consider:[4]

1. the existence of a truly adversarial context;
2. the presence of particular circumstances which justify the expenditure of limited judicial resources to resolve the issue; and

3. the respect shown by courts to limit themselves to their proper adjudicative role, as opposed to making freestanding legislative-type pronouncements.

The analysis should follow a 2 step approach:[5]

1. "inquiry and determination whether the required tangible and concrete dispute has disappeared and the issues have become academic" and
2. if so, "court should then determine whether it should exercise its discretion to hear the case", which involves considering whether there are "special circumstances" that make it in the "interests of justice" to continue.

Factors to consider should consist of:[6]

1. whether the appeal will proceed in a proper adversarial context;
2. the strength of the grounds of the appeal;
3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
    1. a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
    2. a systemic issue related to the administration of justice;
    3. collateral consequences to the family of the deceased or to other interested persons or to the public;
4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;
5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the Court in free-standing, legislative-type pronouncements more properly left to the legislature itself.

1. *R v Slingerland*, 2020 ONCA 417 (CanLII), *per curiam*, at para 8
   R v Monney, 2020 ONCA 6 (CanLII), at para 6
2. *Slingerland*, *ibid.*, at para 8
   R v Cadeddu, 1983 CanLII 1763 (ON CA), 3 CCC (3d) 112, *per curiam* at p. 114
   R v Smith, 2004 SCC 14, [2004] 1 SCR 385, *per* Binnie J, at para 11
3. *Slingerland*, *supra*, at para 8
   Cadeddu, *supra* at p. 118 to 119
4. *Slingerland*, *supra* at para 10
   Borowski v Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 SCR 342, *per* Sopinka J, at p. 353
   Smith, *supra*, at para 33
5. *Slingerland*, *supra* at para 11 to 12
   Monney, *supra* at para 9 to 10
6. *R v Poulin*, 2019 SCC 47 (CanLII), 379 CCC (3d) 513, *per* Martin J, at para 50

Other Powers

> 683
> [*omitted (1), (2), (2.1), (2.2) and (2.3)*]
>
> **Other powers**

(3) A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) [*powers of court of appeal – interests of justice*] that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court, but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.
[*omitted (4), (5), (5.1), (6) and (7)*]
R.S., 1985, c. C-46, s. 683; R.S., 1985, c. 27 (1st Supp.), s. 144, 1985, s. 5; 1995, c. 22, s. 10; 1997, c. 18, ss. 97, 141; 1999, c. 25, s. 15(Preamble); 2002, c. 13, s. 67; 2008, c. 18, s. 29.
[*annotation(s) added*]

– CCC

Compelling Attendance

683
[*omitted (1), (2), (2.1), (2.2), (2.3) and (3)*]

Execution of process

(4) Any process that is issued by the court of appeal under this section may be executed anywhere in Canada.
[*omitted (5), (5.1), (6) and (7)*]
R.S., 1985, c. C-46, s. 683; R.S., 1985, c. 27 (1st Supp.), s. 144, 1985, s. 5; 1995, c. 22, s. 10; 1997, c. 18, ss. 97, 141; 1999, c. 25, s. 15(Preamble); 2002, c. 13, s. 67; 2008, c. 18, s. 29.

– CCC

Misc Authority of Crown to Appeal

Appeals by Attorney General of Canada
Right of Attorney General of Canada to appeal

696 The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*].
R.S., c. C-34, s. 624.
[*annotation(s) added*]

– CCC

Report by Lower Court Judge

Report by judge

682 (1) Where, under this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*], an appeal is taken or an application for leave to appeal is made, the judge or provincial court judge who presided at the trial shall, at the request of the court of appeal or a judge thereof, in accordance with rules of court, furnish it or him with a report on the case or on any matter relating to the case that is specified in the request.

Transcript of evidence

(2) A copy or transcript of

> (a) the evidence taken at the trial,
> (b) any charge to the jury and any objections that were made to a charge to the jury,
> (c) the reasons for judgment, if any, and
> (d) the addresses of the prosecutor and the accused, if a ground for the appeal is based on either of the addresses,

shall be furnished to the court of appeal, except in so far as it is dispensed with by order of a judge of that court.
(3) [Repealed, 1997, c. 18, s. 96]

Copies to interested parties

(4) A party to an appeal is entitled to receive, on payment of any charges that are fixed by rules of court, a copy or transcript of any material that is prepared under subsections (1) [*appellate court requesting report by judge*] and (2) [*appellate court requesting report by judge – transcript*].

Copy for Minister of Justice

(5) The Minister of Justice is entitled, on request, to receive a copy or transcript of any material that is prepared under subsections (1) [*appellate court requesting report by judge*] and (2) [*appellate court requesting report by judge – transcript*].
R.S., 1985, c. C-46, s. 682; R.S., 1985, c. 27 (1st Supp.), ss. 143, 203; 1997, c. 18, s. 96.
[*annotation(s) added*]

– CCC

See Also

- Representation and Attendance on Appeal

Appeal Procedure For Summary Convictions

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79478)

< Procedure and Practice < Appeals

General Principles

Procedure on Appeal
Notification and transmission of conviction, etc.

821 (1) Where a notice of appeal has been given in accordance with the rules referred to in section 815 [*Notice of summary appeal to court of appeal*], the clerk of the appeal court shall notify the summary conviction court that made the conviction or order appealed from or imposed the sentence appealed against of the appeal and on receipt of the notification that summary conviction court shall transmit the conviction, order or order of dismissal and all other material in its possession in connection with the proceedings to the appeal court before the time when the appeal is to be heard, or within such further time as the appeal court may direct, and the material shall be kept by the clerk of the appeal court with the records of the appeal court.

Saving

(2) An appeal shall not be dismissed by the appeal court by reason only that a person other than the appellant failed to comply with the provisions of this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] relating to appeals.

Appellant to furnish transcript of evidence

(3) Where the evidence on a trial before a summary conviction court has been taken by a stenographer duly sworn or by a sound recording apparatus, the appellant shall, unless the appeal court otherwise orders or the rules referred to in section 815 [*Notice of summary appeal to court of appeal*] otherwise provide, cause a transcript thereof, certified by the stenographer or in accordance with subsection 540(6) [*transcription of record taken by sound recording apparatus*], as the case may be, to be furnished to the appeal court and the respondent for use on the appeal.
R.S., c. C-34, s. 754; 1972, c. 13, s. 67; 1974-75-76, c. 93, s. 93.
[*annotation(s) added*]

– CCC

No Writs Required on Summary Appeal

No writ required

833 No writ of certiorari or other writ is required to remove any conviction, judgment, verdict or other final order or determination of a summary conviction court for the purpose of obtaining the judgment, determination or opinion of the appeal court.
R.S., 1985, c. C-46, s. 833; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

– CCC

Certified Copies

Depending on the specific provincial court rules, the record, including transcripts, charging and release documents, orders and reports should all be certified.[1]

1. *R v Avard*, 2019 NSSC 161 (CanLII), *per* Rosinski J

Section 813 Appeals Vs Section 830 Appeals

Applicable Rules for a Section 830 Appeal

Appeals

830
[*omitted (1)*]

Form of appeal

(2) An appeal under this section shall be based on a transcript of the proceedings appealed from unless the appellant files with the appeal court, within fifteen days of the filing of the notice of appeal, a statement of facts agreed to in writing by the respondent.

Rules for appeals

(3) An appeal under this section shall be made within the period and in the manner directed by any applicable rules of court and where there are no such rules otherwise providing, a notice of appeal in writing shall be served on the respondent and a copy thereof, together with proof of service, shall be filed with the appeal court within thirty days after the date of the conviction, judgment or verdict of acquittal or other final order or determination that is the subject of the appeal.

[*omitted (4)*]
R.S., 1985, c. C-46, s. 830; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

– CCC

When Section 830 Appeals Not Available

Appeal barred

837 Where it is provided by law that no appeal lies from a conviction or order, no appeal under section 830 [*summary conviction appeal*] lies from such a conviction or order.
R.S., 1985, c. C-46, s. 837; R.S., 1985, c. 27 (1st Supp.), s. 182.

– CCC

When Section 813 Appeals Not Available

Appeal under section 830

836 Every person who appeals under section 830 [*summary conviction appeal*] from any conviction, judgment, verdict or other final order or determination in respect of which that person is entitled to an appeal under section 813 [*appeal by defendant, informant or Attorney General*] shall be taken to have abandoned all the person's rights of appeal under section 813 [*appeal by defendant, informant or Attorney General*].
R.S., 1985, c. C-46, s. 836; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

– CCC

Application of Procedure Between Appeals

Application

831 The provisions of sections 816 [*release order for appellant*], 817 [*recognizance of prosecutor*], 819 [*application to fix date for hearing of appeal*] and 825 [*dismissal for failure to appeal or want of prosecution*] apply, with such modifications as the circumstances require, in respect of an appeal under section 830 [*summary conviction appeal*], except that on receiving an application by the person having the custody of an appellant described in section 819 [*application to fix date for hearing of appeal*] to appoint a date for the hearing of the appeal, the appeal court shall, after giving the prosecutor a reasonable opportunity to be heard, give such directions as it thinks necessary for expediting the hearing of the appeal.
R.S., 1985, c. C-46, s. 831; R.S., 1985, c. 27 (1st Supp.), s. 182.

– CCC

Notice of Appeal

Notice of appeal

815 (1) An appellant who proposes to appeal to the appeal court shall give notice of appeal in such manner and within such period as may be directed by rules of court.

Extension of time

(2) The appeal court or a judge thereof may extend the time within which notice of appeal may be given.
R.S., c. C-34, s. 750; 1972, c. 13, s. 66; 1974-75-76, c. 93, s. 89.

– CCC

Setting Dates

Application to fix date for hearing of appeal

819 (1) Where, in the case of an appellant who has been convicted by a summary conviction court and who is in custody pending the hearing of his appeal, the hearing of his appeal has not commenced within thirty days from the day on which notice of his appeal was given in accordance with the rules referred to in section 815 [*Notice of summary appeal to court of appeal*], the person having the custody of the appellant shall, forthwith on the expiration of those thirty days, apply to the appeal court to fix a date for the hearing of the appeal.

Order fixing date

(2) On receiving an application under subsection (1) [*application to fix date for hearing of appeal*], the appeal court shall, after giving the prosecutor a reasonable opportunity to be heard, fix a date for the hearing of the appeal and give such directions as it thinks necessary for expediting the hearing of the appeal.
R.S., c. 2(2nd Supp.), s. 16; 1974-75-76, c. 93, s. 92.

