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Volume 4B - Pre-Trial Proceedings

The Parties in a Proceeding

Role of the Crown

General Principles

The Crown's role as a "minister of justice" must enforce the laws of the jurisdiction.

Duty of Knowledge

It is improper for the Crown to be selective as to which laws they wish to enforce except when exercising discretion in a particular case.[1]

Both Crown and defence have a "responsibility in providing relevant case law to assist the court".[2]

Prosecuting Crown as Judicial Office

The role of the prosecuting Crown is "quasi-judicial".[3]

Nevertheless, prosecutions are to be undertaken with "earnestness and vigour".[4]

Code of Conduct

In each province, there is a code of conduct or code of ethics that applies to lawyers practicing in that province. These rules also contain additional obligations upon Crown counsel.

The province's rules for prosecutors are all largely uniform, requiring prosecutors under Rule 5.1-3: "When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect."[5]

Discretion

The prosecutor "always has a discretion in prosecuting criminals to the full extent of the law".[6]

Subpoenas

The Crown may avoid a subpoena seeking them to provide evidence justifying the basis for exercising their discretion, such as in a coroner's inquest.[7] However, a subpoena to attend a commission inquiry to explain their actions will be enforceable.[8]

Reviewability of Advice

The Crown's advice on the form charges cannot be reviewable except as a possible abuse of process.[9]

Duties in Handling of Multiple Charges

The powers of the prosecutors include the "power to charge multiple offences".[10]

Where alleged "conduct constitutes an offence under more than one section of the Code, the Crown has a discretion with respect to the offence for which the accused is to be prosecuted".[11]

History

Prior to 1879, most prosecutions in England were brought to the court privately.[12]The powers of the Attorney General concerns mainly initiaiting, managing and terminating prosecutions.[13]

Historically the King was the guardian of the peace and governed the informations and indictments filed with the court. represents the Crown's suits against the accused and are in their control.[14]

1. *R v Catagas*, 1977 CanLII 1636 (MB CA), 38 CCC (2d) 296, *per* Freedman CJ, at para 2
2. *R v Adams*, 2011 NLCA 3 (CanLII), 267 CCC (3d) 155, *per* Welsh JA
3. *R v Bain*, 1992 CanLII 111 (SCC), [1992] 1 SCR 91, *per* Stevenson J
4. *Berger v US* 295 US 78 (1935)
   Bain, *supra* ("[A prosecutor's duty is] to see to it that every material point is made which supports the prosecution case or destroys the case put forward for the defence. But as prosecuting Counsel he should not regard his task as one of winning the case. He is an officer of justice. He must present the case against the prisoner relentlessly, but with scrupulous fairness.")
5.
   - NL [1]: Rule 5.1-3
   - NS [2]: Rule 5.1
   - NB [3]: Rule 5.1-3
   - PEI [4]: Rule 5.1-3
   - ON [5]: Rule 5.1-3
   - MB [6]: Rule 5.1-3
   - SK [7]: 5.1-3
   - AB [8]: Rule 5.1
   - BC [9]: Rule 5.1-3
6. *R v Lyons*, 1987 CanLII 25 (SCC), [1987] 2 SCR 309, *per* La Forest J, at para 64
7. *Picha v Dolan*, 2009 BCCA 336 (CanLII), 308 DLR (4th) 614, *per curiam*
8. *Attorney General v Davies*, 2009 BCCA 337 (CanLII), 308 DLR (4th) 577, *per curiam*
9. *R v Ghavami*, 2010 BCCA 126 (CanLII), 253 CCC (3d) 74, *per* Donald and Huddart JJ
10. *Nelles v Ontario*, 1989 CanLII 77 (SCC), [1989] 2 SCR 170, *per* Lamer J, at para 40
11. *R v Simon*, 1979 CanLII 2997 (ON CA), 45 CCC (2d) 510 (ONCA), *per* Martin JA, at p. 514
12. *Krieger v Law Society of Alberta*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372, at para 25
13. *Krieger*, *ibid.*, at para 25
14. *Krieger*, *supra*, at para 24
    Regina v Pelletier, 1974 CanLII 596 (ON CA), 18 CCC (2d) 516 citing *Wilkes*
    Wilkes v The King (1768), Wilm. 322, 97 E.R. 123 (UK) per Wilmot LCJ

Definition of Crown, Prosecutor and Attorney General

- Definition of Crown, Prosecutor and Attorney General

Purpose of Prosecution

A prosecution is a "search for the truth within the confines of a process that provides for procedural and substantive fairness for the accused".[1]

The purpose of a prosecution can be seen as an investigation, without feeling or animus, with a single view to determine the truth.[2]

1. *R v Desjardin*, 2019 ABCA 215 (CanLII), *per curiam*, at para 11 *R v Chamandy*, 1934 CanLII 130 (ON CA), 61 CCC 224, *per* Riddell JA ("A criminal trial ... is an investigation that should be conducted without animus on the part of the prosecution, with the single view of determining the truth.")
2. *Chamandy*, *ibid.*("It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth.")

Duties of Crown Counsel

The role of a prosecutor is to "assess whether a prosecution is in the public interest and, if so, to carry out that prosecution in accordance with the prosecutor's duties to the administration of justice and the accused".[1]

Crown Role Not to Secure Conviction

The role of the Crown is not to secure convictions. Its role is to present to a trier of fact evidence that is considered credible and relevant to the alleged offence.[2] The role is also characterized as one of ensuring that "justice is done".[3]

The role of bringing forward relevant evidence does not oblige the Crown to call certain evidence. This choice is part of the Crown core discretion. Merely disclosing the existence of the evidence is generally sufficient to satsify this duty.[4]

A criminal proceeding is not a contest between a prosecution that seeks to convict and an accused seeking acquittal.[5]

Role Includes Promoting Justice

The Crown's role is to "promote the cause of justice" and not to persuade a trier of fact "to convict other than by reason".[6] The Crown's job includes seeking the truth. However, it does not mean seeking justice for a complainant.

Role Includes Presenting Evidence and Seeking Truth

The Crown is expected to "present, fully and diligently, all the material facts that have evidentiary value, as well as all the proper inferences that may reasonably be drawn from those facts."[7]

The prosecution of offences is not a contest between the crown and the accused. It is an investigation to determine the truth. It should be done without any feelings of animus.[8]

Crown May Advocate

Nevertheless, the Crown may still "act as a strong advocate within the adversarial process. ...it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability."[9] The Crown should "press fully and firmly every legitimate argument tending to establish guilt, but must be "accurate, fair and dispassionate in conducting the prosecution and in addressing the jury".[10]

The use of rhetorical techniques to distort the evidence or to present misleading and highly prejudicial statements are inappropriate.[11]

Personal Views of Guilt Not Relevant and Impermissible

It is not necessary for the Crown to personally believe in a person's guilt to proceed on charges.[12]

The Crown should not express any personal opinion of guilt or innocence.[13]

Decision to Prosecute

The decision to prosecute is solely in the authority of the crown and should only be reviewable in the clearest of cases.[14]

Duty to Recommend Penalties

Historically, the Crown Counsel was not responsible for making recommendations on penalty in a sentencing hearing.[15]

1. *Ontario (Attorney General) v Clark*, 2021 SCC 18 (CanLII), SCJ No 18, *per* Abella J (8:1)
2. *R v Boucher*, 1954 CanLII 3, , [1955] SCR 16, *per* Locke J, at para 26
   R v Power, 1993 CanLII 3372 (NL CA), 81 CCC (3d) 1, *per* Marshall JA (2:1) ("This quasi-judicial role precludes the Crown having an interest in procuring a conviction as its duty is to fairly and impartially exhibit all facts to the court. The prosecutorial role excludes any notion of winning or losing")
   Chamandy, *supra* ("It is the duty of counsel for the Crown at a criminal trial to bring out before the jury all the facts favourable and unfavourable to the accused.") and ("a criminal prosecution is not a contest between the State and the accused in which the State seeks a victory")
   R v Vallières, 1969 CanLII 1000 (QC CA), 4 CCC 69, *per* Hyde JA
   R v Charest, 1990 CanLII 3425 (QC CA), 57 CCC (3d) 312, *per* Fish JA ("Crown counsel's duty is not to obtain a conviction, but "to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime"") *R v Ahmed*, 2019 SKCA 47 (CanLII), 10 WWR 99, *per* Barrington-Foote JA, at para 28 ("The Crown must bring forward evidence it considers credible that relates to the material facts")
3. *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, *per* Sopinka J, at p. 333
   Ahmed, *supra*, at para 28 ("The function of the prosecutor is not to secure a conviction, but to “ensure justice is done” ")
4. *Ahmed*, *supra*, at para 28("...the Crown has the discretion to decide which witnesses will be called, and a court will not interfere with that discretion unless the Crown is influenced by some oblique motive: ... . Further, the duty to bring forward evidence may be satisfied by disclosing the material to the defence...")
   Stinchcombe, *supra*, at p. 338 *R v Harris*, 2009 SKCA 96 (CanLII), 2 WWR 477, *per* Ricards JA, at para 42
   R v R v JV, 1994 CanLII 5620 (QC CA), 91 CCC (3d) 284, *per* Lebel JA, at para 8
5. *Chamandy*, *supra*("It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth.")
6. *R v Proctor*, 1992 CanLII 2763 (MB CA), 69 CCC (3d) 436, *per* Twaddle JA, at para 59 and adopted in *R v Trochym*, 2007 SCC 6 (CanLII), [2007] 1 SCR 239, *per* Deschamps J
7. *Trochym*, *supra*
8. *Chamandy*, *supra*, at p. 227
9. *R v Cook*, 1997 CanLII 392 (SCC), [1997] 1 SCR 1113, *per* L’Heureux-Dubé J, at para 21
10. *Charest*, *supra*
    R v Pisani, 1970 CanLII 30 (SCC), 1 CCC (2d) 477, *per* Laskin J, at p. 478
11. *Trochym*, *supra* at 79
12. *Miazga v Kvello Estate*, 2009 SCC 51 (CanLII), [2009] 3 SCR 339, *per* Charron J, at paras 65 to 67
13. *Charest*, *supra* ("It is improper for Crown counsel to express his or her opinion as to the guilt or innocence of the accused(9) or as to the credibility of any witness.(10) Such expressions of opinion are objectionable not only because of their partisan nature, but also because they amount to testimony which likely would be inadmissible even if Crown counsel had been sworn as a witness.(11)")
    Boucher, *supra*, *per* Locke J, at p. 273
14. *Miazga*, *supra*
15. *Butterwasser* (1948), 32 Cr. App. Reports 81 (UK) at 87 (UK decision)
    R v Lapierre, [1976] NSJ 421, (NSCA)(*no CanLII links) , at para 32 ("Crown counsel should never request a specific term of imprisonment and in this province it rarely happens that such is done.")

Discretion of Crown

- Prosecutorial Discretion

Relationship with Police

The crown must remain separate from the police. [1] The Crown and police are to consult with each other but the "maintenance of a distinct line between these two functions is essential to the proper administration of justice."[2]

A critical part of the Crown's independence is its independence from police.[3]

The Crown can be liable for their part in giving advice to police during an investigation.[4]

While it is acceptable, the Crown should not try to be involved in interviews with parties prior to charges being laid.[5]

The Crown has no legal duties to the police on how they choose to conduct a prosecution. To a degree the law immunizes the Crown against allegation of misfeasance by police.[6]

1. *Dix v Canada (AG)*, 2002 ABQB 580 (CanLII), 1 WWR 436, *per* Ritter J - fined $200,000 to crown
2. See Marshall Inquiry http://www.gov.ns.ca/just/marshall_inquiry/
3. *Ontario (Attorney General) v Clark*, 2021 SCC 18 (CanLII), 456 DLR (4th) 361, *per* Abella J (8:1), at para 41
4. see *Dix v Canada (Attorney General)*, *supra*
   Proulx v Quebec (Attorney General), 2001 SCC 66 (CanLII), [2001] 3 SCR 9, *per* Iacobucci and Binnie JJ
5. *R v Regan*, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J at 61-70
6. *Ontario (Attorney General) v Clark*, *supra*

Relationship with Defence Counsel

Despite the special status of Crown, it is still treated as being in an "adversarial role" to the accused in many respects.[1]

1. *R v Hills*, 2020 ABCA 263 (CanLII), 2 WWR 31, at para 42
   contra R v Stinchcombe(*complete citation pending*) ("The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high.")

Negotiations with Defence

The Crown is permitted to negotiate charges, by offering to drop certain charges that are supported by evidence, in exchange for guilty pleas to others. [1] By inference, it may be improper for the Crown to use charges unsupported by evidence as part of a bargain. There is also a requirement that the defence be in possession of a "substantial" portion of the disclosure so that an informed decision can be made.[2]

A plea deal worked out between a particular Crown Attorney and defence counsel may have a binding effect on the Crown on other cases.[3]

1. *R v Babos*, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, *per* Moldaver J, at para 59
2. *Babos*, *ibid.*, at paras 59 to 60
3. *R v Mattu* , [2009] EWCA Crim 1483 (UK) [10]

Relationship with the Courts

Concessions

Any concessions of law that are made by the Crown are non-binding on the Court.[1]

Courts generally take a "dim view" to the Crown conceding constitutional cases given that they have "wide ramifications" to other parties. [2]

However, concessions of a factual nature or mixed fact and law involve tactical and strategic decisions are so are more likely to be honored.[3]

1. *R v Hills*, 2020 ABCA 263 (CanLII), 2 WWR 31, *per* Antonio JA, at para 29 ("If Crown counsel's position was a concession, it does not bind this Court as to its legal content or effect. "As has been noted on numerous occasions, concessions of law are not binding on courts")
   R v Silveira, 1995 CanLII 89 (SCC), [1995] 2 SCR 297, at para 100(*complete citation pending*)
2. *Hill*, *ibid.*, at para 29
   M v H, 1999 CanLII 686 (SCC), [1999] 2 SCR 3, *per* Gothier J (dissent on separate issue), at para 210
3. *Hill*, *supra*, at para 30

Crown Undertakings

Agreements made by a Crown Attorney is binding upon the Attorney General. Their word is to be relied upon. Thus, if a subsequent Crown were to repudiate an agreement could be an abuse of process. [1]

1. *Aucoin v Nova Scotia (Attorney General)* (1990) 94 NSR (2d) 205(*no CanLII links) -- first crown agrees to withdraw charges, attorney general directs charges to proceed
   R v Hardick, [1990] NSJ No 305(*no CanLII links) - charges stayed

Judge Shopping

Judge shopping is where counsel attempts to influence which judge will hear a particular matter. Judge shopping by crown counsel is not acceptable as it suggests that the system is partial.[1]

1. *R v Scott*, 1990 CanLII 27 (SCC), [1990] 3 SCR 979, *per* Cory J
   R v Regan, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J, at para 61
   R v Pilarinos, 2001 BCSC 1690 (CanLII), 52 WCB (2d) 161, *per* Bennett J, at para 126 ("The principle is clear – judge shopping by Crown counsel is not acceptable in our system of justice. I will return to this issue when I discuss the evidence in this case.")

Non-Appearance of Crown

> 803
> [*omitted (1), (2) and (3)*]
>
> **Non-appearance of prosecutor**
>
> (4) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned trial, the summary conviction court may dismiss the information with or without costs.
> (5) to (8) [Repealed, 1991, c. 43, s. 9]
> R.S., 1985, c. C-46, s. 803; 1991, c. 43, s. 9; 1994, c. 44, s. 79; 1997, c. 18, s. 112; 2008, c. 18, s. 45.

– CCC

Relationship with Witnesses

Crown's should not call witnesses that give evidence that they knew or should have known were lying.[1]

The Crown has an ethical obligation "to ensure that an accused person is not denied a fair trial as a result of their words or deeds". However, it is not to say that Crown counsel cannot "be forceful during closing argument" that may "jeopardize the accused's right to a fair trial".[2]

Obligation to Call Witnesses

- see Prosecutorial_Discretion#Calling_Witnesses

1. (US) *United States v Freeman*, 691 F.3d 893 (7th Cir. 2012) Testimonial Evidence
2. *R v Joyce*, 1998 CanLII 12216 (NB CA), 518 APR 1, *per* Drapeau JA, at p. 10

Preparation

Guidelines on the preparation of witnesses by crown include:[1]

- Counsel should not discuss evidence with witnesses collectively
- It witnesses memory should be exhausted through questioning before any references are made to conflicting evidence
- Witnesses recollection should be recorded by counsel. Sometimes it should be done in the presence of a third-party or police officer.
- Question should not be suggestive

Inappropriate preparation and communication with witnesses may contaminate the residence and produce a mistrial.[2]

1. *R v Spence*, 2011 ONSC 2406 (CanLII), 85 CR (6th) 72, *per* Howden J
2. *Spence*, *ibid.*

Abuse of Process

Intervening Crowns

Intervention by the Crown in a collateral case is to be done "sparingly" or "rarely".[1] Granting intervener status may result in unfairness or appearance of unfairness without adding much to the content of the submissions.[2]

When Attorney General does not stay proceedings

579.01 If the Attorney General intervenes in proceedings and does not stay them under section 579 [*stay of proceedings by crown*], he or she may, without conducting the proceedings, call witnesses, examine and cross-examine witnesses, present evidence and make submissions.
2002, c. 13, s. 47.
[*annotation(s) added*]

– CCC

Intervention by Attorney General of Canada or Director of Public Prosecutions

579.1 (1) The Attorney General of Canada or the Director of Public Prosecutions appointed under subsection 3(1) of the *Director of Public Prosecutions Act*, or counsel instructed by him or her for that purpose, may intervene in proceedings in the following circumstances:

(a) the proceedings are in respect of an offence for which he or she has the power to commence or to conduct a proceeding;
(b) the proceedings have not been instituted by an Attorney General;
(c) judgment has not been rendered; and
(d) the Attorney General of the province in which the proceedings are taken has not intervened.

Sections 579 and 579.01 to apply

(2) Sections 579 [*stay of proceedings by crown*] and 579.01 [*Attorney General may intervene in certain proceedings*] apply, with any modifications that the circumstances require, to proceedings in which the Attorney General of Canada or the Director of Public Prosecutions intervenes under this section.

1994, c. 44, s. 60; 2019, c. 25, s. 265.
[*annotation(s) added*]

– CCC

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1. *R v Mayers*, 2011 BCCA 268 (CanLII), 307 BCAC 68, *per* Saunders JA, at para 5 - concerning intervening in sentence appeal
   R v Osolin, 1993 CanLII 87 (SCC), [1993] 2 SCR 313, *per* Sopinka J ("The discretion to allow interventions in criminal appeals has been exercised sparingly by this Court.")
2. *Mayers*, *supra*

Conduct in Trial

Theory of the Case

A Crown does not need to "particularize" as to the manner in which a crime is alleged to have been committed.[1] There is some "fluidity" allowed to the Crown chancing the theory "to accommodate changes in the evidence", including changes arising from the accused testifying.[2]

The Crown is not obliged to prove "particulars" that are given orally at the opening of a trial.[3]

A mistrial can be found where the Crown, at the end of its case, stays the charges against a co-accused, effectively changing its theory of the case.[4]

Changing Theory Mid-trial

The Crown can generally change its theory to conform with the evidence that comes out in trial as long as it is not unfair.[5]

It may not necessarily be unfair for the Crown to change its theory of the case mid-trial to a lesser included offence.[6]

Crown Changing Position

The Crown can change its trial strategy at its discretion as the trial unfolds unless the defence can show that it is abusive, had an "oblique motive" or prejudicial.[7]

Generally, it must be shown that the Crown had broken some agreement, undertaking or quid pro quo.[8]

Crown Duty to Correct the Record

All lawyers, including Crown, have a duty not to mislead the court.[9] That includes a duty not to keep silent in the face of a falsehood.[10]

Crown has a duty to correct any evidence that they know or ought to know is false or misleading.[11]

1. *R v Heaton*, 2014 SKCA 140 (CanLII), 318 CCC (3d) 115, *per* Jackson JA, at para 22
2. *Heaton*, *ibid.*, at para 22
3. *Heaton*, *ibid.*, at para 23
4. *R v White*, 2009 BCSC 1838 (CanLII), *per* Griffin J
5. *R v Pawluk*, 2017 ONCA 863 (CanLII), *per* Paciocco JA, at para 30
   R v Khawaja, 2010 ONCA 862 (CanLII), 103 OR (3d) 321, *per curiam* (3:0), aff'd 2012 SCC 69 (CanLII), [2012] 3 SCR 555, *per* McLachlin CJ (7:0)
6. *Pawluk*, *ibid.*, at para 30
7. *R v IC*, 2010 ONSC 32 (CanLII), 249 CCC (3d) 510, *per* R Clark J
   R v Jolivet, 2000 SCC 29 (CanLII), [2000] 1 SCR 751, *per* Binnie J, at para 21 ({"This is the stuff of everyday trial tactics and hardly rises to the level of an "oblique motive". Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused. Where an element of prejudice results (as it did here), remedial action is appropriate.")
8. *R v Sparks and Ritch*, 2020 NSSC 116 (CanLII), *per* Brothers J, at para 24 ("While there are times the Crown will not be permitted to change its position when the defence has reasonably relied on that position, this is not such a case. Absence some quid pro quo, agreement or an undertaking that the Crown intends to be bound by, the Crown is entitled to change its strategy as the evidence unfolds.")
9. *R v Phillion*, 2010 ONSC 1604 (CanLII), 256 CCC (3d) 63, *per* Ratushny J, at para 57
10. Mark M. Orkin, Legal Ethics: A Study of Professional Conduct (Toronto: Cartwright & Sons, 1957) at p. 27
    Phillion, *supra*, at para 57
11. *Phillion*, *supra*, at para 58 ("In the criminal context, the Honourable Patrick Lesage has recently re-stated this basic principle, that Crown counsel has a duty to correct Crown evidence that he/she knows or ought to have known to be false or misleading. ")
    Hon. Patrick J. LeSage, Report of the Commission of Inquiry Into Certain Aspects of the Trial and Conviction of James Driskell (2007) at p. 105

See Also

- Crown Duty to Disclose

Related

- Definitions of Parties, Persons, Places and Organizations

- Remote Attendance in Court

Other Parties

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

Crown Policy Manuals

- BC Crown Policy Manual
- Alberta Policy Manual
- Nova Scotia Crown Policy Manual

Prosecutorial Discretion

< Procedure and Practice < Role of Parties in Proceedings

General Principles

Prosecutorial discretion refers to the "discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences".[1] It encompasses all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it".[2] The prosecution is empowered with discretionary authority over many decisions that have limited ability to be reviewed.

The discretion has its origins from the "Royal Prerogative of Justice and its enforcement in maintaining the King's Peace".[3]

The doctrine of prosecutorial discretion is not reviewable by courts except only on proof of abuse of process".[4]

Discretion must be exercised "in relation to a specific case" and not simply a blanket choice of what laws to enforce.[5]

Courts should be reluctant to interfere with prosecutorial discretion as they must respect the division of powers.[6]

Discretion is essential to keep the system from becoming "unworkably complex and rigid."[7]

Courts should not be reviewing the rationale for each and every decision of the Crown, it would be virtually impossible to have judge made rules to regulate the considerations involved. It would also create a conflict with the judge effectively regulating a prosecution.[8]

The court cannot direct the Crown on what offences they must prosecute.[9]

While the Attorney-General may enact policies that limit discretion, they are often considered undesirable.[10]

Core matters of prosecutorial discretion cannot be reviewed except for abuse of process.

The conduct can be reviewed where the conduct of the Crown consituted a "marked and unacceptable departure from the reasonable standards expected of the prosecution"[11]

Matters that have been found to be part of the core function of the Crown and so subject to prosecutorial discretion include:[12]

- the decision to prosecute
- the stay of a charge
- the withdraw of a charge
- the acceptance of a lesser charge
- the Crown election
- taking control of a private prosecution
- the decision to appeal
- the decision to consent to an adjournment [13]
- consenting or refusal to consent to re-election[14]
- notice to seek increased penalty[15]

It is not constitutionally required that the Crown consider the aboriginal status of the accused before making decisions that will limit the judge's sentencing options.[16]

Constitutionality

The "existence of prosecutorial discretion does not offend the principles of fundamental justice".[17]

1. *R v Anderson*, 2014 SCC 41 (CanLII), [2014] 2 SCR 167, *per* Moldaver J, at para 44
2. *Anderson*, *ibid.*, at para 44
   Krieger v Law Society of Alberta, 2002 SCC 65 (CanLII), [2002] 3 SCR 372, *per* Iacobucci and Major JJ, at para 47

3. *R v Smythe*, 1971 CanLII 30 (ON CA), 3 CCC (2d) 97, *per* Wells CJHC, at pp. 105 and 109 aff'd at 1971 CanLII 831 (SCC), *per* Fauteux CJ
4. *R v Nixon*, 2011 SCC 34 (CanLII), [2011] 2 SCR 566, *per* Charron J, at paras 20, 63 to 64
5. *R v Catagas*, 1977 CanLII 1636 (MB CA), [1978] 38 CCC (2d) 296, *per* Freedman CJM, at p. 301
6. *R v Power*, 1994 CanLII 126 (SCC), [1994] 1 SCR 601, *per* L'Heureux-Dubé J ("courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case law. They have been so as a matter of principle based on the doctrine of separation of powers ...")
see also *R v Cook*, 1997 CanLII 392 (SCC), [1997] 1 SCR 1113, *per* L'Heureux-Dubé J
7. *R v Beare*, 1988 CanLII 126 (SCC), [1988] 2 SCR 387, *per* La Forest J, at p. 410-411
8. *Power*, *supra*, at pp. 626-627
9. *Power*, *supra* ("A judge does not have the authority to tell prosecutors which crimes to prosecute...".)
10. e.g. *R v K(M)*, 1992 CanLII 2765 (MB CA), 74 CCC (3d) 108, *per* O'Sullivan JA, at p. 110 - commenting on "zero-tolerance" policy on prosecution
11. See *R v 974649 Ontario Inc*, 2001 SCC 81 (CanLII), [2001] 3 SCR 575, *per* McLachlin CJ
R v LL, 2015 ABCA 222 (CanLII), 300 CCC (3d) 345, *per curiam*, at para 10
12. *R v DN*, 2004 NLCA 44 (CanLII), 188 CCC (3d) 89, *per* Wells JA, at para 17
Krieger, *supra*
Power, *supra*, at paras 41 to 43
Beare, *supra*, at pp. 410-411
13. *DN*, *supra* and *Beare*, *supra*, at para 51
14. *R v Ng*, 2003 ABCA 1 (CanLII), 173 CCC (3d) 349, *per* Wittmann JA
15. *R v Gill*, 2012 ONCA 607 (CanLII), 96 CR (6th) 172, *per* Doherty JA
16. *Anderson*, *supra*, at paras 29 to 33
17. *Beare*, *supra*, at para 56
R v Lyons, 1987 CanLII 25 (SCC), [1987] 2 SCR 309, *per* La Forest J, at p. 348
R v Jones, 1986 CanLII 32 (SCC), [1986] 2 SCR 284, *per* La Forest J, at pp. 303-304

Calling Witnesses

The Crown does not need to call any witnesses it considers to be unnecessary.[1] Likewise, the crown does not need to call unidentified witnesses or untrustworthy witnesses.[2]

There is no obligation on the Crown to call any witnesses at all, short of it amounting to an abuse of process.[3]

The decision to call a witness on a related subject after the Crown had determined the witness is otherwise unreliable can be acceptable in some circumstances.[4]

1. *Lemay v The King*, 1951 CanLII 27 (SCC), [1952] 1 SCR 232(*complete citation pending*), at p. 241
R v Jolivet, 2000 SCC 29 (CanLII), [2000] 1 SCR 751, *per* Binnie J, at para 14
R v Ellis, 2013 ONCA 9 (CanLII), 293 CCC (3d) 541, *per* Watt JA, at para 44 ("As a matter of general principle, Crown counsel is under no obligation to call a witness whom the Crown considers is unnecessary to the Crown's case...")
2. *Jolivet*, *ibid.*, at para 29
3. *R v Rezaei*, 2017 BCSC 611 (CanLII), *per* Jenkins J
R v Cook, 1997 CanLII 392 (SCC), [1997] SCJ No 2, *per* L'Heureux-Dube J, at para 56
4. *R v LL*, 2015 ABCA 222 (CanLII), 300 CCC (3d) 345, *per curiam*

Relationship with Police

The Crown and police are to consult with each other but the "maintenance of a distinct line between these two functions is essential to the proper administration of justice."[1]

The Crown can be liable for their part in giving advice to police during an investigation.[2]

While it is acceptable, the Crown should not try to be involved in interviews with parties prior to charges being laid.[3]

1. See Marshall Inquiry http://www.gov.ns.ca/just/marshall_inquiry/
2. see *Dix v Canada (Attorney General)*, 2002 ABQB 580 (CanLII), 96 CRR (2d) 1, *per* Ritter J
Proulx v Quebec (Attorney General), 2001 SCC 66 (CanLII), [2001] 3 SCR 9, *per* Iacobucci and Binnie JJ
3. *R v Regan*, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, *per* LeBel J at 61-70

Evaluating Whether to Prosecute (Charge Screening)

Most prosecution offices are guided by Crown Policy manuals requirements that there be a "reasonable prospect of conviction"[1] and there is a "public interest" in the proceeding.[2]

One cannot evaluate the decisions of the Crown to proceed retroactively. The context of what was known at the time.[3]

Considerations on the exercise of discretion must take into account the interest of the individual and the public interest.[4]

Re-evaluation of proceedings can be based on aspects that come to light at trial:[5]

- witnesses may not testify in accordance with their earlier statements;
- weaknesses in the evidence may be revealed during cross-examination;
- scientific evidence may be proved faulty; or
- defence evidence may shed an entirely different light on the circumstances as they were known at the time process was initiated.

Province's Policy

- Nova Scotia
- Ontario
- Alberta
- British Columbia [12]
- Federal Crown

1. Some provinces use difference standards such as "realistic prospects of conviction" (NS) or "substantial likelihood" (BC)
2. *Miazga v Kvello Estate*, 2009 SCC 51 (CanLII), [2009] 3 SCR 339, *per* Charron J, at para 64
3. *Miazga v Kvello Estate*, *ibid.*, at para 76
4. *R v Harrigan and Graham* (1975), 33 CRNS 60(*no CanLII links) , *per* Henry J, stated, at p. 69 ("In exercising these powers, which vitally concern the right and liberty of the individual, he must take into account not only the interest of the individual but also what the public interest requires.")
   R v Kenny, 1991 CanLII 2738 (NL SC), 68 CCC (3d) 36, *per* Barry J
5. *Miazga v Kvello Estate*, *supra*, at para 76

Prospects of Conviction

"Reasonable Prospects of Conviction" (RPC) is an objective test.

RPC must be more than establishing a *prima facie* case against the accused.

RPC does not require that conviction is "likely".

The Crown is generally permitted consideration of the reliability of the complainant or witness. Determinations on the credibility of that person is often not appropriate and is done only exceptionally and on a limited basis.

Public Interest

The determination of public interest is primarily a function of the gravity of the offence and level of culpability of the offender.

While there are many elements that inform the gravity of the offence

The Crown considers the wishes of the alleged victim or complainant, including:

- the trauma caused by testifying and its effect on rehabilitation
- the social pressures upon the person from their involvement
- their willingness to cooperate and testify

There should also be careful consideration on whether it is possible to mitigate these issues through resources with the courts, victim services or police. For example, the use of testimonial aids may assist in the testimony. Real dangers to the person may be mitigated through police protections. Emotional trauma may be mitigated with victim services.