– CCC

Extension of Time

Extension of time

838 The appeal court or a judge thereof may at any time extend any time period referred to in section 830 [*summary conviction appeal*], 831 [*application of s. 816, 817, 819, 825 to s. 830 summary appeals*] or 832 [*appeal of summary appeal court – imposition of release order*].
R.S., 1985, c. C-46, s. 838; R.S., 1985, c. 27 (1st Supp.), s. 182.
[*annotation(s) added*]

– CCC

Adjournments

Adjournment

824 The appeal court may adjourn the hearing of an appeal from time to time as may be necessary.
R.S., c. C-34, s. 756.

– CCC

Enforcing Orders

Enforcement of conviction or order by court of appeal

828 (1) A conviction or order made by the appeal court may be enforced

(a) in the same manner as if it had been made by the summary conviction court; or
(b) by process of the appeal court.

Enforcement by justice

(2) Where an appeal taken against a conviction or order adjudging payment of a sum of money is dismissed, the summary conviction court that made the conviction or order or a justice for the same territorial division may issue a warrant of committal as if no appeal had been taken.

Duty of clerk of court

(3) When a conviction or order that has been made by an appeal court is to be enforced by a justice, the clerk of the appeal court shall send to the justice the conviction or order and all writings relating to that conviction or order, except the notice of intention to appeal and any undertaking, release order or recognizance.
R.S., c. C-34, s. 760; 2019, c. 25, s. 326.

– CCC

Enforcement

835 (1) Where the appeal court renders its decision on an appeal, the summary conviction court from which the appeal was taken or a justice exercising the same jurisdiction has the same authority to enforce a conviction, order or determination that has been affirmed, modified or made by the appeal court as the summary conviction court would have had if no appeal had been taken.

Idem

(2) An order of the appeal court may be enforced by its own process.
R.S., 1985, c. C-46, s. 835; R.S., 1985, c. 27 (1st Supp.), s. 182.

– CCC

Dismissal of Appeal

Dismissal for failure to appear or want of prosecution

825 The appeal court may, on proof that notice of an appeal has been given and that

> (a) the appellant has failed to comply with any order made under section 816 [*release order for appellant*] or 817 [*recognizance of prosecutor*] or with the conditions of any undertaking or recognizance given or entered into as prescribed in either of those sections, or
> (b) the appeal has not been proceeded with or has been abandoned,

order that the appeal be dismissed.

R.S., c. C-34, s. 757; R.S., c. 2(2nd Supp.), s. 18.

– CCC

Costs

Costs

826 Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.
R.S., c. C-34, s. 758.

– CCC

To whom costs payable, and when

827 (1) Where the appeal court orders the appellant or respondent to pay costs, the order shall direct that the costs be paid to the clerk of the court, to be paid by him to the person entitled to them, and shall fix the period within which the costs shall be paid.

Certificate of non-payment of costs

(2) Where costs are not paid in full within the period fixed for payment and the person who has been ordered to pay them has not been bound by a recognizance to pay them, the clerk of the court shall, on application by the person entitled to the costs, or by any person on his behalf, and on payment of any fee to which the clerk of the court is entitled, issue a certificate in Form 42 [*forms*] certifying that the costs or a part thereof, as the case may be, have not been paid.

Committal

(3) A justice having jurisdiction in the territorial division in which a certificate has been issued under subsection (2) [*certificate of non-payment of costs*] may, on production of the certificate, by warrant in Form 26 [*forms*], commit the defaulter to imprisonment for a term not exceeding one month, unless the amount of the costs and, where the justice thinks fit so to order, the costs of the committal and of conveying the defaulter to prison are sooner paid.
R.S., c. C-34, s. 759.
[*annotation(s) added*]

– CCC

Misc Provisions

Certain sections applicable to appeals

822 (1) Where an appeal is taken under section 813 [*appeal by defendant, informant or Attorney General*] in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689 [*certain powers of court of appeal*], with the exception of subsections 683(3) [*powers of court of appeal – other powers*] and 686(5) [*new trial under Part XIX*], apply, with such modifications as the circumstances require.

New trial

(2) Where an appeal court orders a new trial, it shall be held before a summary conviction court other than the court that tried the defendant in the first instance, unless the appeal court directs that the new trial be held before the summary conviction court that tried the accused in the first instance.

Order of detention or release

(3) Where an appeal court orders a new trial, it may make such order for the release or detention of the appellant pending the trial as may be made by a justice pursuant to section 515 and the order may be enforced in the same manner as if it had been made by a justice under that section, and the provisions of Part XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] apply with such modifications as the circumstances require to the order.

Trial de novo

(4) Despite subsections (1) to (3) [*provisions re procedure to s. 813 summary trial appeals*], if an appeal is taken under section 813 [*appeal by defendant, informant or Attorney General*] and because of the condition of the record of the trial in the summary conviction court or for any other reason, the appeal court, on application of the defendant, the informant, the Attorney General or the Attorney General's agent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a trial de novo, the appeal court may order that the appeal shall be heard by way of trial de novo in accordance with any rules that may be 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*], and for that purpose the provisions of sections 793 to 809 [*provisions re conducting and disposing of summary conviction trial*] apply, with any modifications that the circumstances require.

Former evidence

(5) The appeal court may, for the purpose of hearing and determining an appeal under subsection (4) [*Section 813 summary trial appeal – trial de novo*], permit the evidence of any witness taken before the summary conviction court to be read if that evidence has been authenticated in accordance with section 540 [*taking evidence by preliminary inquiry judge*] and if

(a) the appellant and respondent consent,

(b) the appeal court is satisfied that the attendance of the witness cannot reasonably be obtained, or
(c) by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced,

and any evidence that is read under the authority of this subsection has the same force and effect as if the witness had given the evidence before the appeal court.

Appeal against sentence

(6) Where an appeal is taken under subsection (4) [*Section 813 summary trial appeal – trial de novo*] against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against and may, on such evidence, if any, as it thinks fit to require or receive, by order,

(a) dismiss the appeal, or
(b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and in making any order under paragraph (b), the appeal court may take into account any time spent in custody by the defendant as a result of the offence.

General provisions re appeals

(7) The following provisions apply in respect of appeals under subsection (4) [*Section 813 summary trial appeal – trial de novo*]:

(a) where an appeal is based on an objection to an information or any process, judgment shall not be given in favour of the appellant

(i) for any alleged defect therein in substance or in form, or
(ii) for any variance between the information or process and the evidence adduced at the trial,

unless it is shown

(iii) that the objection was taken at the trial, and
(iv) that an adjournment of the trial was refused notwithstanding that the variance referred to in subparagraph (ii) had deceived or misled the appellant; and

(b) where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect.

R.S., 1985, c. C-46, s. 822; 1991, c. 43, s. 9; 2002, c. 13, s. 83.

– CCC

830
[*omitted (1), (2) and (3)*]

Rights of Attorney General of Canada

(4) The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this section.
R.S., 1985, c. C-46, s. 830; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

– CCC

Superior Court Rules re Summary Conviction Appeals

- NS: Civil Procedure Rules Rule 7 and 63
- ON: Criminal Proceedings Rules for the Superior Court of Justice (Ontario), SI/2012-7 Rules 40 to 49

Appeal Procedure For Indictable Convictions

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< Procedure and Practice < Appeals

General Principles

Source of Authority

The Court of Appeal is a court of inherent jurisdiction and is not recognized in common law. It is a "creature of statute" where its powers to hear cases and make orders must come from statute. [1]

Under s. 683, the Court of Appeal's main powers consists of the authority to:

- order the production of any writing, exhibit or other thing connected with the proceedings;
- "order any witness ... to attend and be examined before the court of appeal..." and admit the testimony as evidence;
- order an inquiry and report to a special commissioner and to act on such a report; and,
- amend an indictment

The court also has "ancillary" authority to control its own process. [2]

1. *R v W(G)*, 1999 CanLII 668 (SCC), [1999] 3 SCR 597, *per* Lamer CJ, at para 8 - power of

CA to hear criminal appeals is statutory *Kourtessis v M.N.R.*, 1993 CanLII 137 (SCC), [1993] 2 SCR 53, *per* La Forest J, at pp. 69-70

R v Meltzer, 1989 CanLII 68 (SCC), [1989] 1 SCR 1764, *per* McIntyre J, at p. 1773

2. e.g. *R v Zaharia*, 1986 CanLII 4633, 25 CCC (3d) 149, *per* Zuber JA

Notice of Appeal

Section 678 provides a requirement that anyone filing an appeal to the Court of Appeal must provide notice:

> **Notice of appeal**
>
> 678 (1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.
>
> **Extension of time**
>
> (2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given. R.S., c. C-34, s. 607; 1972, c. 13, s. 53; 1974-75-76, c. 105, s. 16.
>
> – CCC

Provincial rules of court set out the notice requirements for each appealing party such as the form of notice, the form of service, and the time limit of service.[1]

Form of Notice

The notice must always take the form of notice in writing. It will typically have to include details such as:

- the charges being appealed
- the venue in which the trial took place, such as the level of court, the presiding judge or justice, dates of the proceeding, and the result of trial;
- the grounds of appeal, including the governing sections of the Code.

Whether service must be personally upon the accused or their counsel will vary between jurisdictions. Similarly, whether the Crown needs to be served at all or whether the Court will automatically serve notice upon the Crown on behalf of the appellant will vary from province to province.

Where the Respondent Cannot Be Found

Service where respondent cannot be found

678.1 Where a respondent cannot be found after reasonable efforts have been made to serve the respondent with a notice of appeal or notice of an application for leave to appeal, service of the notice of appeal or the notice of the application for leave to appeal may be effected substitutionally in the manner and within the period directed by a judge of the court of appeal.
R.S., 1985, c. 27 (1st Supp.), s. 140; 1992, c. 1, s. 60(F).

– CCC

Rules may permit substituted service on notice, but when they do, they require a high standard of proof.[2]

1. E.g.
   NS: Rule 91.04 Civil Procedure Rules

2. e.g. see *R v Goodhart*, 2012 ABQB 712 (CanLII), *per* Wilson J - substituted notice to accused quashed

Late Notice

Section 678(2) provides that where late notice is given:

678
[*omitted (1)*]

Extension of time

(2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.
R.S., c. C-34, s. 607; 1972, c. 13, s. 53; 1974-75-76, c. 105, s. 16.

– CCC

An extension of time for filing and service of notice of appeal typically consideration of: [1]

(a) Whether the applicant showed a bona fide intention to appeal within the appeal period;
(b) Whether the applicant has acted with reasonable diligence or has reasonable excuse for delay; and
(c) Whether there is merit to the proposed appeal.