The Crown will usually not force a vulnerable victim to testify in a case where there is clear interest against doing so.

Crown Election

The decision to proceed either by summary conviction or by imdictment is an "essential component of the fair and efficient operation of the criminal justice system".[1]

1. *R v Nur*, 2013 ONCA 677 (CanLII), 303 CCC (3d) 474, *per* Doherty JA, at para 190, appealed to SCC on other issues at 2015 SCC 15

(CanLII), *per* McLachlin CJ

See Also

- Abuse of Process by Crown Counsel

Role of the Defence Counsel

This page was last substantively updated or reviewed *March 2021*. (Rev. # 79573)

< Procedure and Practice < Role of Parties in Proceedings

General Principles

The defence counsel have several duties including:[1]

- Duty of loyalty to the client
- Duty of confidentiality to the client
- Duty of honesty
- Duties to the Court

These duties overlap and may occasionally conflict.

Counsel's purpose is to "provide professional assistance and advice" which involves allowing him to "exercise his professional skill and judgment in the conduct of the case".[2] He is responsible to conduct the defence and "exercise independent judgment as to what is in the client's best interests" and decide whether a particular course of action is within counsel's "duties as an officer of the court".[3]

Ethical Standards

Counsel who violates some ethical standard of the profession does not necessarily equate to a breach of the right to effective counsel. The two must be treated separately.[4] Concerns only for counsel performance, without a prejudice having occurred, can only be addressed by the profession's self-governing body.[5]

Conduct

All counsel are required to treat witnesses, counsel and the court with "fairness, courtesy and respect".[6]

Counsel who has been suspended from the bar while conducting trial will not necessarily require a new trial. Overturning the verdict requires that the counsel "ability to effectively represent the [accused] was impaired as a result of that disqualification."[7]

Counsel who is intoxicated during trial will result in an overturning of verdict regardless of the impact on the reliability on verdict.[8]

Retainer

Where counsel appears with an accused it is presumed that they have a general retainer. Counsel should tell the court if that is not the case.[9]

Duty to Streamline

For the purposes of analysis under s. 11(b), the defence have an obligation to avoid promulgating a culture of delay.[10]

There is suggestion that defence have some obligation to "identify ... issues that will actually be in play at trial", which should be used to assist the court streamlining evidentiary issues.[11]

1. e.g. *Myers v Elman*, (1940) AC 282 (HL) per Lord Wright ("A solicitor is an officer of the court and owes a duty to the court; he is a helper in the administration of justice. He owes a duty to his client, but if he is asked or required by his client to do something which is inconsistent with this duty to the court, it is for him to point out that he cannot do it and, if necessary, cease to act")
2. *R v Faulkner*, 2013 ONSC 2373 (CanLII), 282 CRR (2d) 95, *per* Code J, at para 39
3. *Faulkner*, *ibid.*, at para 39
   R v Samra, 1998 CanLII 7174 (ON CA), 129 CCC (3d) 144, *per* Rosenberg JA, at paras 30 to 33
4. *R v GDB*, 2000 SCC 22 (CanLII), [2009] 1 SCR 716, *per* LeBel J, at para 5 ("the question of competence of counsel is usually a matter of professional ethics that is not a question for the appellate courts to consider")
5. *GDB*, *ibid.*, at para 29
   See also Ineffective Counsel
6. *R v Felderhof*, 2003 CanLII 37346 (ON CA), 180 CCC (3d) 498, *per* Rosenberg JA
7. *R v Prebtani*, 2008 ONCA 735 (CanLII), 240 CCC (3d) 237, *per* Rosenberg JA
8. *Prebtani*, *ibid.*
9. *R v Harrison and Alonso*, 1982 ABCA 152 (CanLII), 67 CCC (2d) 401, *per curiam*
   R v Salha, 2007 ABQB 159 (CanLII), 414 AR 395, *per* Lee J, at para 24
10. Delay of Trial
11. *R v ZWC*, 2021 ONCA 116 (CanLII), *per* Strathy CJ, at para 100

Duty to the Court

Both Crown and defence have a "responsibility in providing relevant case law to assist the court".[1]

In registering objections, Counsel only need to do it once to extinguish their duty. Renewing objections "ad nauseam" or quarreling with the judge is not obligated.[2]

Jury Nullification

Defence counsel are not permitted to direct a jury to ignore the law.[3]

1. *R v Adams*, 2011 NLCA 3 (CanLII), 267 CCC (3d) 155, *per* Welsh JA
2. *Redican v Nesbitt*, 1923 CanLII 10 (SCC), [1924] SCR 135, *per* Idington J
3. *R v Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 SCR 30, *per* Dickson J and Beetz J and Wilson J
   R v Latimer, 2001 SCC 1 (CanLII), [2001] 1 SCR 3, *per curiam*

Duties of Honesty

Defence counsel have an obligation not to call evidence that is believed or known to be false. The lawyer must attempt to dissuade the accused from seeking to call such witnesses and if unsuccessful should withdraw as counsel.[1]

Where an accused admits to committing the offence to counsel, counsel cannot advance any evidence that would tend to contradict this fact.[2] This will also include prohibiting counsel from calling the accused.[3]

A failure to pass a polygraph does not equate to a confession and so does not prevent calling the accused.[4]

When defence counsel become in possession real evidence such as a video of a criminal offence, they are obliged to turn it over to police.[5]

1. *R c Legato*, 2002 CanLII 41296 (QC CA), 172 CCC (3d) 415, *per* Biron JA, at para 88
   see also CBA Code of Professional Conduct
2. *R v Li*, 1993 CanLII 1314 (BCCA), 21 WCB (2d) 497, *per* McEachern JA, at paras 48 to 74
3. *Li*, *ibid.*
4. *R v Moore*, 2002 SKCA 30 (CanLII), 163 CCC (3d) 343, *per* Tallis JA
5. *R v Murray*, 2000 CanLII 22378 (ONSC), 144 CCC (3d) 289, *per* Gravely J

Duty of Loyalty and Confidentiality

A lawyer representing an accused must have undivided loyalty to their client.[1] Loyalty is a fundamental principle of the solicitor-client relationship and is essential to the integrity of system and the public's confidence in it.[2]

The duty of loyalty requires that there be no conflict of interest with the lawyer. A conflict of interest is where there is "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or third person."[3]

The duty of loyalty includes the duty of candor in relation to retainer fees.[4]

1. *R v MQ*, 2012 ONCA 224 (CanLII), 289 OAC 316, *per* Goudge JA, at para 26
2. see *R v Widdifield*, 1995 CanLII 3505 (ON CA), 25 OR (3d) 161, *per* Doherty JA, at pp. 171-172
3. *R v Neil*, 2002 SCC 70 (CanLII), [2002] 3 SCR 631, *per* Binnie J, at para 31
4. *Neil*, *supra*

Decision Making

Where counsel make good faith decisions in the best interests of the client, a court should not look behind it except to prevent a miscarriage of justice.[1]

A retainer can be employed to set out what authority the counsel has to make without the explicit instructions of the client.[2]

Defence counsel is obliged, "within ethical and legal limits", to protect the interests of their client.[3]

Instructions

While it is not necessary to seek express approval for "each and every decision" in relation to the conduct of the defence, certain fundamental decision ethically require counsel to seek explicit instructions:[4]

- whether to plead guilty or not guilty
- whether to testify or not to testify
- whether to chose trial by provincial court, superior court with or without a jury

Failure to get instructions on these fundamental decisions could "raise questions of procedural fairness and the reliability of the result leading to a miscarriage of justice".[5]

It is often advisable that counsel have instructions provided to them in writing.[6]

Instructions Against Interest

Where counsel receives instructions that will "imperil" imperil the accused's interests, counsel is obligated to resist those instructions, but if unsuccessful, should follow them.[7] It is recommended that defence counsel should prefer getting the instructions in writing rather than simply withdrawing as counsel.[8]

Relationship with Client

The defence counsel is not the alter ego of the client. The function of defence counsel is to provide professional assistance and advice. He must, accordingly, exercise his professional skill and judgment in the conduct of the case and not allow himself to be a mere mouthpiece for the client.

There is no principle in law that the defence lawyer is the "mouth-piece" or "alter ego" of the client.[9]

There is no obligation for counsel to "make submissions no matter how foolish or ill-advised or contrary to established legal principle and doctrine, provided that is what the client desires".[10]

In fact, "there are only a small number of fundamental decisions where the client 'calls the shots'".[11]

Trial strategy is the responsibility of defence counsel after consulting with the accused. The accused has the right to terminate the relationship at any time.[12]

1. *R v GDB*, 2000 SCC 22 (CanLII), [2000] 1 SCR 520, *per* Major J, at para 34
2. E.g. See discussion in *Stewart v CBC*, 1997 CanLII 12318 (ONSC), 150 DLR (4th) 24, *per* MacDonald J

3. *R v Joanisse*, 1995 CanLII 3507 (ON CA), 102 CCC (3d) 35, *per* Doherty JA (3:0) leave to appeal refused, [1996] SCCA No 347
4. *GDB*, *supra*, at para 34
5. *GDB*, *supra*, at para 34
6. e.g. see *R v Beuk*, 2004 CanLII 53603 (ONSC), *per* Hill J, at para 40
7. *Joanisse*, *supra*
8. *Joanisse*, *supra* at footnote 15
9. *R v Samra*, 1998 CanLII 7174 (ON CA), 129 CCC (3d) 144, *per* Rosenberg JA
   R v Faulkner, 2013 ONSC 2373 (CanLII), 282 CRR (2d) 95, *per* Code J, at paras 27, 39
10. *Samra*, *supra*
11. *Faulkner*, *supra*, at para 39
12. *R v Connors*, 2011 NLCA 74 (CanLII), 981 APR 234, *per* Welsh JA, at para 11

Withdrawing as Counsel

Where there is a request to withdraw well in advance of trial. It should normally be granted without enquiring into the reasons.[1]

Counsel may reveal reasons for the request to withdraw, such as for ethical reasons, non-payment or workload, without risking breach of privilege.[2]

Courts "must accept counsel's answer" on the reasons for withdraw at "face value" and not inquire further.[3]

Right to Discharge

The accused has an unfettered right to discharge their client at any time for any reason.[4]

Withdraw for Ethical Reasons

A judge must grant any request by counsel to withdraw for ethical reasons.[5] For the grounds to be "ethical" related, it must be that it has become "impossible" for counsel to continue in "good conscience", such as a requirement that professional obligations be violated or refusal to listen to advice on an important issue.[6]

A judge may inquire into the reasons for the breakdown between client and counsel in an *in camera* hearing to see if there is a possibility of reconciliation.[7]

Withdraw for Lack of Payment

A judge had discretion to refuse a request to Withdraw for non-payment of fees.[8]

Factor to consider on a withdraw for failure to pay fees include:[9]

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

In all factors, the court must consider whether a withdrawal would cause "serious harm to the administration of justice".[10] The relevant harm will include that harm to other persons affected by prolonging the proceedings, including "complainants, witnesses, jurors and society at large".[11]

Whether the time booked can be used for other purposes is *not* a relevant factor.[12]

Returning Documents in Possession of Counsel

A discharged lawyer has a common law right to exercise a lien on documents in his possession.[13] If counsel withholds materials, they must inform the crown and the court that he is doing so.[14]

1. *R v Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 SCR 331, *per* Rothstein J, at para 47
2. *Cunningham*, *ibid.*, at para 48
3. *Cunningham*, *supra*, at para 48
4. *Cunningham*, *supra*, at para 9 ("An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused")
5. *Cunningham*, *supra*, at para 49
6. *Cunningham*, *supra*, at para 48 ("ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused.")
7. e.g. see *R v Denny*, 2014 NSSC 334 (CanLII), *per* Rosinski J, at para 22
8. *Cunningham*, *supra*, at paras 17, 50
9. *Cunningham*, *supra*, at para 50
10. *Cunningham*, *supra*, at para 50
11. *Cunningham*, *supra*, at para 51
12. *Cunningham*, *supra*, at para 51 ("...whether allotted court time can be otherwise usefully filled is not a relevant consideration in this balancing of interests.")
13. *R v Gladstone*, 1971 CanLII 500 (ON CA), [1972] 2 OR 127, *per* McGillivary JA
    see also *R v Dugan*, 1994 CarswellAlta 492 (ABCA) (*no CanLII links)
14. *Dugan*, *ibid.*

Sitting in Court and Order of Matters to be Called

The order in which matters are called is determined by the province's Barrister Act or Law Society Act.[1]

A Justice of the Peace has the authority to order that paralegals not be allowed to sit in the area reserved for Barristers.[2]

In Ontario, it is recommended that the Crown call the list rather than the judge–even where legislation suggests seniority ordering–given that the Crown will "likely has greater knowledge of it than does the judicial officer".[3]

The judicial officer has the jurisdiction to decide what method of ordering is applied, whether it is alphabetically, "first-come, first-served", or seniority of the defending counsel.[4]

Economic impact of being called later in the docket, alone, is not enough to amount to a impugne rights under s. 7 of the Charter.[5]

1. ON: Law Society Act RSO 19909, c L.8
2. *R v Lippa*, 2013 ONSC 4424 (CanLII), *per* Fuerst J, at paras 21 to 26
3. *Lippa*, *ibid.*, at para 36
4. *Lippa*, *ibid.*, at para 37
5. *Lippa*, *ibid.*, at para 39 (citing *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 (CanLII), [2003] 1 SCR 6, *per* Major J "ability to generate business revenue by one's chosen means is not a right that is protected under s. 7")

See Also

- Representation at Trial
- Ineffective Counsel
- Guilty Plea
- Remote Attendance in Court

Other Parties

- Role of the Crown
- Role of the Accused
- Role of the Trial Judge
- Role of Law Enforcement
- Role of the Victim and Third Parties

Conflicts of Interest

This page was last substantively updated or reviewed *June 2021*. (Rev. # 79573)

< Procedure and Practice < Role of Parties in Proceedings

General Principles

The "unifying theme" of conflict of interest rules is one of "divided loyalties and duties".[1]

Purpose

The mischief addressed by the rules of conflict of interest is to prevent the disclosure of confidential information of previous related parties and to prevent counsel from putting himself in a situation where loyalty may be conflicted between present and past parties.[2]

Timing of Raising Issue

Issues of conflict of interest of trial counsel can be raised at any point including on appeal after trial. [3]

Requirements

The party alleging the conflict must demonstrate that:[4]

1. an actual conflict of interest exists
2. there is “some impairment of counsel’s ability to represent effectively the interests” of the accused; and
3. the accused has been “denied the right to make full answer and defence” and “a miscarriage of justice has occurred.”

The test for a "disqualifying conflict of interest" has been alternatively stated as requiring:[5]

1. Did the lawyer receive information attributable to a solicitor and client relationship, relevant to the matter at hand; and
2. Is there a risk that it could be used to prejudice the client?