The principle of "finality" recognizes that due process has temporal limits and can be extinguished in time.[2]

An alternative list of considerations includes the following:[3]

> (a) Whether the applicant formed a bona fide intention to appeal and communicated that intention to the opposing party within the prescribed time;
> (b) Whether counsel moved diligently;
> (c) Whether a proper explanation for the delay has been offered;
> (d) The extent of the delay;
> (e) Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
> (f) The merits of the proposed appeal.

Merit

The factor of merit to the appeal is not a "difficult threshold". It only requires that the appellant show a "realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal".[4] In New Brunswick, it must "demonstrate a serious chance of success".[5] While in Saskatchewan, it must have a "reasonably arguable ground"[6]

In determining if there is an "arguable issue", the issue should be "reasonably specific". The chambers judge should not consider "evidence nor arguments relevant to the outcome".[7]

Open-Ended List

The factors are not a fixed list.[8] Other suggested factors include:[9]

1. whether the consequences of conviction were out of proportion to the penalty imposed;
2. whether the Crown will be prejudiced; and
3. whether the applicant has “taken the benefit of the judgment:”

The judge has no jurisdiction to correct service retroactively.[10]

If "service of the notice of appeal is out of time and thereafter an order is made extending the time for service, the notice of appeal must be re-served within the extended time".[11]

1. *R v Donaldson*, 2005 SKQB 479 (CanLII), 273 Sask R 12, *per* Currie J
   R v Menear, 2002 CanLII 7570 (ON CA), [2002] OJ No 244, *per curiam*, at para 20
   R v Spencer, 2015 NSCA 99 (CanLII), *per* Fichaud JA
   R v REM, 2011 NSCA 8 (CanLII), 947 APR 258, *per* Beveridge JA
2. *R v Letiec*, 2015 ABCA 123 (CanLII), 322 CCC (3d) 306, *per* Wakeling JA, at para 7
   R v Canto, 2015 ABCA 306 (CanLII), 329 CCC (3d) 169, *per* Slatter JA, at para 10
3. *R v Chan*, 2012 ABCA 250 (CanLII), 292 CCC (3d) 19, *per* Slatter JA, at para 24
4. *Spencer*, *supra*, at paras 12 to 13
5. *R v Stapleton* (2000) 225 NBR (2d) 260(*no CanLII links)
6. *R v Brittain*, 2008 SKCA 104 (CanLII), 311 Sask R 175, *per* Richards JA
7. *Coughlan v Westminer*, 1993 CanLII 3254 (NS CA), 349 APR 171, *per* Freeman JA, at para 11
8. *Donaldson*, *supra*, at para 18
   Menear, *supra*, at para 20
   Blin v Boudreau, 2015 NSCA 78 (CanLII), *per* Bryson JA, at para 6- re civil appeal extension, using same test
9. *Donaldson*, *supra*, at para 18

10. *R v Bouchard*, 2012 ONSC 7174 (CanLII), *per* Pierce J, at para 10
    R v Holmes, 1982 CanLII 1977 (ON CA), 2 CCC (3d) 471, *per* Martin JA cf. *R v Vinet*, 2011 BCSC 1928 (CanLII), *per* Schultes J
11. *Holmes*, *supra*

Extention of Time to Appeal

The provincial rules of court will generally govern the requirements for appeal, including time limitations.

The Court of Appeal has the discretion to extend the period of time to appeal. It is necessary that the extension be "in the interests of justice".[1]

The court may look at whether there was a *bona fide* intention to appeal within the time limitation and there was a reasonable excuse for the delay.[2]

The presence of communication with the opposing party of an intention to appeal will be a factor to consider on the exercise of discretion to extent the period of time to appeal.[3]

Crown Extention

In most cases, the Crown seeks extention on the basis that the respondent is unavailable to be served with notice of appeal.[4]

1. *R v REM*, 2011 NSCA 8 (CanLII), 947 APR 258, *per* Beveridge JA
2. *R v RA*, 2020 NSCA 3 (CanLII), *per* Beveridge JA, at para 11
   REM, *supra*, at para 39 ("Both in Nova Scotia, and elsewhere, the criteria to be considered in the exercise of this discretion has been generally the same. The Court should consider such issues as whether the applicant has demonstrated he had a bona fide intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the merits of the proposed appeal.")
3. *RA*, *supra*, at para 24
   R v Roberge, 2005 SCC 48 (CanLII), [2005] 2 SCR 469
4. *RA*, *supra*, at para 13

Report by Trial Judge

The Court of Appeal may order provincial court judge to make a report relating to a case:

> **Report by judge**
>
> 682 (1) Where, under this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*], an appeal is taken or an application for leave to appeal is made, the judge or provincial court judge who presided at the trial shall, at the request of the court of appeal or a judge thereof, in accordance with rules of court, furnish it or him with

a report on the case or on any matter relating to the case that is specified in the request.
[*omitted (2), (3), (4) and (5)*]
R.S., 1985, c. C-46, s. 682; R.S., 1985, c. 27 (1st Supp.), ss. 143, 203; 1997, c. 18, s. 96.
[*annotation(s) added*]

– CCC

Section 682 is considered a "historical anachronism" from the days when full transcripts of decisions were rare.[1] It should only be permitted "where something has occurred which is not reflected on the record upon which opposing counsel cannot agree".[2]

It should be used "rarely" and has a tendency to do more to influence the Court of Appeal rather than assist the Court.[3]

1. *R v AWE*, 1993 CanLII 65 (SCC), [1993] 3 SCR 155, *per* Cory J, at para 190
2. *AWE*, *ibid.*, at paras 191 to 192
3. *R v Dhillon*, 2014 BCCA 182 (CanLII), *per* Levine JA

Amending Indictments or Informations

It is section 683(1)(g), not section 686(1)(b)(i), that provides an appeal court with the authority to amend an indictment or information on appeal. In deciding whether to amend, an appeal court should consider:[1]

1. the original indictment;
2. the evidence at trial;
3. the positions of the parties at trial;
4. the instructions of the trial judge;
5. the verdict of the jury; and
6. the issues raised on appeal.

1. *R v Fraser*, 2007 SKCA 113 (CanLII), 411 WAC 210, *per* Klebuc JA, at para 60

Consequently, the remedial provisions of s. 686 are also applicable when considering a defence appeal against conviction, unfitness or NCR verdict the court is guided by s. 686:

Powers

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
(iii) on any ground there was a miscarriage of justice;

[*omitted (b), (c), (d) and (e)*]

[*omitted (2), (3), (4), (5), (5.01), (5.1), (5.2), (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26.

– CCC

Disclosure Motion

An accused may apply to the court of appeal for an order of disclosure, usually in the context of a fresh evidence application.

Third party records can be obtained through an application under s. 683. These production orders apply the same law as at trial level.[1] The applicant must show:[2]

1. There is a connection between the request for production and the fresh evidence he proposes to adduce in that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence; and
2. There is a reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal.

1. *R v Trotta*, 2004 CanLII 60014 (ON CA), [2004] OJ No 2439 (CA), *per* Doherty JA
2. *R v Hobbs*, 2010 NSCA 32 (CanLII), 916 APR 327, *per* Beveridge JA, at para 28

Re-opening an Appeal

The Court of Appeal has "inherent jurisdiction to re-open an appeal".[1] It is an "extraordinary power" that is to be "exercised rarely" and requires "the demonstration of a potential miscarriage of justice".[2]

Factors to consider include:[3]

1. Finality is a primary but not always determinative factor.
2. The interests of justice include finality and the risk of a miscarriage of justice.
3. The applicant must make out a clear and compelling case to justify a re-opening.
4. If the case has been heard on the merits the applicant must show that the court overlooked or misapprehended the evidence or an argument.

5. The error must go to a significant aspect of the case.

There should be a demonstrated "potential miscarriage of justice".[4]

1. *R v Chudley (#1)*, 2016 BCCA 142 (CanLII), *per curiam*, at para 3
   R v Chudley (#2), 2015 BCCA 391 (CanLII), 125 WCB (2d) 129, *per* Donald JA, at para 9
   R v Hummel, 2003 YKCA 4 (CanLII), 175 CCC (3d) 1, *per* Donald J
2. *Chudley (#1)*, *supra*, at para 3
3. *Chudley (#2)*, *supra*, at para 9
   Hummel, *supra*, at para 24
4. *Chudley (#2)*, *supra*, at para 10
   R v Jahanrakhshan, 2013 BCCA 398 (CanLII), *per* Donald J, at para 5

Dissents

Specifying grounds of dissent

677 Where a judge of the court of appeal expresses an opinion dissenting from the judgment of the court, the judgment of the court shall specify any grounds in law on which the dissent, in whole or in part, is based.
R.S., 1985, c. C-46, s. 677; 1994, c. 44, s. 67.

– CCC

Summary Dismissal

Summary determination of frivolous appeals

685 (1) Where it appears to the registrar that a notice of appeal, which purports to be on a ground of appeal that involves a question of law alone, does not show a substantial ground of appeal, the registrar may refer the appeal to the court of appeal for summary determination, and, where an appeal is referred under this section, the court of appeal may, if it considers that the appeal is frivolous or vexatious and can be determined without being adjourned for a full hearing, dismiss the appeal summarily, without calling on any person to attend the hearing or to appear for the respondent on the hearing.

Summary determination of appeals filed in error

(2) If it appears to the registrar that a notice of appeal should have been filed with another court, the registrar may refer the appeal to a judge of the court of appeal for summary determination, and the judge may dismiss the appeal summarily

without calling on any person to attend the hearing or to appear for the respondent on the hearing.
R.S., 1985, c. C-46, s. 685; 2008, c. 18, s. 30.

– CCC

The Court of Appeal may dismiss without reasons where they are of the view, after reading written and oral submissions, that the appeal is frivolous or vexatious.[1]

The court may further order that the appellant be prohibited from filing any further appeals without the permission of a member of the court.[2]

1. e.g. *R v Olumide*, 2017 ABCA 366 (CanLII), *per curiam*
2. e.g. *Olumide*, *ibid.*

Representation and Attendance on Appeal

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Attendance on Appeal to Summary Conviction Appeal Court or Court of Appeal

Section 688 addresses the right of an appellant to attend personally. By function of s. 813, the section equally applies to a summary conviction appeal court as well.[1]

Right of appellant to attend

688 (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

Appellant represented by counsel

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

> (a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,
> (b) on an application for leave to appeal, or
> (c) on any proceedings that are preliminary or incidental to an appeal,

unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

Manner of appearance

(2.1) In the case of an appellant who is in custody and who is entitled to be present at any proceedings on an appeal, the court may order that, instead of the appellant personally appearing,

> (a) at an application for leave to appeal or at any proceedings that are preliminary or incidental to an appeal, the appellant appear by audioconference or videoconference, if the technological means is satisfactory to the court; and
> (b) at the hearing of the appeal, if the appellant has access to legal advice, they appear by closed-circuit television or videoconference.