Where it is shown that a lawyer had previously been retained on a related matter, the onus shifts to the lawyer "to prove that no information was provided that could be relevant."[6] The test is what "would a reasonably informed member of the public be satisfied that the new retainer will not give rise to a conflict of interest".[7]

The court must consider the public interest including the public's confidence in the administration of justice. The confidence is undermined by the appearance of an unfair trial such as a cross-examination based on information obtained from prior involvement with the witness.[8]

The court must also consider the lawyer's "duty of loyalty" as well as confidentiality and privilege.[9]

The applicant does not need to establish that the verdict would have been different but for the conflict. [10]

Effect on Right to Choice of Counsel

The accused's right to counsel of choice is limited by the requirement that there be no disqualifying conflict of interest.[11] The standard require to limit the right to counsel is a high one as "a litigant should not be deprived of his or her choice of counsel without good cause".[12]

Procedure

A procedure suggested to consider conflicts goes as follows:[13]

1. It is clear that the courts have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, in the exercise of the court's supervisory authority over members of the bar; [14]
2. The courts must be concerned not only with actual conflicts but also with perceived or potential conflicts that develop as a trial unfolds;
3. The test must be such that the public, represented by the reasonably informed person, must be satisfied that no use of confidential information would occur;
4. Litigants ought not to be lightly deprived of their chosen counsel, without good cause or for compelling reasons;
5. A potential disqualifying conflict of interest must first be established before it can be weighed against the fundamental right to the accused's choice of counsel;
6. Typically, these cases require two questions to be answered:
    1. Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? and
    2. Is there a risk that it will be used to the prejudice of the client? Consideration of these two questions is case-specific.
7. Disqualification of trial defence counsel can be disruptive, and it may require a trial be adjourned in order to allow new counsel to bring themselves "up to speed".

The courts should balance the accused's right to counsel of choice, public policy, the interest in the administration of justice and fairness.[15]

Judicial Intervention

A judge may not direct that counsel not act on behalf of the accused unless there is a "realistic risk of a conflict of interests".[16]

The court may need to speculate on what risks may arise at trial that could cause a conflict.[17]

Consequence of Forced Withdraw

Requiring counsel to withdraw is not a disciplinary matter, it is preventative to protect the administration of justice and ensure trial fairness.[18]

Accused's Choice of Conflicted Counsel

The right to choice of counsel is not an absolute right.[19]

The accused has not right to counsel who is in conflict.[20]

Effect of Codes of Conduct

The courts are not obliged to enforce codes of conduct. The codes are only statements of public policy.[21]

Duty to Previous Clients

The main duty Counsel as to previous clients is the duty not to misuse confidential information.[22]

Examples

There was no conflict where defence counsel was present at the party where an assault occurred.[23]

1. Paul M Perell, *Conflicts of Interest in the Legal Profession (1995) at 5.*
2. *R v Sandhu*, 2011 BCSC 1137 (CanLII), 279 CCC (3d) 327, *per* Fitzpatrick J
3. *R v Widdifield*, 1995 CanLII 3505 (ON CA), OR (3d) 161, *per* Doherty JA at 169
4. *R v Sherif*, 2012 ABCA 35 (CanLII), 545 WAC 61, *per* Hunt JA
   R v WW, 1995 CanLII 3505 (ON CA), 100 CCC (3d) 225, *per* Doherty JA
5. *R v McCall*, 2013 ONSC 4157 (CanLII), *per* Gunsolus J, at para 26
6. *McCall*, *supra*, at para 27
7. *McCall*, *supra*, at para 27
   Widdifield, *supra*
   See also *MacDonald Estate*, *supra*
8. *McCall*, *supra*, at para 30
   R v Robillard, 1986 CanLII 4687 (ON CA), [1986] OJ No 261 (ONCA), *per* Lacourciere JA, at p. 5
   R v Brissett, 2005 CanLII 2716 (ON SC), [2005] OJ No 343, *per* Hill J, at para 39 - a lawyer should not use information obtained from a former client to cross-examine them on a future case.
9. *McCall*, *supra*, at para 31
   MacDonald Estate, *supra*, at para 41
   See also *R v Billy*, 2009 CanLII 63957 (ON SC), [2009] OJ No 4737 (SCJ), *per* Pomerance J, at paras 24 to 25
10. *Sherif*, *supra*, at para 13 (no conflict found)
11. *McCall*, *supra*, at para 24
    R v McCallen, 1999 CanLII 3685 (ON CA), 131 CCC (3d) 518, *per* O'Connor JA, at paras 68 to 72
    Billy, *supra*, at para 19
12. *MacDonald Estate v Martin*, 1990 CanLII 32 (SCC), [1990] 3 SCR 1235, *per* Sopinka J
13. *Brissett*, *supra*
14. *Macdonald Estate v Martin*, *supra*, at p. 1245
15. *R v Speid*, 1983 CanLII 1704 (ON CA), 8 CCC (3d) 18, *per* Dubin JA
16. *R v WW*, 1995 CanLII 3505 (ON CA), 100 CCC (3d) 225, *per* Doherty JA, at p. 238
17. *WW*, *ibid.*
18. *R v Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 SCR 331, *per* Rothstein J, at para 35
19. *R v Cocks*, 2012 BCSC 1336 (CanLII), *per* Silverman J, at para 10

20. *Robillard*, *supra*, at para 10
21. *Cunningham*, *supra*, at para 38
22. *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39 (CanLII), [2013] 2 SCR 649, *per* McLachlin CJ (9:0)
23. *R v Karmis*, 2008 ABQB 525 (CanLII), 177 CRR (2d) 232, *per* MacLeod J

Waivers

An irrevocable waiver of a conflict of interests by the accused, after having received independent legal advice, will usually be sufficient to permit counsel to be retained.[1]

However, the existence of a conflict of interest without waiver will generally result in the disqualification of counsel.[2]

A revocable waiver can also give rise to disqualification.[3]

1. see e.g. *R v Hill*, 2014 ABQB 298 (CanLII), *per* Wilson J
2. *Hill*, *supra*, at para 31
   R v Leask, (1996) 1 CR (5th) 132 (*no CanLII links)
   R v Werkman, 1997 CanLII 14735 (AB QB), 6 CR (5th) 221, *per* Ritter J
3. see *Hill*, *supra*, at para 31

Representing Co-Accused

There is a "heavy onus" on the accused to ensure that there is no conflict when representing multiple accused is a single matter.[1]

There is no fixed rule preventing a lawyer from representing multiple co-accused. [2]

When representing multiple co-accused there is always the risk of conflict.[3] The presence of this conflict may prevent counsel from exploring plea negotiations and the possibility of one counsel testifying against another, presenting evidence incriminating the co-accused, or making sentencing submissions that only mitigate for one and not the other.[4]

A co-accused's counsel may be enjoined from switching clients and representing an accused regardless of the consent of the accused.[5]

It is expected that before accepting a retainer from a co-accused, counsel must "fully disclose to both [co-accused] the issues and risks associated with concurrent representation" as well as get both of their informed consent and conclude that they can represent both co-accused without adversely affecting the each other.[6]

Counsel have an obligation to advise them to emphasize evidence that points to co-accused and exonerates them.[7]

Where there is concurrent representation of two co-accused, the issue to be determined with any allegation of divided loyalty is whether "there was actual conflict of interests" and whether "one of the co-accused did not receive effective representation".[8] This test applies equally to circumstances where the two accused are involved in different matters.[9]

Consequence of Being in Conflict

Where counsel is in conflict, their representation becomes tainted by a divided loyalty.[10]

1. *R v WW*, 1995 CanLII 3505 (ON CA), 100 CCC (3d) 225, *per* Doherty JA
2. *WW*, *ibid.*, at p. 13
   R v Silvini, 1991 CanLII 2703 (ON CA), 68 CCC (3d) 251, *per* Lacourciere JA
3. *Silvini*, *ibid.*
4. *Silvini*, *ibid.*
5. *R v Quiriconi*, 2011 BCSC 1737 (CanLII), *per* Rogers J
6. *R v Baharloo*, 2017 ONCA 362 (CanLII), 348 CCC (3d) 64, *per* Brown JA, at para 51
7. *R v Thanigasalam*, [2007] OJ No 5374 (Ont. C.J.) (*no CanLII links) , at para 16
8. *Baharloo*, *supra*, at para 53
9. *Baharloo*, *supra*, at para 53
10. *Baharloo*, *supra*, at para 52

Duty of Loyalty

The duty of loyalty is the foundation of the solicitor-client relationship.[1] This duty includes the duty of confidentiality.[2]

This duty also includes the duty to avoid conflicting interests.[3] Defence counsel owe a duty to the client to *avoid* conflicts of interest.[4] This rule protects against:[5]

1. prejudice arising from the "misuse of confidential information obtained from a client"; and
2. prejudice arising from the counsel "soft peddling" the representation of one client to the benefit of others, including the other client.

The duty of loyalty requires that the counsel put the client's business interests before the counsel's business interests.[6]

Counsel has a duty to "not place herself in a situation that jeopardizes her effective on-going representation of [a] client".[7] There is "no room for doubt" in clients mind as to where the lawyer's loyalty lies.[8]

Once a lawyer is retained, the client has a right to believe that silence from counsel is affirmation that there are no conflicts.[9]

Test for Breach of Duty of Loyalty

A lawyer's acceptance of a new retainer will breach the duty of loyalty of a current client where it is determined:[10]

1. that the client's "interests are directly adverse to the immediate interests of another current client" or
2. the lawyer does not reasonably believe he is able to represent each client without adversely affecting the other.

There will be no conflict where both clients consent to the joint representation, after receiving full disclosure and independent legal advice.[11]

This first stage is considered the "bright line" rule.[12]

1. *R v Cocks*, 2012 BCSC 1336 (CanLII), *per* Silverman J, at para 10
2. *Cocks*, *ibid.*, at para 10
3. *R v Baharloo*, 2017 ONCA 362 (CanLII), 348 CCC (3d) 64, *per* Brown JA, at para 31
4. *R v Faudar*, 2021 ONCA 226 (CanLII), *per* Tulloch JA, at para 55
5. *Faudar*, *ibid.*, at para 56
   Baharloo, *ibid.*, at para 31 (conflict of interest can create prejudice for the client where counsel "'soft peddles' his representation of a client in order to serve his own interests, those of another client, or those of a third party".)
   Canadian National Railway Co v McKercher LLP, 2013 SCC 39 (CanLII), [2013] SCR 649, *per* McLachlin CJ, at para 23
6. *R v Neil*, 2002 SCC 70 (CanLII), [2002] 3 SCR 631, *per* Binnie J, at para 24("Loyalty includes putting the client's business ahead of the lawyer's business")
7. *Canadian National Railway*, *supra*, at para 23
8. *R v McCallen*, 1999 CanLII 3685 (ON CA), 43 OR (3d) 56, *per* O'Connor JA, at p. 67 ("[t]here should be no room for doubt about counsel's loyalty and dedication to the client's case")
   Baharloo, *supra*, at para 32
9. *Baharloo*, *supra*, at para 32
   Strother v 3464920 Canada Inc, 2007 SCC 24 (CanLII), [2007] SCR 177, *per* Binnie J, at para 55
10. *Neil*, *supra Baharloo*, *supra*, at para 34
11. *Baharloo*, *supra*, at para 34
12. *Neil*, *supra*, at para 29

Duty of Confidentiality

Every lawyer has a duty of confidentiality to his client. This duty extends beyond the duration of the legal relationship.[1]

Any lawyer who has obtained confidential information from a client can never act against that client.[2]

A lawyer may act against a former client where "a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information has occurred or would occur."[3]

The rule intends to balance the three factors of:[4]

1. the need to maintain the high standards of the legal profession and the integrity of the justice system;
2. the right of litigants not to be deprived of their choice of counsel without good cause; and,
3. permitting reasonable mobility in the legal profession.

Courts should discourage the use of these conflict rules from being used as a weapon or tactic to obstruct proceedings.[5] As such the mischief must be real and not speculative.[6]

Where the conflicted lawyer moves to a different firm, the other lawyers in the new firm are not necessarily conflicted as well. There will only be a conflict if:[7]

1. the lawyer at the new firm received confidential information attributable to the solicitor-client relationship
2. is there a risk that the confidential information could be used to prejudice the client

There is a "strong inference" that lawyers working together will share confidential information about clients.[8] This inference is rebutted by "clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur by the 'tainted lawyer' to the member or members of the firm who are engaged against the former client."[9]

1. *Canadian National Railway v McKercher*, 2013 SCC 39 (CanLII), {{{4}}}, *per* McLachlin CJ, at para 23
2. *R v Imperial Tobacco Canada Limited*, 2013 BCSC 1963 (CanLII), *per* N Smith J, at para 22 *Macdonald Estate v Martin*, 1990 CanLII 32 (SCC), [1990] 3 SCR 1235, *per* Sopinka J, at p. 1261 ("No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out has been gleaned from the client and what was acquired elsewhere.")
3. *Martin*, *supra*, at p. 1263
4. *Martin*, *supra*
   Imperial, *supra*, at para 25
5. *Imperial*, *supra*, at para 27
6. *Imperial*, *supra*, at para 28
7. *Martin*, *supra*, at p. 1260
   McKercher, *supra*, at para 24
8. *Imperial*, *supra*, at para 24
   Martin, *supra*
9. *Martin*, *supra*

See Also

- Role of the Defence Counsel

Obligation of Accused to be Present During Proceedings

General Principles

Appearance Other Than Trial

Generally, an accused is expected to be present during the proceedings against him. He must be present for his trial, but may have representation appear on his behalf for non-trial matters.[1]

Under Part XVI, Compelling Appearance of an Accused Before a Justice and Interim Release, s. 502.1 reads:

> **Appearance of the accused**
>
> 502.1 (1) Except as otherwise provided in this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], an accused who is required to appear in a proceeding under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] shall appear personally but may appear by audioconference or videoconference, if arrangements are made with the court in advance and those arrangements are satisfactory to the justice.
>
> **Witness in Canada**
>
> (2) Despite section 714.1 [*audioconference and videoconference – witness in Canada*], a witness in Canada who is required to give evidence in a proceeding under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] may do so by audioconference or videoconference, if it is satisfactory to the justice.
>
> **Witness outside Canada**
>
> (3) For greater certainty, sections 714.2 to 714.8 [*video and audio evidence*] apply when a witness outside Canada gives evidence in a proceeding under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*].
>
> **Participants**
>
> (4) A participant, as defined in subsection 715.25(1) [*definition of participant*], who is to participate in a proceeding under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] shall participate personally but may participate by audioconference or videoconference, if it is satisfactory to the justice.
>
> **Justice**
>
> (5) The justice who is to preside at a proceeding under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] shall preside personally but may preside by audioconference or videoconference, if the justice considers it necessary in the circumstances.
> 2019, c. 25, s. 216.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

matters

1. s. 650(1) requires attendance at trial
   s. 650.01 allows counsel to appear on accused behalf for non-trial

Accused's Presence at Trial

Under s. 650(1) (indictable matters) and 800(2) (summary matters), the accused must be present for the whole of their trial.