Argument may be oral or in writing

(3) An appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case of argument so presented.

Sentence in absence of appellant

(4) A court of appeal may exercise its power to impose sentence notwithstanding that the appellant is not present.

R.S., 1985, c. C-46, s. 688; 2002, c. 13, s. 68; 2019, c. 25, s. 283.
[*annotation(s) added*]

– CCC

Telepresence

683
[*omitted (1) and (2)*]

Virtual presence of parties

(2.1) In proceedings under this section, the court of appeal may order that the presence of a party may be by any technological means satisfactory to the court that permits the court and the other party or parties to communicate simultaneously.
[*omitted (2.1), (2.2), (2.3), (3), (4), (5), (5.1), (6) and (7)*]
R.S., 1985, c. C-46, s. 683; R.S., 1985, c. 27 (1st Supp.), s. 144, c. 23 (4th Supp.), s. 5; 1995, c. 22, s. 10; 1997, c. 18, ss. 97, 141; 1999, c. 25, s. 15(Preamble); 2002, c. 13, s. 67; 2008, c. 18, s. 29.

– CCC

Attendance on Appeal to the Supreme Court of Canada

Right of appellant to attend

694.2 (1) Subject to subsection (2) [*appellant in custody represented by counsel not entitled to attend SCC*], an appellant who is in custody and who desires to be present at the hearing of the appeal before the Supreme Court of Canada is entitled to be present at it.

Appellant represented by counsel

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present before the Supreme Court of Canada

(a) on an application for leave to appeal,
(b) on any proceedings that are preliminary or incidental to an appeal, or
(c) at the hearing of the appeal,

unless rules of court provide that entitlement or the Supreme Court of Canada or a judge thereof gives the appellant leave to be present.

R.S., 1985, c. 34 (3rd Supp.), s. 13.
[*annotation(s) added*]

– CCC

Court Appointed Counsel for Appeals

Section 684(1) provides:

Legal assistance for appellant

684 (1) A court of appeal or a judge of that court may ... assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that

assistance.
[*omitted (2) and (3)*]
R.S., 1985, c. C-46, s. 684; R.S., 1985, c. 34 (3rd Supp.), s. 9.

– CCC

The elements of s. 684 consist of:[2]

1. Does the applicant have the means to hire counsel privately?
2. Has the applicant advanced arguable grounds of appeal?
3. Does the applicant have the ability to effectively advance his or her appeal without the assistance of counsel?

Burden

The onus is upon the applicant to prove all requirements of s. 684.[3]

1. *R v Pomeroy*, 2007 BCCA 142 (CanLII), 218 CCC (3d) 400, *per* Donald JA, at para 25 - sections 683 to 689 apply with some exception to SCAC
2. *R v McCullough*, 2017 ONCA 315 (CanLII), *per* Lauwers JA, at para 7
   R v Staples, 2016 ONCA 392 (CanLII), 352 OAC 392, *per* Gilese JA, at para 34
3. *R v Abbey*, 2013 ONCA 206 (CanLII), 115 OR (3d) 13, *per* Watt JA, at para 31
   McCullough, *supra*, at para 8

"Interests of Justice"

The "interests of justice" requirement is highly context dependent.[1] It is an exercise of judicial discretion.[2]

The “interests of justice” consists of many factors including:[3]

- the points to be argued on appeal; are the points arguable?[4]
- the complexity of the case based on "grounds of appeal, the length and content of the record, the legal principles involved, and their application to the facts"[5]
- the appellant's capability to advance his appeal considering his level of education and his competency; Can he "effectively present his appeal without ... counsel" based on "ability to comprehend, communicate, and apply legal principles to the facts";[6]
- whether the assistance of counsel is necessary in order to marshal the evidence and make the argument; [7]
- whether court has capacity to decide appeal without assistance of counsel.[8]
- the nature and extent of the penalty imposed; [9]
- the merits of the appeal[10]
- the court’s role to assist[11]

- responsibility of Crown counsel to ensure that the applicant is treated fairly.[12]

Merits of the Case

There must be at minimum an "arguable" case.[13] An "arguable" case is not one that "will succeed". It is only one that is not "frivolous".[14]

1. *R v Abbey*, 2013 ONCA 206 (CanLII), 303 OAC 335, *per* Watt JA, at para 29 (it is a "legal chameleon that takes its meaning from its surroundings")
2. *Abbey*, *ibid.*, at para 29 (it “contemplates a judicial discretion exercisable on a case-by-case basis”)
3. *R v Donald*, 2008 BCCA 316 (CanLII), 258 BCAC 117, *per* Saunders JA, at paras 10 to 15
   R v Hoskins, 2012 BCCA 51 (CanLII), 315 BCAC 238, *per* Garson JA
   R v Assoun, 2002 NSCA 50 (CanLII), 53 WCB (2d) 267, *per* Cromwell JA
   R v Morton, 2010 NSCA 103 (CanLII), 943 APR 65, *per* MacDonald JA
   see E.G. Ewaschuk, Criminal Pleadings & Practice in Canada, loose-leaf, 2nd ed., vol. 3 (Aurora: Canada Law Book, 2014) at s. 23:3035
   R v Bernardo, 1997 CanLII 2240 (ON CA), 121 CCC (3d) 123, *per* Doherty JA
   R v Leroux, 2014 SKCA 60 (CanLII), 438 Sask R 162, *per* Jackson JA, at para 29
4. *Donald*, *ibid.*
   Hoskins, *ibid.*
   R v Martin, 2015 NSCA 82 (CanLII), *per* Farrar JA
5. Donald, *Hoskins*, *supra*
   R v Miller, 2015 NSCA 19 (CanLII), *per* Fichaud JA
   Assou, *supra*n
6. *Donald*, *supra*
   Hoskins, *supra*
   Assoun, *supra*
   Miller, *supra*
   Leroux, *supra*, at para 30
   R v Pendergast, 2003 NLCA 66 (CanLII), 693 APR 13, *per* Rowe JA
7. Donald, Hoskins
8. Miller
   Martin
9. *Donald*, *supra*
   Hoskins, *supra*
10. *Donald*, *supra*
    Hoskins, *supra*
11. *Assoun*, *supra*
12. *Morton*, *supra*
    Miller, *supra*
    Martin, *supra*
13. *R v Bernardo*, 1997 CanLII 2240 (ON CA), 121 CCC (3d) 123, *per* Doherty JA, at para 21
    R v Chappell, 2010 PECA 18 (CanLII), *per* McQuaid JA, at para 22
    R v Buckingham, 2004 PESCAD 21 (CanLII), 717 APR 300{perPECA|McQuaid JA}}, at paras 11 and 31
14. *Buckingham*, *ibid.*, at para 16

See Also

- Remote Attendance at the Court of Appeal

Appellate Evidence

This page was last substantively updated or reviewed *January 2021*. (Rev. # 79478)

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General Principles

The Court of Appeal has powers to take receive evidence under s. 683. This consists of the authority to:

- order the production of any writing, exhibit or other thing connected with the proceedings;
- "order any witness ... to attend and be examined before the court of appeal..." and admit the testimony as evidence;
- order an inquiry and report to a special commissioner and to act on such a report.

Powers of court of appeal

683 (1) For the purposes of an appeal under this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*], the court of appeal may, where it considers it in the interests of justice,

(a) order the production of any writing, exhibit or other thing connected with the proceedings;
(b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,

(i) to attend and be examined before the court of appeal, or
(ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;

(c) admit, as evidence, an examination that is taken under subparagraph (b) (ii) [*compel witnesses to be examined by a judge or appointee of Court of Appeal*];
(d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;
(e) order that any question arising on the appeal that

(i) involves prolonged examination of writings or accounts, or scientific or local investigation, and
(ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal,

be referred for inquiry and report, in the manner provided by rules of court, to a special commissioner appointed by the court of appeal;
(f) act on the report of a commissioner who is appointed under paragraph (e) [*order question be referred to inquiry by a commissioner*] in so far as the court of appeal thinks fit to do so; and
(g) amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.

Parties entitled to adduce evidence and be heard

(2) In proceedings under this section, the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under paragraph (1)(e) [*order question be referred to inquiry by a commissioner*], are entitled to be present during the inquiry, to adduce evidence and to be heard.

[*omitted (2.1), (2.2), (2.3), (3), (4), (5), (5.1), (6), and (7)*]
R.S., 1985, c. C-46, s. 683; R.S., 1985, c. 27 (1st Supp.), s. 144, c. 23 (4th Supp.), s. 5; 1995, c. 22, s. 10; 1997, c. 18, ss. 97, 141; 1999, c. 25, s. 15(Preamble); 2002, c. 13, s. 67; 2008, c. 18, s. 29; 2019, c. 25, s. 281.

– CCC[1]

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1. s. 683 was previously s. 610, R.S.C. 1970, c. C-34. see Table of Concordance (Criminal Code)

Compelling Evidence

Under s. 683(1)(b), a Court of Appeal may order the production of materials.[1] The test to permit the production of records requires that the applicant satisfy the following:[2]

1. "demonstrate a connection between the Request for Production and the fresh evidence he proposes to adduce";
2. "that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence"; and
3. "it must be demonstrated that there is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal".

This authority does not permit the court to compel a trial witness tot attend a specified place and provide a sample of his voice for comparison purposes.[3]

1. *R v Travers*, 2019 NSCA 56 (CanLII), *per* Farrar JA, at para 24
2. *R v Trotta*, 2004 CanLII 60014 (ON CA), [2004] OJ No 2439, *per* Doherty JA, at para 25
3. *R v Karimi*, 2014 ONCA 133 (CanLII), *per curiam*

Fresh Evidence

The test for the admission of fresh evidence is set out as follows: [1]

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

3. The evidence must be credible in the sense that it is reasonably capable of belief, and
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Where however, the application arises out of the Crown's failure to provide disclosure, then test is less onerous.[2] The accused must show that his right to make full answer and defence was violated by showing either "that there is a reasonable possibility the non-disclosure affected the outcome at trial" or that it affected "the overall fairness of the trial process".[3]

The Palmer criteria are somewhat relaxed when the issue concerns the integrity of the trial process.[4]

Due Diligence

The due diligence criteria is to be applied flexibly when there is a risk of a miscarriage of justice.[5]

Appeal of Sentence

A sentence appeal is permitted under s. 687. Where the defence counsel failed to put forward evidence relating to collateral immigration consequences, the court should generally allow for fresh evidence.[6]

A failure by Crown to exercise due diligence to seek out and put a youth record to the sentencing judge in an adult matter may be remedied by a fresh evidence application at the appeal hearing.[7]

1. *R v Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, *per* McIntyre J (9:0), at p. 775 [cited to SCR}]
   R v Levesque, 2000 SCC 47 (CanLII), [2000] 2 SCR 487, *per* Gonthier J (6:1)
   R v Hay, 2013 SCC 61 (CanLII), [2013] 3 SCR 694, *per* Rothstein J (7:0), at para 63
   R v Truscott, 2007 ONCA 575 (CanLII), 225 CCC (3d) 321, *per curiam* (5:0), at para 245
   R v Garcia, 2018 ONCA 580 (CanLII), *per curiam* (3:0), at para 2
   R v Trotta, 2004 CanLII 60014 (ON CA), [2004] OJ No 2439
2. *R v McQuaid, (sub nom R v Dixon)*, 1998 CanLII 805 (SCC), [1998] 1 SCR 244, *per* Cory J (5:0), at p. 34
   R v Taillefer, 2003 SCC 70 (CanLII), [2003] 3 SCR 307, *per* LeBel J (9:0)
   R v Illes, 2008 SCC 57 (CanLII), [2008] 3 SCR 134, *per* LeBel and Fish JJ (4:3), at para 24
3. *McQuaid*, *supra*, at para 34
4. *R v Benham*, 2013 BCCA 276 (CanLII), 340 BCAC 26, *per* Frankel JA (3:0), at para 33
   R v Dunbar, 2003 BCCA 667 (CanLII), 191 BCAC 223, *per curiam* (3:0), at paras 33 to 37
5. *R v Fraser*, 2011 NSCA 70 (CanLII), 273 CCC (3d) 276, *per* Saunders JA (3:0), at para 36
6. *R v Pham*, 2013 SCC 15 (CanLII), [2013] 1 SCR 739
7. *R v Tamoikin*, 2020 NSCA 43 (CanLII), *per* Van den Eynden J

Post-Sentence Evidence

The courts are reluctant to consider fresh evidence on appeal as it is outside of the appeal court's role.[1]

There are four criteria to consider before allowing the evidence:[2]

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil

cases.
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue relating to the sentence.
3. The evidence must be credible in the sense that it is reasonably capable of belief.
4. The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

See also:*R v Power*, 2011 NLCA 68 (CanLII), 971 APR 31, *per* Welsh JA (3:0)

1. *R v Lévesque*, 2000 SCC 47 (CanLII), [2000] 2 SCR 487, *per* Gonthier J (6:1), at para 20
2. Levesque, at 35

Post-Sentence Report

The Court of Appeal has jurisdiction to order a post-sentence report under s. 687 or 721.[1] If it to be ordered under s. 721, the order should only be made once the court has received some evidence, such as by affidavit, establishing the basis for ordering the report.[2]

Where the ordering of a post-sentence report is in dispute the proper test is the same as for the admission of fresh evidence.[3]

1. *R v Taylor*, 2009 ABCA 254 (CanLII), 460 AR 266, *per* Côté JA (alone)
2. *Taylor*, *ibid.*
3. *R v Webster*, 2016 BCCA 218 (CanLII), *per* Frankel JA (3:0), at para 40
   R v Takhar, 2007 BCCA 423 (CanLII), 226 CCC (3d) 410, *per* Ryan JA (3:0), at para 14
   R v Radjenovic, 2013 BCCA 131 (CanLII), 573 WAC 93, *per* D Smith JA (3:0), at para 6

Interim Remedies Pending Appeal

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General Principles

The filing of a notice of appeal does not suspend the operation of any sentencing orders.[1]

1. *R v Trabulsey*, 1993 CanLII 14673 (ONSC), (1993), 16 OR (3d) 52, 84 CCC (3d) 240, *per* Watt J

Suspension of Sentences

Under s.683(5), the Court of Appeal has the power to suspend fine orders, forfeiture orders, restitution orders, victim fine surcharge, probation order, and conditional sentence orders, where it is in the interest of justice to do so:[1]

683
[*omitted (1), (2), (2.1), (2.2), (2.3), (3) and (4)*]

Power to order suspension

(5) If an appeal or an application for leave to appeal has been filed in the court of appeal, that court, or a judge of that court, may, when the court, or the judge, considers it to be in the interests of justice, order that any of the following be suspended until the appeal has been determined:

(a) an obligation to pay a fine;
(b) an order of forfeiture or disposition of forfeited property;
(c) an order to make restitution under section 738 [*restitution orders*] or 739 [*restitution orders*];
(d) an obligation to pay a victim surcharge under section 737 [*victim fine surcharge*];
(e) a probation order under section 731 [*probation orders*]; and
(f) a conditional sentence order under section 742.1 [*conditional sentence orders*].

Release order or recognizance

(5.1) Before making an order under paragraph (5)(e) [*powers of court of appeal – suspension of probation*] or (f) [*powers of court of appeal – suspension of CSO*], the court of appeal, or a judge of that court, may make a release order or order the offender to enter into a recognizance.

Revocation of suspension order

(6) The court of appeal may revoke any order it makes under subsection (5) [*powers of court of appeal – suspension of orders*] where it considers the revocation to be in the interests of justice.

Release order to be taken into account

(7) If the offender is subject to a release order under subsection (5.1) [*powers of court of appeal – release order or recog*], the court of appeal shall, in determining whether to vary the sentence of the offender, take into account the conditions of that order and the period for which they were imposed on the offender.
R.S., 1985, c. C-46, s. 683; R.S., 1985, c. 27 (1st Supp.), s. 144, c. 23 (4th Supp.), s. 5; 1995, c. 22, s. 10; 1997, c. 18, ss. 97, 141; 1999, c. 25, s. 15(Preamble); 2002, c. 13, s. 67; 2008, c. 18, s. 29; 2019, c. 25, s. 281.
[*annotation(s) added*]

– CCC

At any time when the "interests of justice" are served by the revocation of the suspension order, the accused may do so. (683(6))

Before any order is revoked under s. 683(5), the Court may consider placing the offender on an undertaking or recognizance.(s. 683(5.1)) The terms and conditions imposed upon the offender may be a factor when considering whether the vary the sentence. (683(7))

Variations of Court of Appeal Sentences

Variations of a conditional sentence imposed by a Court of Appeal should generally be done by the trial court.[2]

Variation of probation will not be considered where the reason for the suspension can equally be accomplished by an application to vary the order to the sentencing court.[3]

Interest of Justice

The merit to the appeal is a factor in considering the interest of justice. A low chance of success will weigh against suspending order.[4]

1. *R v Shaw*, 2014 ABCA 6 (CanLII), *per* O'Ferrall JA
2. *R v Barrett*, 2008 NLCA 23 (CanLII), 842 APR 308, *per* Welsh JA
3. *Shaw*, *supra*
4. *R v Shaw*, 2014 ABCA 6 (CanLII), *per* O'Ferrall JA, at para 10

Stay of Order Pending Appeal

Whether an order can by stayed pending appeal requires three findings:[1]

1. a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.
2. it must be determined whether the applicant would suffer irreparable harm if the application were refused.
3. an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits

A firearms prohibition may be the subject of a stay of proceedings.[2]

Interim Suspension of Orders

The ordering of interim measures on Charter appeal requires consideration on the following:[3]

1. "the seriousness of the question to be tried";
2. "the possibility of irreparable harm to the applicant if the interim order is refused"; and
3. "the balance of inconvenience caused to the parties by the interim order."

1. *R v Strongitharm*, 2013 NLCA 69 (CanLII), *per* Hoegg JA, at para 20
2. *R v Lupyrypa*, 2010 ABCA 264 (CanLII), 490 AR 59, *per* Berger JA

3. *143471 Canada Inc v Quebec (Attorney General); Tabah v Quebec (Attorney General)*, 1994 CanLII 89 (SCC), [1994] 2 SCR 339

Bail on Appeal

- See Bail Pending Appeal

Suspension of Restitution and Forfeiture

> **Restitution or forfeiture of property**
>
> 689 (1) If the trial court makes an order for compensation or for the restitution of property under section 738 [*restitution orders*] or 739 [*restitution orders*] or an order of forfeiture of property under subsection 164.2(1) [*forfeiture of property on conviction for s. 162.1, 163.1, 172.1 or 172.2*] or 462.37(1) [*order of forfeiture of proceeds of crime*] or (2.01) [*order of forfeiture of proceeds of crime – particular circumstances*], the operation of the order is suspended
>
> > (a) until the expiration of the period prescribed by rules of court for the giving of notice of appeal or of notice of application for leave to appeal, unless the accused waives an appeal; and
> > (b) until the appeal or application for leave to appeal has been determined, where an appeal is taken or application for leave to appeal is made.
>
> **Annulling or varying order**
>
> (2) The court of appeal may by order annul or vary an order made by the trial court with respect to compensation or the restitution of property within the limits prescribed by the provision under which the order was made by the trial court, whether or not the conviction is quashed.
> R.S., 1985, c. C-46, s. 689; R.S., 1985, c. 42 (4th Supp.), s. 5; 1995, c. 22, s. 10; 2002, c. 13, s. 69; 2005, c. 44, s. 12.
> [*annotation(s) added*]
>
> – CCC

Bail Pending Appeal

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79478)

< Procedure and Practice < Judicial Interim Release
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General Principles

Bail pending appeal may be initiated under the rules of court for the particular province.[1]

> **Release pending determination of appeal**
>
> 679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
>
> > (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678 [*requirements for notice to appeal*];
> > (b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
> > (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.
>
> [*omitted (2), (3), (4), (5), (5.1), (6), (7.1), (8), (9) and (10)*]
> R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
>
> [*annotation(s) added*]
>
> – CCC

Where the appeal is against sentence *only* (s. 679(1)(b)), the appellate judge must decide the issue of whether leave should be granted first. In any other circumstances leave does not need to be determined.

Burden

The burden is upon the offender to establish the grounds of release on a balance of probabilities.[2] Each criterion must be met on a balance of probabilities.[3] This shift of burden is because the presumption of innocence is no longer in effect upon conviction.[4]

1. e.g. Rule 19(4) of the Criminal Appeal Rules (BC)
   Rule 91.24 of the Civil Procedure Rules (NS)
2. *R v Chubbs*, 2013 NLCA 30 (CanLII), *per* Hoegg JA, at para 3
   R v Dow, 2013 NSCA 50 (CanLII), *per* Saunders JA, at para 10 citing numerous NS cases
   R v Brown, 2013 ABCA 256 (CanLII), 107 WCB (2d) 703, *per* O'Ferrall JA, at para 2
3. *R v Oland*, 2017 SCC 17 (CanLII), 347 CCC (3d) 257, *per* Moldaver J, at para 19 ("bears the burden of establishing that each criterion is met on a balance of probabilities")
4. *Dow*, *ibid.*, at para 10

Bail on Sentence Appeal

679
[*omitted (1), (2) and (3)*]

Idem

(4) In the case of an appeal referred to in paragraph (1)(b) [*appeal of sentence only*], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that

> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
> (b) he will surrender himself into custody in accordance with the terms of the order; and
> (c) his detention is not necessary in the public interest.