Section 650 sets out the base requirement that the accused be present for their trial on an indictable matter as well as exceptions and other permitted accommodations. The section states:

> **Accused to be present**
>
> 650 (1) Subject to subsections (1.1) to (2) [*various exceptions to requirement of accused being personally present*] and section 650.01 [*designation of counsel*], an accused, other than an organization, shall be present in court during the whole of his or her trial.
> [*omitted (1.1), (1.2) and (2)*]
>
> **To make defence**
>
> (3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

> R.S., 1985, c. C-46, s. 650; 1991, c. 43, s. 9; 1994, c. 44, s. 61; 1997, c. 18, s. 77; 2002, c. 13, s. 60; 2003, c. 21, s. 12; 2019, c. 25, s. 274. [*annotation(s) added*]
>
> – CCC

Section 650 protects the "fundamental right" and "duty" to be present at trial.[1] Violation of the section will generally render the trial void irrespective of whether any prejudice was caused.[2] Counsel are not permitted to waive this requirement.[3]

The prohibition is more lenient in certain circumstances. Non-presence of the accused during counsel submissions on an admissibility issue, absent prejudice, can be treated as a procedural irregularity and may not require a new trial.[4]

Purpose of s. 650

There are two purposes for the requirement of personal attendance for trial. First, it permits the accused to hear the evidence so as "to put forward a defence". Second, the accused is able to see "that the correct procedure is followed and that the trial is fair".[5]

It further respects the "right of the accused to fully participate in the proceedings".[6]

Charter and section 650

Where there is a violation of s. 7 and 11(d) of the *Charter of Rights and Freedoms*. A Charter violation cannot be treated as a procedural irregularity.[7]

History

The statutory requirement was first found in the Criminal Code 1954.[8]

1. *R v Edwardsen*, 2019 BCCA 259 (CanLII), *per* Harris JA (3:0), at para 9 ("...the right of the accused to be present at trial is a fundamental right protected by s. 650 of the Criminal Code, R.S.C. 1985, c. C-46.") *R v D*, 1982 CanLII 3324 (ON CA), 68 CCC (2d) 13, *per* Martin JA, at para 23 ("Mr. Doherty for the Crown in a most able argument did not dispute the general proposition that, subject to certain exceptions, an accused has not only an absolute right, but a duty, to be present at his trial.") *R v Barrow*, 1987 CanLII 11 (SCC), [1987] 2 SCR 694, at para 38
2. *R v Meunier*, 1966 CanLII 50 (CSC), [1966] RCS 399
3. *R v Dumont, Bellegarde and Yuzicappi*, 1984 CanLII 2432 (SK CA), 35 Sask R 112, *per* Hall JA, at para 5 ("The provisions of s. 577(1) cannot be waived by counsel. Under these circumstances the convictions must be set aside and a new trial ordered.")
4. *R v Mohebtash*, 2007 BCCA 307 (CanLII), 220 CCC (3d) 244, *per* Hall JA, at para 14 ("In my opinion, the short absences of the appellant from the courtroom while legal argument occurred in his absence were of no particular moment in these trial proceedings. I cannot think that a fair-minded and knowledgeable observer would have any belief that what occurred here had any capacity to work an injustice upon this appellant. I entirely agree with the comment of trial counsel for the appellant that there was no prejudice caused by the events to the appellant. What occurred here was within the terms of s. 686(1)(b)(iv), a procedural irregularity at trial that occasioned no prejudice to the appellant. In those circumstances, I would invoke the provisions of that section.")
5. *R v Chan*, 2002 ABQB 866 (CanLII), 169 CCC (3d) 419, *per* Sulyma J, at para 35
6. *R v Reale*, 1973 CanLII 55 (ON CA), [1973] 3 OR 905, 13 CCC (2d) 345 (Ont CA), *per curiam*
7. *R v Dedam*, 2018 NBCA 52 (CanLII), 364 CCC (3d) 360, *per* Quigg JA
8. *R v Pazder*, 2015 ABQB 493 (CanLII), 21 Alta LR (6th) 130, *per* Germain J, at para 243

What Constitutes "Trial"

The meaning of "trial" is broad and can refer to any proceedings that form part of the "trial process for determining the guilt or innocence of the accused" as well as penalty.[1]The key factor is whether the proceedings involved the accused's "vital interests."[2]

Vital Interests

In-chambers discussions without the accused on certain issues of jury selection is preliminary in nature and so does not engage the accused's "vital interests".[3]

This can include any "normal part of the trial process" of "determining guilt".[4]

Under s.650(1.1) and (1.2), the court may order that the accused appear by way of video link where all the parties agree. This can include parts of the trial where evidence is not being taken so long as there is a means to have defence counsel consult with their client.

The court may exclude the accused from their trial under s.650(2) for three situations: 1) where the accused "misconducts himself by interrupting the proceedings" so much so that it would be infeasible to continue; 2) where the court finds it "proper"; or 3) where the accused's presence may have an adverse effect on the accused's mental health on a hearing for fitness.

Examples

The following are examples that are "part of the trial process":[5]

- arraignment and plea,
- the empanelling of the jury,
- the reception of evidence (including voir dire proceedings with respect to the admissibility of evidence),
- rulings on evidence,

- arguments of counsel,
- addresses of counsel to the jury,
- the judge's charge, including requests by the jury for further instructions,
- the reception of the verdict and
- imposition of sentence if the accused is found guilty.

Contact with Jurors

The judge may not interview jurors outside of the presence of the accused.[6]

Discussions between the judge and prospective jurors are part of trial and must be in presence of accused.[7]

As a general practice, any communications between prospective jurors and the judge should be recorded. Any reasons for excluding a prospective juror should also be on the record.[8]

Discussion in chambers regarding the credibility of witnesses by the trial judge in absence of accused can violate s. 650(1) right to be present.[9]

The judge talking with the jury constables and reporter after trial when she heard that members of the jury were pressured in their verdict.[10]

Trial Includes Voir Dires

Any voir dire is considered part of the trial and therefore is subject to the requirements of s. 650 the same the actual trial.[11]

1. *R v Sinclair*, 2013 ONCA 64 (CanLII), 300 CCC (3d) 69, *per* Rouleau JA, at para 15 : cites many examples
2. *Sinclair*, *ibid.*, at para 15
   R v Vezina; R v Cote, 1986 CanLII 93 (SCC), [1986] 1 SCR 2, *per* Lamer J
3. *Sinclair*, *supra*, at para 17 (discussions occurred without accused present, however, discussions were summarized to accused in court and only finalized in accused presence.)
   R v Dunbar, 1982 CanLII 3324 (ON CA), 68 CCC (2d) 13, *per* Martin JA
4. *R v Hertrich*, 1982 CanLII 3307 (ON CA), [1982] OJ No 496, 67 CCC (2d) 510 (CA), at para 50
5. *Hertrich*, *supra*
6. *Vezina*, *supra*
   R v Fenton, 1984 CanLII 633 (BCCA), 11 CCC (3d) 109, *per* Taggart JA
7. *Sinclair*, *supra*
8. *Sinclair*, *supra*
9. *R v James*, 2009 ONCA 366 (CanLII), 244 CCC (3d) 330, *per* Rosenberg JA
10. *R v Phillips*, 2008 ONCA 726 (CanLII), 242 OAC 63, *per* MacPherson JA
11. *R v Edwardsen*, 2019 BCCA 259 (CanLII), *per* Harris JA (3:0), at para 9 ("... a voir dire is part of the trial. For the purposes of s. 650 of the Code, there is no distinction between receiving evidence on a voir dire and receiving evidence at the trial proper. Mr. Edwardsen had the same right to be present for the evidence led on the voir dire as he had for any part of the trial.")
    R v Ali, Boparai, Khan & Malonga-Massamba, 2020 BCSC 996 (CanLII), *per* Ehrcke J, at para 10 ("For the purposes of s. 650, a voir dire is considered part of the trial")

Exception

> 650
>
> [*omitted (1), (1.1) and (1.2)*]
>
> **Exceptions**
>
> (2) The court may
>
> > (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;
> > (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or
> > (c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.
>
> [*omitted (3)*]
> R.S., 1985, c. C-46, s. 650; 1991, c. 43, s. 9; 1994, c. 44, s. 61; 1997, c. 18, s. 77; 2002, c. 13, s. 60; 2003, c. 21, s. 12; 2019, c. 25, s. 274.
> [*annotation(s) added*]
>
> – CCC

Whether to excuse an accused from attending is a matter of judicial discretion and should be considered on its own merits.[1]

Considerations should include:[2]

- whether the accused was "fully aware of the consequences of his decision";
- whether the court is content the counsel will represent the interests of the accused;
- not acting under compulsions to avoid delay.

Historically, the exceptions listed in s. 650(2)(b) are applied with restraint.[3]

An accused can waive his right to be present at trial, and be permitted to be excluded under s. 650(2)(b), where the court is satisfied that the wavier is "informed, clear, and unequivocal".[4]

1. *R v Drabinsky*, 2008 CanLII 40225 (ON SC), 235 CCC (3d) 350, *per* Benotto J, at para 12
2. *Drabinsky*, *ibid.*, at para 12
3. *R v Ali, Boparai, Khan & Malonga-Massamba*, 2020 BCSC 996 (CanLII), *per* Ehrcke J, at para 13 ("Although the plain wording of s. 650(2)(b) would appear to create an open-ended discretion, historically, the section has been applied with restraint.")
   R v Pazder, 2015 ABQB 493 (CanLII), 21 Alta LR (6th) 130, *per* Germain J, at para 241 ("As is obvious from this survey, the first fundamental principle is that Criminal Code, s 650(2)(b) should only be used sparingly, and with caution. An accused's absence should only occur where there is a valid and legitimate reason that does not offend public policy, and that is beneficial to the accused without prejudicing the fair trial rights of the accused and other trial participants.")
4. *Ali*, *supra*

Remedy

Where there is a part of the trial without the presence of the accused as a procedural irregularity, it may be cured under s. 686(1)(b)(iv), particularly where there is no prejudice or unfairness against the accused.[1]

1. *Sinclair*, *supra*

Summary Offences

In Part XXVII concerning summary convictions, s. 800 reads:

> **When both parties appear**
>
> 800 (1) Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.
>
> **Counsel or agent**
>
> (2) A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.
>
> [*omitted (2.1) and (3)*]
> R.S., 1985, c. C-46, s. 800; 1997, c. 18, s. 111; 2003, c. 21, s. 21; 2019, c. 25, s. 317
>
> – CCC

Remote Attendance

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Evidence < Testimonial Evidence < Remote Attendance

General Principles

Remote Attendance in Court of persons other than witnesses is largely governed by Part XXII.01 of the *Criminal Code* (s. 715.21 to 715.26).

> **Attendance**
>
> 715.21 Except as otherwise provided in this Act, a person who appears at, participates in or presides at a proceeding shall do so personally.
>
> 2019, c. 25, s. 292.
>
> – CCC

Provisions providing for audioconference or videoconference

715.22 The purpose of the provisions of this Act that allow a person to appear at, participate in or preside at a proceeding by audioconference or videoconference, in accordance with the rules of court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.

2019, c. 25, s. 292.

– CCC

Topics

- Remote Attendance of Judges or Jurors
- Remote Attendance of Accused (715.23 to 715.24)
  - Obligation of Accused to be Present During Proceedings
- Remote Attendance of Witnesses (Remote Testimony)
- Remote Attendance of Counsel or Certain Other Participants (715.25 and 715.26)
- Remote Attendance at the Court of Appeal

Remote Attendance of Accused

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Evidence < Testimonial Evidence < Remote Attendance

General Principles

650 (1) Subject to subsections (1.1) to (2) [*various exceptions to requirement of accused being personally present*] and section 650.01 [*designation of counsel*], an accused, other than an organization, shall be present in court during the whole of his or her trial.

Video links

(1.1) If the court so orders, and if the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken.

Video links

(1.2) If the court so orders, an accused who is confined in prison may appear by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken, as long as the accused is given the opportunity to communicate privately with counsel if they are represented by counsel.
[*omitted (2) and (3)*]

R.S., 1985, c. C-46, s. 650; 1991, c. 43, s. 9; 1994, c. 44, s. 61; 1997, c. 18, s. 77; 2002, c. 13, s. 60; 2003, c. 21, s. 12; 2019, c. 25, s. 274.

– CCC

PART XXII.01
Remote Attendance by Certain Persons
Principles
Attendance

715.21 Except as otherwise provided in this Act, a person who appears at, participates in or presides at a proceeding shall do so personally.

2019, c. 25, s. 292.

– CCC

In Part XX.01 concerning remote attendance by certain persons, s. 715.23 reads:

Accused
Appearance by audioconference or videoconference

715.23 (1) Except as otherwise provided in this Act, the court may order an accused to appear by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

(a) the location and personal circumstances of the accused;
(b) the costs that would be incurred if the accused were to appear personally;
(c) the suitability of the location from where the accused will appear;
(d) the accused's right to a fair and public hearing; and
(e) the nature and seriousness of the offence.

Reasons

(2) If the court does not make an order under subsection (1) [*appearance by audioconference or videoconference*] it shall include in the record a statement of the reasons for not doing so.

Cessation

(3) The court may, at any time, cease the use of the technological means referred to in subsection (1) [*appearance by audioconference or videoconference*] and take any measure that the court considers appropriate in the circumstances to have the accused appear at the proceeding.

– CCC

Accused in prison

715.24 Despite anything in this Act, if an accused who is in prison does not have access to legal advice during the proceedings, the court shall, before permitting the accused to appear by videoconference, be satisfied that the accused will be able to understand the proceedings and that any decisions made by the accused during the proceedings will be voluntary.

– CCC

Audioconference and videoconference

Section 2 defines "audioconference" and videoconference".[1]

1. see Definitions of Parties, Persons, Places and Organizations

Summary Conviction Offences

In Part XXVII concerning summary convictions, s. 800 reads:

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

Video links

(2.1) If the summary conviction court so orders and the defendant agrees, the defendant who is confined in prison may appear by closed-circuit television or videoconference, as long as the defendant is given the opportunity to communicate privately with counsel if they are represented by counsel.
[*omitted (3)*]
R.S., 1985, c. C-46, s. 800; 1997, c. 18, s. 111; 2003, c. 21, s. 21; 2019, c. 25, s. 317.

– CCC

Preliminary Inquiry

Powers of justice

537 (1) A justice acting under this Part may

[*omitted (a), (b), (c), (d), (e), (f), (g), (h) and (i)*]
(j) where the prosecutor and the accused so agree, permit the accused to appear by counsel or by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the inquiry other than a part in which the evidence of a witness is taken;
(j.1) permit, on the request of the accused, that the accused be out of court during the whole or any part of the inquiry on any conditions that the justice considers appropriate; and
(k) for any part of the inquiry other than a part in which the evidence of a witness is taken, require an accused who is confined in prison to appear by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, if the accused is given the opportunity to communicate privately with counsel, in a case in which the accused is represented by counsel.

[*omitted (1,01), (1.02), (1.1) and (2)*]
(3) and (4) [Repealed, 1991, c. 43, s. 9]
R.S., 1985, c. C-46, s. 537; 1991, c. 43, s. 9; 1994, c. 44, s. 53; 1997, c. 18, s. 64; 2002, c. 13, s. 28; 2008, c. 18, s. 22.

– CCC

See also

- Obligation of Accused to be Present During Proceedings
- Remote Attendance of Counsel or Other Participants
- Remote Testimony
- Remote Attendance at the Court of Appeal

Remote Attendance of Counsel or Certain Other Participants

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Evidence < Testimonial Evidence < Remote Attendance

General Principles

Depending on what venue and what stage of proceedings a criminal matter is in, counsel for the Crown or defence may be able to appear by tele-presence through video or audio link.

A participant, including counsel, may appear under s. 715.25:

Participants
Definition of participant

715.25 (1) In this section, **"participant"** means any person, other than an accused, a witness, a juror, a judge or a justice, who may participate in a proceeding.

Participation by audioconference or videoconference

(2) Except as otherwise provided in this Act, the court may order a participant to participate in a proceeding by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

(a) the location and personal circumstances of the participant;
(b) the costs that would be incurred if the participant were to participate personally;
(c) the nature of the participation;
(d) the suitability of the location from where the participant will participate;
(e) the accused's right to a fair and public hearing; and
(f) the nature and seriousness of the offence.

Reasons

(3) If the court does not make an order under subsection (2) [*participation by audioconference or videoconference*] it shall include in the record a statement of the reasons for not doing so.

Cessation

(4) The court may, at any time, cease the use of the technological means referred to in subsection (2) [*participation by audioconference or videoconference*] and take any measure that the court considers appropriate in the circumstances to have the participant participate in the proceeding.

Costs

(5) Unless the court orders otherwise, a party who has a participant participate by audioconference or videoconference shall pay any costs associated with the use of that technology.
2019, c. 25, s. 292.
[*annotation(s) added*]

– CCC

Jury Trials

Under Part XX concerning jury trials:

Remote appearance

650.02 The prosecutor or the counsel designated under section 650.01 [*designation of counsel*] may appear before the court by audioconference or videoconference, if the technological means is satisfactory to the court.