[*omitted (5), (5.1), (6), (7), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.

[*annotation(s) added*]

– CCC

Depending on the rules of court of each jurisdiction it may be required that the Court of Appeal grant leave to appeal before they can consider bail pending a hearing on the merits of appeal.[1]

Leave Required

seeking bail on a sentence appeal requires the applicant to obtain leave. The burden is not onerous and does not require showing "sufficient merit" as referenced in s. 679(4)(a).[2]

"sufficient merit"

The standard of "sufficient merit" considers the time spent in jail pending appeal and whether that time is greater than the time in jail for a fit and proper sentence.[3]

1. NS: *R v KMF*, 2018 NSCA 58 (CanLII), *per* Farrar JA in Chambers ("[17] K.M.F. is only appealing her sentence. Before she can seek bail pending appeal I must grant leave to appeal.") -- applying 91.24 (1) of the NS Civil Procedure Rules
2. *R v Mauger*, 2017 NSCA 94 (CanLII), *per* Van den Eynden JA
3. *Mauger*, *ibid.*

Bail on Reference

679
[*omitted (1), (2), (3), (4), (5), (5.1) and (6)*]

Release or detention pending hearing of reference

(7) If, with respect to any person, the Minister of Justice gives a direction or makes a reference under section 696.3 [*definition of court of appeal, powers of minister of justice*], this section applies to the release or detention of that person pending the hearing and determination of the reference as though that person were an appellant in an appeal described in paragraph (1)(a) [*release pending appeal – against conviction*].
[*omitted (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.

[*annotation(s) added*]

– CCC

Bail on Appeal of Conviction, Conviction and Sentence, or Appeal to Supreme Court of Canada

Section 679(3) sets out the grounds to consider on bail:[1]

679
[*omitted (1) and (2)*]

Circumstances in which appellant may be released

(3) In the case of an appeal referred to in paragraph (1)(a) [*appeal of conviction or conviction and sentence*] or (c) [*appeal to supreme court of canada*], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

(a) the appeal or application for leave to appeal is not frivolous;
(b) he will surrender himself into custody in accordance with the terms of the order; and
(c) his detention is not necessary in the public interest.

> [*omitted (4), (5), (5.1), (6), (7.1), (8), (9) and (10)*]
> R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
> [*annotation(s) added*]
>
> – CCC

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1. see also *R v Manasseri*, 2013 ONCA 647 (CanLII), 312 CCC (3d) 132, *per* Watt JA

Not Frivolous

The requirement of a non-frivolous appeal is made out where the appeal raises "arguable issues" that has a "viable ground". This does not require establishment of a "likelihood" of success.[1]

It is only necessary that it be shown that the appeal will "not necessarily fail".[2] Or to put in another way, it is "an appeal that one can say with confidence cannot possibly succeed".[3]

1. *R v HB*, 2014 ONCA 334 (CanLII), *per* Lauwers JA, at para 3
   R v Manasseri, 2013 ONCA 647 (CanLII), 312 CCC (3d) 132, *per* Watt JA, at para 38
2. *R v Passey*, 1997 ABCA 343 (CanLII), 121 CCC (3d) 444, *per* Berger JA, at para 7
   R v Iyer, 2016 ABCA 407 (CanLII), AJ No 1319, *per* Greckol JA, at para 8
3. *Iyer*, *ibid.*, at para 8

Public Interest

The public interests criterion has two components: 1) public safety and 2) public confidence in the administration of justice.[1]

The third factor takes into account the appellant's risk to reoffend, the strength of his case, the nature and circumstances of the offence, the circumstances of the appellant himself, delay and its impact, post-charge conduct, the possible terms of release, and the impact of release on the confidence of the public in the administration of justice.[2]

1. *R v Forcillo*, 2016 ONCA 606 (CanLII), *per curiam*, at para 9
   R v Oland, 2017 SCC 17 (CanLII), [2017] 1 SCR 250, *per* Moldaver J, at paras 23 to 27
   R v Farinacci, 1993 CanLII 3385 (ON CA), 67 OAC 197 (CA), *per* Arbour JA
2. *R v LSR*, 2008 SKCA 77 (CanLII), 311 Sask R 142, *per* Jackson JA
   R v Toy, 2009 SKCA 32 (CanLII), 331 Sask R 1, *per* Wilkinson JA

Public Safety

The risk of re-offence relates to risk to others or the administration of justice.[1]

Consideration will include prior criminal record and history of compliance while on release conditions.[2]

1. *R v Forcillo*, 2016 ONCA 606 (CanLII), *per curiam*, at para 10
   R v Iyer, 2016 ABCA 407 (CanLII), AJ No 1319, *per* Greckol JA, at para 15 ("This involves the likelihood of re-offence or harm to the public if [accused] is released")
2. e.g. *Iyer*, *ibid.*, at para 15

Confidence in the Administration of Justice

The analysis should balance the need to review a conviction leading to imprisonment and the need to have immediately enforced judgments.[1]

This is characterized as a weighing the two competing interests of enforceability and reviewability.[2] This balancing involves a "qualitative and contextual exercise, with no precise formula".[3]

The interest of reviewability concerns the interests of the accused not to serve "all or a significant part of a custodial sentence only to find out on appeal that the conviction ... was unlawful" and to acknowledge that the system is no infallible.[4]

The public's confidence in the administration of justice requires that judgments to be enforced.[5] So too does it require that judgments be reviewed and errors be corrected.[6]

This element is usually the most important when dealing with more serious offences with greater penalties.[7] A more serious offence who advances an arguable but weak ground, will side on the denial of bail.[8] A murder conviction will "rarely" be granted relief on the public interest branch.[9] But where the grounds are strong and there is a "serious concern" of accuracy of the verdict. The public interest will side on granting bail, even in serious offences.[10]

Where safety and flight are negligible concerns and the grounds are "not frivolous", the interests in reviewability may overshadow the enforceability, even for murder.[11]

Circumstantial Factors

The factors to consider include:[12]

- ensuring fairness in the appeal process, to avoid the prospect of the applicant serving a sentence when the appeal is ultimately allowed[13]
- the fact of conviction, and the public importance of respecting the trial decision and the trial process[14]
- the apparent strength of the grounds for appeal, recognizing that it is not the role of the bail judge to resolve the merits[15]
- the standard of review that will be applied by the appeal court[16]
- any risk that the applicant will reoffend if released[17]
- the applicant’s history of compliance with court orders and legally imposed conditions;[18]
- whether the applicant was released pending trial, and if so if his release was uneventful;[19]

- whether conditions of release could be crafted that would protect the public interest;[20]
- the seriousness of the charges, reflected in the severity of the sentence, although no class of offence is excluded from release[21]
- the effect on the perception of the administration of justice if the applicant is released, including the perception of an informed and reasonable member of society[22]
- the status and state of readiness of the appeal[23]

No single factor should be considered determinative.[24]

1. *R v HB*, 2014 ONCA 334 (CanLII), *per* Lauwers JA, at para 3
   R v Farinacci, 1993 CanLII 3385 (ON CA), 86 CCC (3d) 32, *per* Arbour JA, at pp. 47-48
   R v Manasseri, 2013 ONCA 647 (*no CanLII links)
   R v Sidhu, 2015 ABCA 308 (CanLII), 607 AR 395, *per curiam*, at para 5
2. *R v Oland*, 2017 SCC 17 (CanLII), [2017] 1 SCR 250, *per* Moldaver J, at paras 24, 26
   Farinacci, *supra*, at paras 41, 44
3. *Oland*, *supra*, at para 49
4. *Oland*, *ibid.*, at para 25
5. *Manasseri*, *ibid.*
6. *Farinacci*, *supra*, at para 48
   Manasseri, *supra*
7. *HB*, *supra*, at para 3
8. *Manasseri*, *supra*
   Farinacci, *supra*, at para 48
9. *R v Baltovich*, 2000 CanLII 5680 (ON CA), 144 CCC (3d) 233, *per* Rosenberg JA, at para 20
10. *Baltovich*, *ibid.*, at para 20
    R v Parsons, 1994 CanLII 9754 (NL CA), CR (4th) 169 (Nfld. C.A.), *per* Marshall JA, at pp. 186-187
    Manasseri, *supra*
11. *R v Shlah*, 2017 ABCA 103 (CanLII), AJ No 325, *per* O'Ferrall JA, at para 13
12. *R v Sidhu*, 2015 ABCA 308 (CanLII), 607 AR 395, *per curiam*, at para 12
13. *R v Fox*, 2000 ABCA 283 (CanLII), 8 MVR (4th) 1, *per* Wittmann JA, at paras 18 and 19
    R v Colville, 2003 ABCA 133 (CanLII), 296 WAC 143, *per* Conrad JA, at para 12
14. *R v Nguyen*, 1997 CanLII 10835 (BC CA), 97 BCAC 86, 119 CCC (3d) 269] (BCCA), *per* McEachern JA, at para 18
    Farinacci, *ibid.*, at para 41
    R v Rhyason, 2006 ABCA 120 (CanLII), 208 CCC (3d) 193, *per* Berger JA
15. *R v Heyden*, 1999 CanLII 1934 (ON CA), 127 OAC 190, 141 CCC (3d) 570, *per curiam*, at paras 7 to 8, 12
    Rhyason, *supra*, at paras 13 to 18
    Colville, *supra*, at para 16
16. *R v Sagoo*, 2009 ABCA 357 (CanLII), 464 AR 258, *per* Ritter JA, at para 9
17. *Nguyen*, *supra*, at para 7
    Fox, *supra*, at paras 18, 20 to 21
18. *Sidhu*, *supra*, at para 12
19. *Sidhu*, *supra*, at para 12
20. *Sidhu*, *supra*, at para 12
21. *Nguyen*, *supra*, at paras 13, , at paras 20 to 24
    Heyden, *supra*, at para 12
    R v RDL (1995), 178 AR 142(*no CanLII links) , at para 5
22. *Nguyen*, *supra*, at paras 25 to 26
    Rhyason, *supra*, at para 20
    Fox, *supra*, at para 18
    Colville, *supra*, at para 17
23. *Farinacci*, *supra*, at 48 paras 44, 48{{{3}}}
    Heyden, *supra*, at para 12
    RDL, *supra*, at paras 5, 12
24. *Sidhu*, *supra*, at para 12
    R v Gingras, 2012 BCCA 467 (CanLII), 293 CCC (3d) 100, *per* Donald JA, at para 45

Conditions of Release

679
[*omitted (1), (2), (3) and (4)*]

Conditions of release order

(5) If the judge of the court of appeal does not refuse the appellant's application, the judge shall make a release order referred to in section 515 [*judicial interim release provisions*], the form of which may be adapted to suit the circumstances, which must include a condition that the accused surrender themselves into custody in accordance with the order.