2002, c. 13, s. 61; 2019, c. 25, s. 275.
[*annotation(s) added*]

– CCC

See Also

- Obligation of Accused to be Present During Proceedings
- Remote Attendance of Witnesses
- Remote Attendance of Judges or Jurors
- Remote Attendance at the Court of Appeal
- Representation and Attendance on Appeal

Remote Attendance of Witnesses

This page was last substantively updated or reviewed *March 2021*. (Rev. # 79573)

General Principles

The truth seeking function of a trial generally requires the presentation of evidence in court.[1] However, personal attendance is not always possible. Consequently, sections such as 714.1 and 714.2 provide exception to this rule to allow for evidence to be taken remotely.

"In person" testimony is said to assist in testing "truth telling".[2]

History

Various new provisions relating to remote appearance of witnesses were introduced by Bill C-75. The purposes were aimed at expanding the use of technology to "ensure fair and efficient proceedings while enhancing access to justice".[3]

1. *R v Bradshaw*, 2017 SCC 35 (CanLII), [2017] 1 SCR 865, *per* Karakatsanis J, at para 19 ("The truth-seeking process of a trial is predicated on the presentation of evidence in court. ")
2. *Bradshaw*, *ibid.*, at para 19
3. *R v Jeffries*, 2021 ONCJ 98 (CanLII), *per* McKay J, at para 12

Inside Canada

Section 714.1 of the Criminal Code allows a court to use “means of technology” to allow a witness to testify as a “virtual presence”.

> **Audioconference and videoconference — witness in Canada**
>
> 714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including
>
> (a) the location and personal circumstances of the witness;
> (b) the costs that would be incurred if the witness were to appear personally;
> (c) the nature of the witness’ anticipated evidence;
> (d) the suitability of the location from where the witness will give evidence;
> (e) the accused’s right to a fair and public hearing;
> (f) the nature and seriousness of the offence; and
> (g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order the evidence to be given by audioconference.
>
> 1999, c. 18, s. 95; 2019, c. 25, s. 290.
>
> – CCC

Purpose

The purpose of s. 714.1 is to "address not only the high cost of litigation, but also the inconvenience of disruption to the lives of witnesses" where the witnesses are outside of Canada. Consequently, the higher the cost and inconvenience harder it is to resist video link as an option.[1]

Presumption

There is a presumption that "unless the circumstances warrant dispensing with the usual practice, the witness should be called to the witness stand to testify."[2] Section 714.1 "does not replace the established procedure of calling witnesses to the witness stand in criminal cases or of allowing the accused to face his or her accuser" [3]

Analysis

The court can do "a sort of distance-cost, benefit-prejudice analysis" to decide. Naturally, most applicants have witnesses that are in "more remote regions of Canada."[4]

Where credibility is not at issue, the consideration is a "balance of convenience".[5]

It has been said that only in the "rarest of cases" that a complainant should testify by video-link.[6]

The court *may* allow video testimony if it is "appropriate" in "all the circumstances" including:

- the **location** and **personal circumstances** of the witness
- the **costs** that would be incurred if the witness had to be physically present; and
- the **nature** of the witness’ anticipated **evidence**.

s. 714.1

1. *R v Galandie*, 2008 BCPC 6 (CanLII), [2008] BCJ No 79 (P.C.), *per* Blake J

2. *R v Chapple*, 2005 BCSC 383 (CanLII), 15 MVR (5th) 141, *per* Parrett J
3. *Chapple*, *ibid.*
4. *R v Allen*, 2007 ONCJ 209 (CanLII), [2007] OJ No 1353 (ONCJ), *per* Duncan J
5. *R v SDL*, 2017 NSCA 58 (CanLII), 352 CCC (3d) 159, *per* MacDonald JA (3:0), at para 32
6. *R v Dessouza*, 2012 ONSC 145 (CanLII), *per* Ricchetti J, at para 26
   SDL, *supra*, at para 25

Factors

Factors to consider include:[1]

> 1) will a video appearance by the witness impede or impact negatively on the ability of defence counsel to cross-examine that witness?
> 2) the nature of the evidence to be introduced from the witness and whether it is non-controversial and not likely to attract any significant objection from defence counsel, for example various police and technical witnesses who testify to routine matters with respect to exhibits and the like and other matters that would not attract any particular objection on the part of the accused's counsel;
> 3) the integrity of the examination site and the assurance that the witness will be as free from outside influences or interruptions as that person would be in a public courtroom;
> 4) the distance the witness must travel to testify in person and the logistics of arranging for his or her personal appearance;
> 5) the convenience of the witness and to what degree having to attend in person at a distant location may interfere with important aspects of the witness's life, such as his or her employment, personal life and the like;
> 6) the ability of the witness to attend who lives in a country or area that makes it difficult to arrange for travel or travel in a reliable fashion;
> 7) the cost to the state of having the witness attend in person; and
> 8) a fact to consider also is that the witness is effectively beyond the control of the Court in the trial jurisdiction, and whatever powers a judge may have over such a person, they are certainly extraterritorial.

While the form of the order is at the discretion of the judge, the court should always order that witness be able to testify in a manner in which he can be seen, heard, and questioned by the parties. The court may also request the evidence only be given while the witness is in a courtroom and in the presence of a peace officer.[2]

Nature of the Evidence

A case where credibility is central to the dispute will weigh on the side against the use of video testimony.[3] Courts should be "very reluctant" when an issue of the case is one of credibility.[4]

Some suggestion that video only be considered in "exceptional circumstances" that "personally impact" the witness.[5] And where the witness is a complainant it must be "compelling" reasons.[6]

Cost-Savings

However, "cost saving to the state,...,in and of itself does not justify" the use of video conferencing.[7]

Technology

As the quality of video links improve to a point where the distinction from in-person testimony is "almost negligible", judges have increased their support in their use.[8]

Where the quality of the technology is a concern, there are instances the Court has been given an opportunity to see the proposed video link in operation or "alternatively makes an order conditional on a satisfactory test run."[9]

Procedure

It has been recommended that there needs to be a "strong evidentiary foundation" before a court should permit video link, particularly when the witness is the complainant.[10] This is especially so when credibility is at issue with the witness, in which case "compelling evidence" is required.[11]

See also:

- *R v Hinkley*, 2011 ABQB 567 (CanLII), 523 AR 400, *per* Marshall J
- *R v Denham*, 2010 ABPC 82 (CanLII), 500 AR 211, *per* Rosborough J

1. *R v Young*, 2000 SKQB 419 (CanLII), 150 CCC (3d) 317, *per* Wright J, at para 8
2. e.g. *R v Osmond*, 2010 CanLII 6535 (NL PC), NJ No 54, *per* Gorman J, at para 29
3. e.g. *R v Petit*, 2013 ONSC 2901 (CanLII), *per* Ellies J, at paras 7, 8
4. *R v Chapple*, 2005 BCSC 383 (CanLII), 15 MVR (5th) 141, *per* Parrett J, at paras 50 to 55
   R v SDL, 2017 NSCA 58 (CanLII), 352 CCC (3d) 159, *per* MacDonald JA (3:0), at para 26
5. *SDL*, *supra*, at para 32
6. *SDL*, *supra*, at para 32
7. *R v Ross*, 2007 BCPC 244 (CanLII), [2007] BCJ No 1753 (P.C.), *per* Giardini J
8. *R v Denham*, 2010 ABPC 82 (CanLII), 500 AR 211, *per* Rosborough J, -- judge speculated that it "will soon become essential to the conduct of court business"
9. *R v Chehil*, 2014 NSSC 421 (CanLII), 353 NSR (2d) 215, *per* Wood J, at para 6
10. *R v SDL*, 2017 NSCA 58 (CanLII), 352 CCC (3d) 159, *per* MacDonald CJ, at para 27
11. *SDL*, *ibid.*, at para 27

Outside Canada

Sections 714.2 addresses the circumstances where the court may take evidence by video link from a witness located outside of Canada. The section states:

> **Videoconference — witness outside Canada**
>
> 714.2 (1) A court shall receive evidence given by a witness outside Canada by videoconference, unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.
>
> **Notice**
>
> (2) A party who wishes to call a witness to give evidence under subsection (1) [*video conference – witness outside Canada*] shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than 10 days before the witness is scheduled to testify.
>
> 1999, c. 18, s. 95; 2019, c. 25, s. 290.
> [*annotation(s) added*]
>
> – CCC

Once an application is made with proper notice, Section 714.2 creates a presumption that places the onus is upon the party that opposes the use of the video link to establish that its use would be "contrary to the principles of fundamental justice"[1]

The difference in the standard between 714.1 and 714.2 "reflects the mischief being addressed", which includes the high cost of litigation and the disruption to the lives of those witnesses, which will be greater when out of country.[2]

Up to 2017, all published decisions resulted in a granting of testimony by video link.[3]

> The court *must* allow video testimony unless it is contrary to the "principles of fundamental justice", including the right to full answer and defence.
> s. 714.2

Factors to Consider

Other factors other than cost include:[4]

- ability or willingness of a witness to attend;
- nature of the testimony;
- dependence on exhibits;
- necessity; and
- reliability.

Costs

The costs associated with any application under s. 714.1 to 714.4 concerning evidence by audio or video link will be covered by the party calling the witness.[5]

1. *R v D'Entremont*, 2009 ABPC 374 (CanLII), 486 AR 222, *per* Fradsham J
2. *D'Entremont*, *supra*, at para 26
3. *R v Al-Enzi*, 2017 ONSC 304 (CanLII), *per* Warkentin J
   R v Christhurajah, 2016 BCSC 2399 (CanLII), *per* Ehrcke J
   R v Nguyen, 2015 SKQB 382 (CanLII), *per* McMurtry J
   R v Singh, 2015 ONSC 6823 (CanLII), *per* Coroza J
   R v Sorenson, 2014 ABQB 464 (CanLII), *per* Poelman J
   R v Schertzer, 2010 ONSC 6686 (CanLII), *per* Pardu J
   D'Entremont, *supra*
   R v Galandie, 2008 BCPC 6 (CanLII), *per* Blake J
   R v Turner, 2002 BCSC 1135 (CanLII), [2002] BCTC 1135, *per* Macaulay J
4. *R v Heynen*, 2000 YTTC 502(*no CanLII links) , at para 323
5. s. 714.7

Audio-only Testimony

Section 714.1 addresses the circumstances where the court may take evidence from a witness located within Canada by means of audio telecommunication. The section states:

Outside of Canada

Section 714.3 and 714.4 addresses the circumstances where the court may take evidence from a witness located outside of Canada by means of audio telecommunication.

> **Audioconference — witness outside Canada**
>
> 714.3 The court may receive evidence given by a witness outside Canada by audioconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including those set out in paragraphs 714.1(a) to (g) [*audioconference and videoconference – circumstances*].

1999, c. 18, s. 95; 2019, c. 25, s. 290.

– CCC

Evidence Outside of Canada

Order for examination of witness in Canada

46 (1) If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

Video links, etc.

(2) For greater certainty, testimony for the purposes of subsection (1) [*order for examination of witness in Canada*] may be given by means of technology that permits the virtual presence of the party or witness before the court or tribunal outside Canada or that permits that court or tribunal, and the parties, to hear and examine the party or witness.
R.S., 1985, c. C-5, s. 46; 1999, c. 18, s. 89.

– CEA

Enforcement of the order

47. On the service on the party or witness of an order referred to in section 46 [*order for examination of witness in Canada*], and of an appointment of a time and place for the examination of the party or witness signed by the person named in the order for taking the examination, or, if more than one person is named, by one of the persons named, and on payment or tender of the like conduct money as is properly payable on attendance at a trial, the order may be enforced in like manner as an order made by the court or judge in a cause pending in that court or before that judge.
R.S., c. E-10, s. 44.

– CEA

Expenses and conduct money

48. Every person whose attendance is required in the manner described in section 47 [*enforcement of the order*] is entitled to the like conduct money and payment for expenses and loss of time as on attendance at a trial.
R.S., c. E-10, s. 45.

– CCC

Administering oath

49. On any examination of parties or witnesses, under the authority of any order made in pursuance of this Part, the oath shall be administered by the person authorized to take the examination, or, if more than one person is authorized, by one of those persons.
R.S., c. E-10, s. 46.

– CEA

Right of refusal to answer or produce document

50 (1) Any person examined under any order made under this Part has the like right to refuse to answer questions tending to criminate himself, or other questions, as a party or witness, as the case may be, would have in any cause pending in the court by which, or by a judge whereof, the order is made.

Laws about witnesses to apply — video links etc.

(1.1) Despite subsection (1), when a party or witness gives evidence under subsection 46(2) [*interrogatories – video links*], the evidence shall be given as though they were physically before the court or tribunal outside Canada, for the purposes of the laws relating to evidence and procedure but only to the extent that giving the evidence would not disclose information otherwise protected by the Canadian law of non-disclosure of information or privilege.

Contempt of court in Canada

(1.2) When a party or witness gives evidence under subsection 46(2) [*interrogatories – video links*], the Canadian law relating to contempt of court applies with respect to a refusal by the party or witness to answer a question or to produce a writing or document referred to in subsection 46(1), as ordered under that subsection by the court or judge.

Nature of right

(2) No person shall be compelled to produce, under any order referred to in subsection (1) [*refusal to comply and contempt*], any writing or other document that he could not be compelled to produce at a trial of such a cause.
R.S., 1985, c. C-5, s. 50; 1999, c. 18, s. 90.

– CEA

Rules of court

51 (1) The court may frame rules and orders in relation to procedure and to the evidence to be produced in support of the application for an order for examination of parties and witnesses under this Part, and generally for carrying this Part into effect.

Letters rogatory

(2) In the absence of any order in relation to the evidence to be produced in support of the application referred to in subsection (1) [*rules of court*], letters rogatory from a court or tribunal outside Canada in which the civil, commercial or criminal matter is pending, are deemed and taken to be sufficient evidence in support of the application.
R.S., 1985, c. C-5, s. 51; 1999, c. 18, s. 91.

– CEA

Special Issues of Remote Technology

Refusal or Termination of Remote Technology

Must Give Reasons For *Not* Taking Evidence Remotely

Reasons

714.4 If the court does not make an order under section 714.1 [*audioconference and videoconference – witness in Canada*] or does not receive evidence under section 714.2 [*video links, etc. – witness outside Canada*] or 714.3 [*audio evidence — witness outside Canada*], it shall include in the record a statement of the reasons for not doing so.

1999, c. 18, s. 95; 2019, c. 25, s. 290.
[*annotation(s) added*]

– CCC

Cessation

714.41 The court may, at any time, cease the use of the technological means referred to in section 714.1 [*audioconference and videoconference – witness in Canada*], 714.2 [*video links, etc. – witness outside Canada*] or 714.3 [*audio evidence — witness outside Canada*] and take any measure that the court considers appropriate in the circumstances to have the witness give evidence.

2019, c. 25, s. 290.
[*annotation(s) added*]

– CCC

Oath or Affirmation Outside of Canada

Misc Consequences

Costs of Costs of technology

714.7 Unless the court orders otherwise, a party who calls a witness to give evidence by means of the technology referred to in section 714.1 [*audioconference and videoconference – witness in Canada*], 714.2 [*video links, etc. – witness outside Canada*] or 714.3 [*audio evidence — witness outside Canada*] shall pay any costs associated with the use of the technology.

1999, c. 18, s. 95; 2019, c. 25, s. 290.
[*annotation(s) added*]

– CCC

Consent

714.8 Nothing in sections 714.1 to 714.7 [*video and audio evidence*] is to be construed as preventing a court from receiving evidence by audioconference or videoconference, if the parties so consent.

1999, c. 18, s. 95; 2019, c. 25, s. 290.
[*annotation(s) added*]

– CCC

Use of Virtual Presence for Witnesses at the Court of Appeal

See Also

- Testimonial Aids for Young, Disabled or Vulnerable Witnesses
- Precedent - Testimony by Video-link

Remote Attendance of Judges or Jurors

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Evidence < Testimonial Evidence < Remote Attendance

Remote Attendance by Judge, Justice or Juror

Judge or Justice
Presiding by audioconference or videoconference

715.26 (1) Except as otherwise provided in this Act, the judge or justice may preside at the proceeding by audioconference or videoconference, if the judge or justice considers it necessary having regard to all the circumstances, including

(a) the accused's right to a fair and public hearing;
(b) the nature of the witness' anticipated evidence;
(c) the nature and seriousness of the offence; and
(d) the suitability of the location from where the judge or justice will preside.