Immediate release of appellant

(5.1) The person having the custody of the appellant shall, if the appellant complies with the release order, immediately release the appellant.

Applicable provisions

(6) Sections 495.1 [*arrest without warrant – for breach of conditions (524)*], 512.3 [*warrant to appear under section 524*] and 524 [*procedure relating to breach of conditions*] apply, with any modifications that the circumstances require, in respect of any proceedings under this section.
[*omitted (7), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
[*annotation(s) added*]

– CCC

This provision came into force on December 18, 2019.

Procedure

679
[*omitted (1)*]

Notice of application for release

(2) Where an appellant applies to a judge of the court of appeal to be released pending the determination of his appeal, he shall give written notice of the application to the prosecutor or to such other person as a judge of the court of appeal directs.

[*omitted (3), (4), (5), (5.1), (6), (7), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.

– CCC

Power to Expedite Appeal

Release pending determination of appeal

679
[*omitted (1), (2), (3), (4), (5), (5.1), (6), (7), (7.1), (8) and (9)*]

Directions for expediting appeal, new trial, etc.

(10) A judge of the court of appeal, where on the application of an appellant he does not make an order under subsection (5) [*release pending appeal – conditions*] or where he cancels an order previously made under this section, or a judge of the Supreme Court of Canada on application by an appellant in the case of an appeal to that Court, may give such directions as he thinks necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be.
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
[*annotation(s) added*]

– CCC

Revocation

Section 679(6) allows for an application to revoke bail in the same manner as regular bail under s. 525:

679
[*omitted (1), (2), (3), (4), (5) and (5.1)*]

Application of certain provisions of section 525

> (6) The provisions of subsections 525(5) [*s. 525 detention review – release order*], (6) [*provisions that apply to s. 525 review hearing*] and (7) [*definition of judge in the Province of Quebec*] apply with such modifications as the circumstances require in respect of a person who has been released from custody under subsection (5) [*release pending appeal – conditions*] of this section.
> [*omitted (7), (7.1), (8), (9) and (10)*]
> R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
> [*annotation(s) added*]
>
> – CCC

Upon arrest for an allegation for failure to comply with the provisions of bail pending appeal, a chambers judge may:[1]

1. revoke release order
2. cancel the recognizance; and
3. release on a new recognizance under s. 515(10) where the detainee shows cause;

1. *R v Manasseri*, 2015 ONCA 3 (CanLII), 329 OAC 156, *per* Watt JA, at para 32

Example Offences

Courts have considered bail in the following offences:

- Sexual assault [1]

Homicide

Bail pending appeal for a conviction for murder is "rare".[2]

1. *R v Tcho*, 2011 SKCA 113 (CanLII), *per* Richards JA - released
2. *R v Baltovich*, 2000 CanLII 5680 (ON CA), 144 CCC (3d) 233, *per* Rosenberg JA
   R v Short, 2017 ONCA 153 (CanLII), OJ No 872, *per curiam*, at para 9
   *R v Manasseri*2013 ONCA 647(*no CanLII links)

Bail On Ordering of a New Trial

Where the accused appeals and a new trial is ordered by the appellate court, the accused's release is governed by s. 679(7.1):

679
[*omitted (1), (2), (3), (4), (5), (5.1), (6) and (7)*]

Release or detention pending new trial or new hearing

(7.1) Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial, section 515 [*judicial interim release provisions*] or 522 [*bail for s. 469 offences*], as the case may be, applies to the release or detention of that person pending the new trial or new hearing as though that person were charged with the offence for the first time, except that the powers of a justice under section 515 [*judicial interim release provisions*] or of a judge under section 522 [*bail for s. 469 offences*] are exercised by a judge of the court of appeal.
[*omitted (8), (9) and (10)*]

R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
[*annotation(s) added*]

– CCC

This section intends to treat accused directed to a new trial to be treated "as if that person were charged with the same offence for the first time".[1]

The order of release or remand will be ordered under s. 515 for all offences except for s. 469 offences in which case it is governed by s. 522. The function of s. 679(7.1) would transfer these release powers to the Court of Appeal.[2]

The phrase "pending the new trial" includes (1) the period between the order of the new trial and the first appearance in addition to (2) the period between the first appearance and the commencement of the new trial.[3] During the first period of time, the appellate court has exclusive jurisdiction to deal with bail.[4] While in the second period of time both the trial court and the court of appeal share concurrent jurisdiction over bail.[5]

Concurrent Jurisdiction

Where there is concurrent jurisdiction to release an accused under s. 679(7.1), the court of appeal will often decline jurisidiction and refer the matter to the trial judge.[6] The Court of Appeal will take into account numerous factors when deciding whether to take jurisdiction including:[7]

1. the geographic location of the person, the proposed sureties, counsel and where necessary, witnesses.
2. the nature of the hearing, including the reasonable necessity of the introduction of viva voce testimony;
3. the issues in controversy;
4. the anticipated length of the hearing;
5. the need for familiarity with the appellate record and the reasons provided for ordering a new trial;

6. the relationship, if any, between the issue of release and the hearing and scheduling of the new trial;
7. the review mechanism available to any party aggrieved by the decision;
8. the nature of the record required for the hearing; and
9. the timing of the hearing.

1. *R v Manasseri*, 2017 ONCA 226 (CanLII), OJ No 1460, *per* Watt JA, at para 38
2. *Manasseri*, *ibid.*, at para 38
3. *Manasseri*, *ibid.*, at paras 39 to 40
4. *Manasseri*, *ibid.*, at para 41
   R v Vincent, 2008 ONCA 76 (CanLII), OJ No 534, *per* Sharpe JA, at para 7
   R v Geddes, 2012 MBCA 31 (CanLII), 100 WCB (2d) 817, *per* Chartier JA, at para 3
5. *Manasseri*, *ibid.*, at para 41
6. *Manasseri*, *ibid.*, at para 42
7. *Manasseri*, *ibid.*

Bail Pending Summary Conviction Appeal

Interim Release of Appellant
Release order — appellant

816 (1) A person who was the defendant in proceedings before a summary conviction court and who is an appellant under section 813 [*appeal by defendant, informant or Attorney General*] shall, if they are in custody, remain in custody unless the appeal court at which the appeal is to be heard makes a release order referred to in section 515 [*judicial interim release provisions*], the form of which may be adapted to suit the circumstances, which must include the condition that the person surrender themselves into custody in accordance with the order.

Release of appellant

(1.1) The person having the custody of the appellant shall, if the appellant complies with the order, immediately release the appellant.

Applicable provisions

(2) Sections 495.1[*arrest without warrant – for breach of conditions (524)*], 512.3 [*warrant to appear under section 524*] and 524 [*procedure relating to breach of conditions*] apply, with any modifications that the circumstances require, in respect of any proceedings under this section.
R.S., 1985, c. C-46, s. 816; R.S., 1985, c. 27 (1st Supp.) , s. 181(E); 2019, c. 25, s. 323.
[*annotation(s) added*]

– CCC

Recognizance of prosecutor

817 (1) The prosecutor in proceedings before a summary conviction court by whom an appeal is taken under section 813 [*appeal by defendant, informant or Attorney General*] shall, immediately after filing the notice of appeal and proof of service of the notice in accordance with section 815 [*Notice of summary appeal to court of appeal*], appear before a justice, and the justice shall, after giving the prosecutor and the respondent a reasonable opportunity to be heard, order that the prosecutor enter into a recognizance, with or without sureties, in the amount that the justice directs and with or without the deposit of money or other valuable security that the justice directs.

Condition

(2) The condition of a recognizance entered into under this section is that the prosecutor will appear personally or by counsel at the sittings of the appeal court at which the appeal is to be heard.

Appeals by Attorney General

(3) This section does not apply in respect of an appeal taken by the Attorney General or by counsel acting on behalf of the Attorney General.

Form of undertaking or recognizance

(4) [repealed, 2019, c. 25, s. 324(2)]
R.S., c. 2(2nd Supp.), s. 16; 2019, c. 25, s. 324.
[*annotation(s) added*]

– CCC

Application to appeal court for review

818 (1) Where a justice makes an order under section 817 [*recognizance of prosecutor*], either the appellant or the respondent may, before or at any time during the hearing of the appeal, apply to the appeal court for a review of the order made by the justice.

Disposition of application by appeal court

(2) On the hearing of an application under this section, the appeal court, after giving the appellant and the respondent a reasonable opportunity to be heard, shall

(a) dismiss the application; or

(b) if the person applying for the review shows cause, allow the application, vacate the order made by the justice and make the order that in the opinion of the appeal court should have been made.

Effect of order

(3) An order made under this section shall have the same force and effect as if it had been made by the justice.
R.S., c. 2(2nd Supp.), s. 16; 1974-75-76, c. 93, s. 91.1.
[*annotation(s) added*]

– CCC

Recognizance

Requiring an Undertaking or Recognizance

Release order or recognizance

832 (1) If a notice of appeal is filed under section 830 [*summary conviction appeal*], the appeal court may, if the defendant is the appellant, make a release order as provided in section 816 [*release order for appellant*] or, in any other case, order that the appellant appear before a justice and enter into a recognizance as provided in section 817 [*recognizance of prosecutor*].

Attorney General

(2) Subsection (1) [*appeal of summary appeal court – imposition of release order*] does not apply where the appellant is the Attorney General or counsel acting on behalf of the Attorney General.
R.S., 1985, c. C-46, s. 832; R.S., 1985, c. 27 (1st Supp.), s. 182; 2019, c. 25, s. 327.
[*annotation(s) added*]

– CCC

Leave to Appeal

679
[*omitted (1), (2), (3), (4), (5), (5.1), (6), (7) and (7.1)*]

Application to appeals on summary conviction proceedings

(8) This section [*release pending appeal*] applies to applications for leave to appeal and appeals to the Supreme Court of Canada in summary conviction proceedings.
[*omitted (9) and (10)*]

– CCC

Dismissal for Failure to Attend or Want of Prosecution

Dismissal for failure to appear or want of prosecution

825 The appeal court may, on proof that notice of an appeal has been given and that

> (a) the appellant has failed to comply with the conditions of a release order made under section 816 [*release order for appellant*] or of a recognizance entered into under section 817 [*recognizance of prosecutor*]; or
> (b) the appeal has not been proceeded with or has been abandoned,

order that the appeal be dismissed.