Reasons

(2) The judge or justice shall include in the record a statement of the judge or justice's reasons for the decision to preside at the proceeding by audioconference or videoconference.

Cessation

(3) The judge or justice may, at any time, cease the use of the technological means referred to in subsection (1) and take any measure that the judge or justice considers appropriate in the circumstances to preside at the proceeding.
2019, c. 25, s. 292.

– CCC

Remote Attendance at the Court of Appeal

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Evidence < Testimonial Evidence < Remote Attendance

General Principles

Appearance by Parties

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 (2.2)*]

Application of sections 715.25 and 715.26

(2.3) Sections 715.25 [*provisions re participants for audio and video conference*] and 715.26 [*judge or justice appearing by audio or videoconference*] apply, with any modifications that the circumstances require, to proceedings under this section.
[*omitted (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.
[*annotation(s) added*]

– CCC

Appearance by Witnesses

683
[*omitted (1), (2) and (2.1)*]

Virtual presence of witnesses

(2.2) Sections 714.1 to 714.8 [*video and audio evidence*] apply, with any modifications that the circumstances require, to examinations and cross-examinations of witnesses under this section.
[*omitted (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.
[*annotation(s) added*]

– CCC

See Also

- Remote Attendance of Counsel or Other Participants
- Remote Attendance of Witnesses
- Representation and Attendance on Appeal

Role of Law Enforcement

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Procedure and Practice < Role of Law Enforcement

General Principles

Duty to Investigate

Police have a duty, on behalf of the public interest, to investigate alleged crimes, which includes making inquiries from relevant sources of information, including the accused.[1] While they have a duty to investigate and enforce the law, there is residual discretion on when to engage the judicial process.

Not Agents of Government

Law enforcement is not the agent or servant of the government that employs them. Rather they are servants to the public interest or Crown.[2]

Tort Liability

At common law, an officer is liable for their own conduct under law.[3] However, liability of officers acting in the execution of their duties is governed under federal and provincial legislation.[4]

Peace officers can be liable for harm inflicted upon prisoners held in their custody.[5]

Trickery

Law enforcement should expect to deal with often "sophisticated criminal" and so should not be expected to be governed by "the Marquess of Queensbury rules". [6]

The police are expected to sometimes resort to "tricks or other forms of deceit" when engaged in the investigation of crime.[7]

Unless the police engage in "dirty tricks", courts should not be engaging in determining "good taste or preferred methods of investigation".[8]

Officers have duty to protect those in custody. They may even be held liable if the detainee is assaulted by others and nothing is done to prevent the assault.[9]

Undercover operations

The use of "reverse sting" operations was found illegal.[10] "Mr Big" operations are permitted, however, the evidence collected is presumptively inadmissible unless proven otherwise.[11]

Police Representing Crown

While it may have been available in the past, police are not allowed to appear at bail hearings for indictable offences.[12]

1. *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* McLachlin CJ and Charron J, at para 63
2. *McCleave v City of Moncton*, 1902 CanLII 73 (SCC), 32 SCR 106, *per* Strong CJ
   New South Wales v Perpetual Trustee Co , [1955] AC 457 (PC) (UK)
3. *Bainbridge v Postmaster General* , [1906] 1 KB 178 (Eng CA) (UK)
4. CAN: Crown Liability Act, s. 3
   ON: Police Services Act, s. 50(1)
   QC: Police Act
   BC: Police Act, s. 21
5. *R v Nixon*, 1990 CanLII 10993 (BCCA), 57 CCC (3d) 97, *per* Legg JA leave refused 60 CCC (3d) vi
6. *R v Rothman*, 1981 CanLII 23 (SCC), [1981] 1 SCR 640, *per* Lamer J ("It must... be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit, and should not through the rule be hampered in their work.")
7. *Rothman*, *ibid.*

8. *R v Skinner*, 1992 CanLII 4015 (MB QB), 17 CR (4th) 265, *per* Scollin J, at p. 14 ("Absent "dirty tricks", the courts should not set themselves up as the arbiters of good taste or of the preferred methods of investigation. It is unrealistic to demand chivalry from those who must investigate what are often heinous offences against blameless victims. ...the courts should not be so indulgent as to preserve the accused from himself and his own untrammelled tongue")
   R v Roberts, 1997 CanLII 3313 (BCCA), 34 WCB (2d) 232, *per* Hall JA, at para 14
   R v Bonisteel, 2008 BCCA 344 (CanLII), 236 CCC (3d) 170, *per* Levine J, at para 89
   R v Figliola, 2012 ONSC 4560 (CanLII), *per* Whitten J, at para 95
9. *R v Nixon*, 1990 CanLII 10993 (BCCA), 57 CCC (3d) 97, *per* Legg JA
10. *R v Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, *per* Binnie J
11. see Admissions from Mr Big Operations
12. *Hearing Office Bail Hearings (Re)*, 2017 ABQB 74 (CanLII), 344 CCC (3d) 357, *per* Wittmann J
    R v Reilly, 2019 ABCA 212 (CanLII), 376 CCC (3d) 497, *per* Slatter JA, at para 12 ("The Alberta government first sought a judicial declaration that police officers were authorized to represent the Crown at bail hearings. That application was dismissed, with the court declaring that police officers could not appear at bail hearings for indictable offences: ... . The government chose not to challenge that decision, but rather proceeded to change the bail system by replacing police officers with Crown prosecutors.")

Police Powers

Police are empowered by common law and statutory powers to execute their duties.

Common Law Powers

Police have a number of powers vested by the common law that are related to their duties.[1]

Statutory Powers

Various provincial legislation empowers police to detain, arrest, search and seize. This includes:

- Liquor and Cannabis Control legislation[2]
- Motor Vehicle legislation
- Mental Health legislation[3]
- Protection of Property legislation[4]

Topics

- Investigative Detention
- Warrantless Arrests
- Warrant Arrests
- Warrantless Search in Exigent Circumstances
- Authorized Searches Under s. 487
- Seizure of Property

Authority by Police Type

The Royal Canadian Mounted Police (RCMP) is the national police force.[5] They are peace officers for all jurisidctions in Canada.[6]

RCMP peace officers have "*primary* investigative jurisdiction concerning crimes committed in relation to national security or designated protected persons or designated protected sites".[7]

1. See Ancillary Powers Doctrine
2. NS: Liquor Control Act, [11]
   ON: Liquor Licence Act
3. ON: Mental Health Act
   NS: Involuntary Psychiatric Treatment Act
4. ON: Trespass to Property Act
5. Royal Canadian Mounted Police Act (RCMPA), R.S.C., 1985, c. R-10, s. 3
6. s. 3 and 11.1 RCMPA
7. *R v Seguin*, 2016 ONCJ 441 (CanLII), *per* Letourneau J, at para 50
   Security Offences Act, RSC 1985, c S-7 at s. 2 and 6

Note Taking

Duty to Make Contemporaneous Notes

The taking of notes during the course of an investigation is not simply as an *aide memoire*. They have an obligation to make notes.[1]

It is important for the judicial fact finding process that significant facts be recorded and not left to the "whim of memory".[2]

Consequence of Not Making Notes

Where police fail to take contemporaneous notes, their testimony may be considered unreliable and may not be admitted.[3]

Intentional failure to make notes may have negative consequences if it associated with a Charter breach.[4] However, there is no known principle that says that incomplete notes, by themselves, amounts to a breach of an accused right to full answer and defence under s. 7 adn 11(d) of the Charter.[5]

Police should not be seen to thwart the objectives of Stinchcombe by making less accurate notes.[6]

Special Cases For Notes

There are additional constitutional obligations on peace officers to make detailed notes when engaged in the following:

- performing a warrantless search of electronic devices (see Search Incident to Arrest)
- performing a warrantless strip/body cavity searches (Search Incident to Arrest#Strip Searches)
- Justifying the use of force during an arrest or search (see Arrest Procedure and Manner of Search)

1. *Wood v Schaeffer*, 2013 SCC 71 (CanLII), SCJ No 71, *per* Moldaver J, at para 67 ("...police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation")
2. *R v Lozanovski*, 2005 ONCJ 112 (CanLII), 64 WCB (2d) 630, *per* Feldman J, at para 14 ("It is important to the proper functioning of the judicial fact-finding role that significant facts be recorded by police and not left to the whim of memory.")
3. *R v Tweedly*, 2013 BCSC 910 (CanLII), *per* Greyell J, at para 160 ("it is important to recall it has been held innumerable times in our courts that police testimony, without the advantage of contemporaneous notes, is unreliable and often not admitted into evidence for that purpose.")
   R v Zack, [1999] OJ No 5747 (Ont. C.J.)(*no CanLII links) , at para 6 ("In my view, the absence of the questioned observations in his notebook lead to the conclusion that those observations were not, in fact, made at the time but are perhaps something that over the course of time the officer has come to believe that he saw")
4. *R v Vu*, 2013 SCC 60 (CanLII), [2013] 3 SCR 657, *per* Cromwell J, at para 70 - Officer intentionally avoided taking notes
5. *R v Bailey*, 2005 ABCA 61 (CanLII), 63 WCB (2d) 614, *per* Hunt JA, at para 43 to 44
6. *R v Eagle*, [1996] OJ No 2867 (Ont. C.J.)(*no CanLII links) referencing the "Martin Report" ("The statement should emphasize that disclosure requirements after Stinchcombe cannot be thwarted by making less accurate or less comprehensive notes.")
   R v Satkunananthan, 2001 CanLII 24061 (ON CA), 152 CCC (3d) 321, *per curiam*, at para 78

Special Authorizations

- Powers to Suppress Riots
- Authorizations to Commit Illegal Acts

See Also

- Abuse of Process by Law Enforcement
- State and Police Misconduct as a Sentencing Factor
- Peace Officers

Other Parties

- Role of the Accused
- Role of the Defence Counsel
- Role of the Trial Judge
- Role of the Victim and Third Parties
- Role of the Crown

Authorizations to Commit Illegal Acts

This page was last substantively updated or reviewed *January 2019*. (Rev. # 79573)

< Procedure and Practice < Role of Law Enforcement

General Principles

It is a constitutional requirement that everyone, including all public officers, are subject to the ordinary laws of the country.[1]

Unless permitted by statute, a peace officer is not permitted to break the law in order to execute his or her duties.[2]

> **Definitions**
>
> 25.1 (1) The following definitions apply in this section and sections 25.2 to 25.4 [*public officer to file annual report*].
> **"competent authority"** means, with respect to a public officer or a senior official,
>
> (a) in the case of a member of the Royal Canadian Mounted Police, the Minister of Public Safety and Emergency Preparedness, personally;
> (b) in the case of a member of a police service constituted under the laws of a province, the Minister responsible for policing in the province, personally; and
> (c) in the case of any other public officer or senior official, the Minister who has responsibility for the Act of Parliament that the officer or official has the power to enforce, personally.
>
> **"public officer"** means a peace officer, or a public officer who has the powers of a peace officer under an Act of Parliament.
> **"senior official"** means a senior official who is responsible for law enforcement and who is designated under subsection (5) [*power to designate senior officials*].
>
> **Principle**

(2) It is in the public interest to ensure that public officers may effectively carry out their law enforcement duties in accordance with the rule of law and, to that end, to expressly recognize in law a justification for public officers and other persons acting at their direction to commit acts or omissions that would otherwise constitute offences.

Designation of public officers

(3) A competent authority may designate public officers for the purposes of this section and sections 25.2 to 25.4 [*public officer to file annual report*].

Condition — civilian oversight

(3.1) A competent authority referred to in paragraph (a) or (b) of the definition of that term in subsection (1) [*protection of law enforcement – definitions*] may not designate any public officer under subsection (3) [*power to designate a public officers*] unless there is a public authority composed of persons who are not peace officers that may review the public officer's conduct.

Declaration as evidence

(3.2) The Governor in Council or the lieutenant governor in council of a province, as the case may be, may designate a person or body as a public authority for the purposes of subsection (3.1), and that designation is conclusive evidence that the person or body is a public authority described in that subsection.

Considerations

(4) The competent authority shall make designations under subsection (3) [*power to designate a public officers*] on the advice of a senior official and shall consider the nature of the duties performed by the public officer in relation to law enforcement generally, rather than in relation to any particular investigation or enforcement activity.

Designation of senior officials

(5) A competent authority may designate senior officials for the purposes of this section and sections 25.2 to 25.4 [*public officer to file annual report*].

Emergency designation

(6) A senior official may designate a public officer for the purposes of this section and sections 25.2 to 25.4 [*public officer to file annual report*] for a period of not more than 48 hours if the senior official is of the opinion that

> (a) by reason of exigent circumstances, it is not feasible for the competent authority to designate a public officer under subsection (3) [*power to designate a public officers*]; and
> (b) in the circumstances of the case, the public officer would be justified in committing an act or omission that would otherwise constitute an offence.

The senior official shall without delay notify the competent authority of the designation.

Conditions

(7) A designation under subsection (3) [*power to designate a public officers*] or (6) [*protection of law enforcement – emergency designation*] may be made subject to conditions, including conditions limiting

> (a) the duration of the designation;
> (b) the nature of the conduct in the investigation of which a public officer may be justified in committing, or directing another person to commit, acts or omissions that would otherwise constitute an offence; and
> (c) the acts or omissions that would otherwise constitute an offence and that a public officer may be justified in committing or directing another person to commit.

Justification for acts or omissions

(8) A public officer is justified in committing an act or omission — or in directing the commission of an act or omission under subsection (10) [*persons acting at direction of public officer*] — that would otherwise constitute an offence if the public officer

> (a) is engaged in the investigation of an offence under, or the enforcement of, an Act of Parliament or in the investigation of criminal activity;
> (b) is designated under subsection (3) [*power to designate a public officers*] or (6) [*protection of law enforcement – emergency designation*]; and
> (c) believes on reasonable grounds that the commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties.

Requirements for certain acts

(9) No public officer is justified in committing an act or omission that would otherwise constitute an offence and that would be likely to result in loss of or serious damage to property, or in directing the commission of an act or omission under subsection (10) [*persons acting at direction of public officer*], unless, in addition to meeting the conditions set out in paragraphs (8)(a) to (c) [*requirements for public officer immunity from criminal offences*], he or she

> (a) is personally authorized in writing to commit the act or omission — or direct its commission — by a senior official who believes on reasonable grounds that committing the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties; or

(b) believes on reasonable grounds that the grounds for obtaining an authorization under paragraph (a) exist but it is not feasible in the circumstances to obtain the authorization and that the act or omission is necessary to

(i) preserve the life or safety of any person,
(ii) prevent the compromise of the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer, or
(iii) prevent the imminent loss or destruction of evidence of an indictable offence.

Person acting at direction of public officer

(10) A person who commits an act or omission that would otherwise constitute an offence is justified in committing it if

(a) a public officer directs him or her to commit that act or omission and the person believes on reasonable grounds that the public officer has the authority to give that direction; and
(b) he or she believes on reasonable grounds that the commission of that act or omission is for the purpose of assisting the public officer in the public officer's law enforcement duties.

Limitation

(11) Nothing in this section justifies

(a) the intentional or criminally negligent causing of death or bodily harm to another person;
(b) the wilful attempt in any manner to obstruct, pervert or defeat the course of justice; or
(c) conduct that would violate the sexual integrity of an individual.

Protection, defences and immunities unaffected

(12) Nothing in this section affects the protection, defences and immunities of peace officers and other persons recognized under the law of Canada.

Compliance with requirements

(13) Nothing in this section relieves a public officer of criminal liability for failing to comply with any other requirements that govern the collection of evidence.