R.S., c. C-34, s. 757; R.S., c. 2(2nd Supp.), s. 18; 2019, c. 25, s. 325.
[*annotation(s) added*]

– CCC

Appeals to the Supreme Court of Canada

This page was last substantively updated or reviewed *January 2019*. (Rev. # 79478)

General Principles

Composition of Supreme Court of Canada

The Supreme Court of Canada is "general court of appeal for Canada".[1]

The court is composed of one Chief Justice and 8 puisne justices.[2]

Section 35 of the Supreme Court Act grants the Court has appellate criminal jurisdiction.[3]

Section 52 establishes the Supreme Court of Canada as the "ultimate" appeal of criminal jurisdiction that is "final and conclusive".[4]

Leave to appeal is permitted under s. 40 where the "public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it".

1. see s. 3 Supreme Court Act
2. see s. 4 Supreme Court Act
3. Section 35 states "The Court shall have and exercise an appellate, civil and criminal jurisdiction within and throughout Canada."
4. see s. 52

Appeals

Appeal from conviction

691 (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or
(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Appeal where acquittal set aside

(2) A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents;
(b) on any question of law, if the Court of Appeal enters a verdict of guilty against the person; or
(c) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

R.S., 1985, c. C-46, s. 691; R.S., 1985, c. 34 (3rd Supp.), s. 10; 1991, c. 43, s. 9; 1997, c. 18, s. 99.

– CCC

Where a conviction for a lesser offence is reversed at the Court of Appeal and a guilty verdict is entered, the accused may appeal the substituted verdict without leave. However, an appeal to substitute the verdict with an acquittal requires leave.[1]

Appeal against affirmation of verdict of not criminally responsible on account of mental disorder

692 (1) A person who has been found not criminally responsible on account of mental disorder and

> (a) whose verdict is affirmed on that ground by the court of appeal, or
> (b) against whom a verdict of guilty is entered by the court of appeal under subparagraph 686(4)(b)(ii) [*appeal from acquittal – enter guilty verdict*],

may appeal to the Supreme Court of Canada.

Appeal against affirmation of verdict of unfit to stand trial

(2) A person who is found unfit to stand trial and against whom that verdict is affirmed by the court of appeal may appeal to the Supreme Court of Canada.

Grounds of appeal

(3) An appeal under subsection (1) [*appeal to SCC against affirmation of verdict of not criminally responsible on account of mental disorder*] or (2) [*appeal to SCC against affirmation of verdict of unfit to stand trial*] may be

> (a) on any question of law on which a judge of the court of appeal dissents; or
> (b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

R.S., 1985, c. C-46, s. 692; R.S., 1985, c. 34 (3rd Supp.), s. 11; 1991, c. 43, s. 9. [*annotation(s) added*]

– CCC

Appeal by Attorney General

693 (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 675 [*right of appeal of person convicted*] or dismisses an appeal taken pursuant to paragraph 676(1)(a) [*Crown right of appeal*

– *types – acquittal/NCR*], (b) [*Crown right of appeal – types – quashing or refuses jurisdiction*] or (c) [*Crown right of appeal – types – stay proceedings*] or subsection 676(3) [*appeal against verdict of unfit to stand trial*], the Attorney General may appeal to the Supreme Court of Canada

> (a) on any question of law on which a judge of the court of appeal dissents; or
> (b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Terms

(2) Where leave to appeal is granted under paragraph (1)(b) [*Appeal by Attorney General – question of law with SCC leave*], the Supreme Court of Canada may impose such terms as it sees fit.
R.S., 1985, c. C-46, s. 693; R.S., 1985, c. 27 (1st Supp.), s. 146, c. 34 (3rd Supp.), s. 12.
[*annotation(s) added*]

– CCC

Notice of appeal

694 No appeal lies to the Supreme Court of Canada unless notice of appeal in writing is served by the appellant on the respondent in accordance with the *Supreme Court Act*.

R.S., 1985, c. C-46, s. 694; R.S., 1985, c. 34 (3rd Supp.), s. 13.

– CCC

Order of Supreme Court of Canada

695 (1) The Supreme Court of Canada may, on an appeal under this Part [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*], make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

Election if new trial

(2) Subject to subsection (3) [*Supreme Court of Canada order new trial – re-elect judge-alone*], if a new trial ordered by the Supreme Court of Canada is to be held before a court composed of a judge and jury, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury or a provincial court judge. The election is deemed to be a re-election within the meaning of subsection 561(5) [*right to re-elect from superior with prelim – notice and transmitting record*] and subsections 561(5) to (7) [*procedure on re-election*] apply to it with any modifications that the circumstances require.

Nunavut

(3) If a new trial ordered by the Supreme Court of Canada is to be held before a court composed of a judge and jury in Nunavut, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury. The election is deemed to be a re-election within the meaning of subsection 561.1(6) [*notice when no preliminary inquiry or preliminary inquiry completed — Nunavut*] and subsections 561.1(6) to (9) [*procedural requirements – Nunavut*] apply to it with any modifications that the circumstances require.
R.S., 1985, c. C-46, s. 695; 1999, c. 5, s. 27; 2008, c. 18, s. 31.
[*annotation(s) added*]

– CCC

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1. *R v Magoon*, 2018 SCC 14 (CanLII), [2018] 1 SCR 309, *per* Abella and Moldaver JJ (9:0)

Leave for Appeal

Appeals with leave of Supreme Court

40 (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Application for leave

(2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(a).

Appeals in respect of offences

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Extending time for allowing appeal

(4) Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.
R.S., 1985, c. S-26, s. 40; R.S., 1985, c. 34 (3rd Supp.), s. 3; 1990, c. 8, s. 37.

– SCA

Extension of Time to Appeal

The Supreme Court has discretion to extend the time period in which to file an appeal. Considerations should include:[1]

1. Whether the applicant formed a bona fide intention to appeal and communicated that intention to the opposing party within the prescribed time;
2. Whether counsel moved diligently;
3. Whether a proper explanation for the delay has been offered;
4. The extent of the delay;
5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
6. The merits of the proposed appeal.

The Court has "traditionally adopted a generous approach in granting extensions of time."[2]

It has been previously suggested that only in "rare" circumstances will the Crown be permitted an extension given it's "vast" resources to serve notice of appeal.[3]

1. *R v Roberge*, 2005 SCC 48 (CanLII), [2005] 2 SCR 469, *per curiam*, at para 6
2. *Roberge*, *ibid.*, at para 6
3. *R v Finley*, [1991] AJ No 82(*no CanLII links)

Legal Assistance for Accused

Legal assistance for accused

694.1 (1) The Supreme Court of Canada or a judge thereof may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal to the Court or to proceedings preliminary or incidental to an appeal to the Court where, in the opinion of the Court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

Counsel fees and disbursements

(2) Where counsel is assigned pursuant to subsection (1) [*legal assistance for accused on appeal to SCC*] and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

Taxation of fees and disbursements

(3) Where subsection (2) [*counsel fees and disbursements on appeal to SCC*] applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the Registrar of the Supreme Court of Canada, and the Registrar may tax the disputed fees and disbursements.
R.S., 1985, c. 34 (3rd Supp.), s. 13; 1992, c. 1, s. 60(F).

– CCC

Ministerial Review

This page was last substantively updated or reviewed *May 2021*. (Rev. # 79478)

General Principles

Part XXI.1 concerns applications for Ministerial Reviews.

Application

696.1 (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a

long-term offender under Part XXIV [*Pt. XXIV – Dangerous Offenders and Long-Term Offenders (s. 752 to 761)*] and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

Form of application

(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.
2002, c. 13, s. 71.
[*annotation(s) added*]

– CCC

Review of applications

696.2 (1) On receipt of an application under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*], the Minister of Justice shall review it in accordance with the regulations.

Powers of investigation

(2) For the purpose of any investigation in relation to an application under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*], the Minister of Justice has and may exercise the powers of a commissioner under Part I of the *Inquiries Act* and the powers that may be conferred on a commissioner under section 11 of that Act.

Delegation

(3) Despite subsection 11(3) of the *Inquiries Act*, the Minister of Justice may delegate in writing to any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation under subsection (2) [*power of court to investigate for a review*].
2002, c. 13, s. 71.
[*annotation(s) added*]

– CCC

Definition of "court of appeal"

696.3 (1) In this section, "the court of appeal" means the court of appeal, as defined by the definition "court of appeal" in section 2, for the province in which the person to whom an application under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*] relates was tried.

Power to refer

(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*] on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

Powers of Minister of Justice

(3) On an application under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*], the Minister of Justice may

(a) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV [*Pt. XXIV – Dangerous Offenders and Long-Term Offenders (s. 752 to 761)*], a new hearing under that Part, or
(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV [*Pt. XXIV – Dangerous Offenders and Long-Term Offenders (s. 752 to 761)*], as the case may be; or

(b) dismiss the application.

No appeal

(4) A decision of the Minister of Justice made under subsection (3) [*power of minister to order remedy on review*] is final and is not subject to appeal.
2002, c. 13, s. 71.
[*annotation(s) added*]

– CCC

Section 696.3(2) permits an appellate judge to direct an acquittal on review where it is "more probable than not" that the accused would be acquitted on re-trial.[1]

Considerations

696.4 In making a decision under subsection 696.3(3) [*power of minister to order remedy on review*], the Minister of Justice shall take into account all matters that the Minister considers relevant, including

> (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV [*Pt. XXIV – Dangerous Offenders and Long-Term Offenders (s. 752 to 761)*];
> (b) the relevance and reliability of information that is presented in connection with the application; and
> (c) the fact that an application under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*] is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

2002, c. 13, s. 71.
[*annotation(s) added*]

– CCC

Annual report

696.5 The Minister of Justice shall within six months after the end of each financial year submit an annual report to Parliament in relation to applications under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*].
2002, c. 13, s. 71.
[*annotation(s) added*]

– CCC

Regulations

Regulations

696.6 The Governor in Council may make regulations

(a) prescribing the form of, the information required to be contained in and any documents that must accompany an application under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*];
(b) prescribing the process of review in relation to applications under this Part [*Pt. XXI.1 – Applications for Ministerial Review – Miscarriages of Justice (s. 696.1 to 696.6)*], which may include the following stages, namely, preliminary assessment, investigation, reporting on investigation and decision; and
(c) respecting the form and content of the annual report under section 696.5 .

2002, c. 13, s. 71.
[*annotation(s) added*]

– CCC

In 2002, the government enacted "Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice", SOR/2002-416.

1. *R v DRS*, 2013 ABCA 18 (CanLII), 293 CCC (3d) 557, *per curiam*