Exception — *Controlled Drugs and Substances Act* and *Cannabis Act*

(14) Nothing in this section justifies a public officer or a person acting at his or her direction in committing an act or omission — or a public officer in directing the commission of an act or omission — that constitutes an offence under a provision of Part I of the *Controlled Drugs and Substances Act* or of the regulations made under it or a provision of Division 1 of Part 1 of the *Cannabis Act*.

2001, c. 32, s. 2; 2005, c. 10, s. 34; 2018, c. 16, s. 207.
[*annotation(s) added*]

– CCC

Public officer to file report

25.2 Every public officer who commits an act or omission — or directs the commission by another person of an act or omission — under paragraph 25.1(9)(a) [*offence by public officers permitted – written authority*] or (b) [*offence by public officers permitted – exigent circumstances*] shall, as soon as is feasible after the commission of the act or omission, file a written report with the appropriate senior official describing the act or omission.
2001, c. 32, s. 2.
[*annotation(s) added*]

– CCC

Annual report

25.3 (1) Every competent authority shall publish or otherwise make available to the public an annual report for the previous year that includes, in respect of public officers and senior officials designated by the competent authority,

(a) the number of designations made under subsection 25.1(6) [*protection of law enforcement – emergency designation*] by the senior officials;
(b) the number of authorizations made under paragraph 25.1(9)(a) [*offence by public officers permitted – written authority*] by the senior officials;
(c) the number of times that acts and omissions were committed in accordance with paragraph 25.1(9)(b) [*offence by public officers permitted – exigent circumstances*] by the public officers;

(d) the nature of the conduct being investigated when the designations referred to in paragraph (a) or the authorizations referred to in paragraph (b) were made or when the acts or omissions referred to in paragraph (c) were committed; and
(e) the nature of the acts or omissions committed under the designations referred to in paragraph (a) , under the authorizations referred to in paragraph (b) and in the manner described in paragraph (c) .

Limitation

(2) The annual report shall not contain any information the disclosure of which would

(a) compromise or hinder an ongoing investigation of an offence under an Act of Parliament;
(b) compromise the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer;
(c) endanger the life or safety of any person;
(d) prejudice a legal proceeding; or
(e) otherwise be contrary to the public interest.

2001, c. 32, s. 2.
[*annotation(s) added*]

– CCC

Written notification to be given

25.4 (1) When a public officer commits an act or omission — or directs the commission by another person of an act or omission — under paragraph 25.1(9)(a) [*offence by public officers permitted – written authority*] or (b) [*offence by public officers permitted – exigent circumstances*], the senior official with whom the public officer files a written report under section 25.2 [*public officer to file annual report*] shall, as soon as is feasible after the report is filed, and no later than one year after the commission of the act or omission, notify in writing any person whose property was lost or seriously damaged as a result of the act or omission.

Limitation

(2) The competent authority may authorize the senior official not to notify the person under subsection (1) [*written notification to be given*] until the competent authority is of the opinion that notification would not

(a) compromise or hinder an ongoing investigation of an offence under an Act of Parliament;
(b) compromise the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer;
(c) endanger the life or safety of any person;
(d) prejudice a legal proceeding; or
(e) otherwise be contrary to the public interest.

2001, c. 32, s. 2.
[*annotation(s) added*]

– CCC

A civilian can be authorized to commit a criminal act or omission when directed by a public officer or otherwise acting as an agent.[3]

1. *R v Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, *per* Binnie J, at para 1(It is a "constitutional principle that everyone from the highest officers of the state to the constable on the beat is subject to the ordinary law of the land. ")
2. *R v Brennan*, 1989 CanLII 7169 (ON CA), 52 CCC (3d) 366, *per* Catzman JA - police officer not permitted to ignore stop signs while on duty
3. *R v Lising and Ghavami*, 2007 BCSC 369 (CanLII), *per* Curtis J, at para 78 - includes a sample authorization letter

Accused in Court

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Procedure and Practice < Trials

General Principles

Right to Self-Representation

- Right to Self-Representation

Accused's Obligation to be Present in Court

- Obligation of Accused to be Present During Proceedings

Video-link Appearance

See also: Procuring the Attendance of a Prisoner

Accused Absconding

Where the accused is required to attend an appearance for a summary offence and does not, the court may issue a warrant for their arrest.[1]

From Preliminary Inquiry or Trial

> **Accused absconding during trial**
>
> 475 (1) Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, absconds during the course of his trial,
>
> (a) he shall be deemed to have waived his right to be present at his trial, and
> (b) the court may
>
> (i) continue the trial and proceed to a judgment or verdict and, if it finds the accused guilty, impose a sentence on him in his absence, or
> (ii) if a warrant in Form 7 [*forms*] is issued for the arrest of the accused, adjourn the trial to await his appearance,
>
> but where the trial is adjourned pursuant to subparagraph (b)(ii), the court may, at any time, continue the trial if it is satisfied that it is no longer in the interests of justice to await the appearance of the accused.
>
> **Adverse inference**
>
> (2) Where a court continues a trial pursuant to subsection (1) [*accused absconding during trial*], it may draw an inference adverse to the accused from the fact that he has absconded.
>
> **Accused not entitled to re-opening**
>
> (3) Where an accused reappears at his trial that is continuing pursuant to subsection (1) [*accused absconding during trial*], he is not entitled to have any part of the proceedings that was conducted in his absence re-opened unless the court is satisfied that because of exceptional circumstances it is in the interests of justice to re-open the proceedings.
>
> **Counsel for accused may continue to act**
>
> (4) Where an accused has absconded during the course of his trial and the court continues the trial, counsel for the accused is not thereby deprived of any authority he may have to continue to act for the accused in the proceedings.
> R.S., 1985, c. C-46, s. 475; R.S., 1985, c. 27 (1st Supp.), s. 185(F), c. 1 (4th Supp.), s. 18(F).
> [*annotation(s) added*]
>
> – CCC

For the purpose of s. 475, "abscond" refers to the avoidance of trial "for the purpose of impeding or frustrating" the trial. Merely failure to attend is not enough.[2]

Section 475 does not violate section 7[3] or section 11(d) right to a fair trial.[4]

Merely failing to attend for a trial continuation and the withdraw of defence counsel does not permit a finding that the accused "absconded" within the meaning of s. 475.[5]

> **Absconding Accused**
> **Accused absconding during inquiry**
>
> 544 (1) Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, absconds during the course of a preliminary inquiry into an offence with which he is charged,
>
> (a) he shall be deemed to have waived his right to be present at the inquiry, and
> (b) the justice

(i) may continue the inquiry and, when all the evidence has been taken, shall dispose of the inquiry in accordance with section 548 [*order to stand trial or discharge, process and consequences*], or
(ii) if a warrant is issued for the arrest of the accused, may adjourn the inquiry to await his appearance,

but where the inquiry is adjourned pursuant to subparagraph (b)(ii), the justice may continue it at any time pursuant to subparagraph (b)(i) if he is satisfied that it would no longer be in the interests of justice to await the appearance of the accused.

Adverse inference

(2) Where the justice continues a preliminary inquiry pursuant to subsection (1) [*consequence of accused absconding preliminary inquiry*], he may draw an inference adverse to the accused from the fact that he has absconded.

Accused not entitled to re-opening

(3) Where an accused reappears at a preliminary inquiry that is continuing pursuant to subsection (1) [*consequence of accused absconding preliminary inquiry*], he is not entitled to have any part of the proceedings that was conducted in his absence re-opened unless the justice is satisfied that because of exceptional circumstances it is in the interests of justice to re-open the inquiry.

Counsel for accused may continue to act

(4) Where an accused has absconded during the course of a preliminary inquiry and the justice continues the inquiry, counsel for the accused is not thereby deprived of any authority he may have to continue to act for the accused in the proceedings.

Accused calling witnesses

(5) If, at the conclusion of the evidence on the part of the prosecution at a preliminary inquiry that has been continued under subsection (1) [*consequence of accused absconding preliminary inquiry*], the accused is absent but their counsel is present, the counsel shall be given an opportunity to call witnesses on behalf of the accused, subject to subsection 537(1.01) [*power limit issues and witnesses*], and subsection 541(5) [*depositions of inquiry witnesses*] applies with any modifications that the circumstances require.

R.S., 1985, c. C-46, s. 544; 1994, c. 44, s. 55; 2019, c. 25, s. 246.
[*annotation(s) added*]

– CCC

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1. s. 800(2)
2. *R v Taylor*, 2010 BCCA 58 (CanLII), 252 CCC (3d) 197, *per* Levine JA
3. *R v Czuczman*, 1986 CanLII 2714 (ON CA), 26 CCC (3d) 43, *per* Brooke JA
4. *R v Tzimopoulos*, 1986 CanLII 152 (ON CA), 29 CCC (3d) 304, *per curiam*
5. *Taylor*, *supra*

Deceased Accused

Generally, a prosecution will terminate by the Court declaring the matter "abated" where the accused dies regardless of the stage of proceedings.[1]

There are is some exception permitted for pending appellate matters.[2]

The Court of Appeal maintains jurisdiction over an appeal where the accused has died. It is in their discretion to either declare the appeal "abated" or considering it on its merits.[3] Discretion should be exercised where the court is satisfied that:[4]

1. there are serious grounds of appeal *and* the verdict being appealed carries significant consequences for the party seeking to continue the appeal; or
2. for any reason where it is in the interests of justice to do so.

The "interests of justice" component will be the predominant consideration and should subsume the other elements.[5]

The "interests of justice" test requires consideration of "all relevant circumstances".[6]

The "overwhelming number" of appeals where the accused dies should result in abatement.[7]

"Scarce judicial resources" should rarely be a "disqualifying consideration".[8]

Fresh evidence leading to factual innocence may be sufficient to be in the interests of justice.[9]

Factors

The court should consider to varying degrees the following non-exhaustive list of factors:[10]

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 Ssenyonga*, 1993 CanLII 14680 (ON SC), [1993] OJ No 3273 (Ont. Ct. (Gen. Div.)), *per* McDermid J
   R v Neufeldt, 2005 ABPC 163 (CanLII), *per* Norheim J
   R v Douglas, 2004 BCPC 279 (CanLII), *per* Lenaghan J
2. *R v MacLellan*, 2019 NSCA 2 (CanLII), *per* Beveridge JA (2:1)
   R v Jetté, 1999 CanLII 13411 (QC CA), , 141 CCC (3d) 52; [1999] J.Q. No 4641, *per* Fish JA (3:0) - first case to find discretion to continue
   R v Smith, 2004 SCC 14 (CanLII), [2004] 1 SCR 385, *per* Binnie J (7:0)
   cf. *R v Netter*, [1975] BCJ No 1191 (CA)(*no CanLII links)
   Collins v The Queen, 1973 CanLII 655 (ON CA), [1973] 3 OR 672 (CA), *per curiam*
   Cadeddu v The Queen, 1983 CanLII 1763 (ON CA), (1983), 41 OR (2d) 481 (CA), 3 CCC (3d) 112, *per curiam*
   R v Hay, [1994] OJ No 2598 (CA)(*no CanLII links)
   R v Lewis, 1997 CanLII 3584 (BC CA), (1997), 153 DLR (4th) 184 (BCCA)
3. *Jette*, *supra*, at para 59 *Cadeddu*, *supra*, at pp. 118-119
4. *Jette*, *supra*, at para 60
5. *Smith*, *supra*, at paras 41 and 42
6. *Smith*, *supra*, at para 46
7. *Smith*, *supra*, at para 46
   Cadeddu, *supra*, at p. 114
8. *Smith*, *supra*, at para 47
9. e.g. see *Jette*, *supra*
10. *Smith*, *supra*, at para 51

Special Issues of Accused Appearances

Right to Face Accusers

The "right to face one's accusers is not in this day and age to be taken in the literal sense...it is simply the right of an accused to be present in court, to hear the case against him and to make answer and defence to it."[1]

This is a qualified right and can be limited by the availability of witness screens, closed-circuit video testimony, video link testimony, and other statutory and common law protections of witnesses.

1. *R v R(ME)*, 1989 CanLII 7212 (NS CA), 49 CCC (3d) 475, *per* Macdonald JA
   R v JZS, 2008 BCCA 401 (CanLII), 238 CCC (3d) 522, *per* D Smith J, at para 34

Use of Restraints in Court

There is a presumption that the accused should not be in restraints while in court.[1] The crown Bears the burden to establish that the use of restraint is reasonable.[2]

1. *R v McNeill*, 1996 CanLII 812 (ON CA), 108 CCC (3d) 364, *per* Morden ACJ
2. *R v Wills*, 2006 CanLII 31909 (ON SC), [2006] OJ No 3662 (SCJ), *per* Fuerst J, at para 45

Sitting Position of Accused

- Sitting Position of the Accused at Trial

Accused and Offender Defined

Right to Representation

A judge must make adequate inquiries into whether the accused wants to be represented by counsel.[1] He should be "thorough" in his explanation of the importance of exercising the right.[2] Failure to do so may infringe the accused's Charter rights under s. 7.[3]

1. *R v Boone*, 2003 MBQB 292 (CanLII), 179 Man R (2d) 227, *per* Darichuk J, at para 15
   R v Hardy, 1990 CanLII 5615 (AB QB), 62 CCC (3d) 28, *per* Mcdonald J
2. *Boone*, *supra*, at para 16
   R v H(BC), 1990 CanLII 10964 (MB CA), 58 CCC (3d) 16, *per* Twaddle JA, at 22
3. *Boone*, *supra*, at #par15 para 15
   see also *Hardy*, *supra*

Organizations as Accused

An accused who is an organization must appear by counsel or agent.[1] Failure of counsel or agent to attend permits the court to order an ex parte trial.[2]

1. s. 800(3)
2. S. 800(3)

See Also

Other Parties

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

Sitting Position of the Accused at Trial

< Procedure and Practice < Trials

General Principles

The Criminal Code is silent on the issue of the sitting position of the accused. It is understood at common law that the sitting arrangement of the accused in the court is in the sole discretion of the trial judge.[1]

Custom dictates that the accused is to be placed in the dock.[2] This expectation does not violate the accused's Charter rights.[3]

Visibility of Accused

The trier of fact should be able to see the accused during the trial.[4] This interest may prevent the accused from requesting a seat at counsel table to give instructions.[5]

Two Lines of Authority

The primary line of cases suggests that the accused should be placed in the dock unless the accused can establish "sound reason" to allow the accused to sit at counsel table.[6] It has further been suggested that the presumption should prevail unless "a miscarriage of justice has been established."[7]

The second line of cases suggests that the accused should be permitted to sit outside the dock "unless security considerations...[are] demonstrated to be necessary, or at least advisable, to ensure the safety of all involved."[8]

When considering the sitting position the court should take into account the fairness of differential treatment between a person in custody and those released from custody.[9]

Constitutionality

The requirement to sit in the "prisoner's" dock does not violate the accused's charter rights, including the right to the presumption of innocence.[10]

1. *R v Levogiannis*, 1993 CanLII 47 (SCC), [1993] 4 SCR 475, *per* L'Heureux-Dubé J, at para 53
   R v Lalande, 1999 CanLII 2388 (ON CA), , [1999] OJ No 3267, *per* Borins JA, at para 19("Where an accused person sits during his or her trial is within the discretion of the presiding judge, to be determined in the interests of a fair trial and courtroom security")
   R v Rafferty, 2012 ONSC 1009 (CanLII), *per* Heeney J, at para 3
2. *R v Ahmad et al.*, 2010 ONSC 1777 (CanLII), *per* Dawson J, at para 4
   R v Gervais, 2001 CanLII 28428 (ON SC), 49 CR (5th) 177, *per* Campbell J
3. *Gervais*, *ibid.*, at para 8
4. *R v Sinclair*, 2010 ONSC 7253 (CanLII), OJ No 5749, *per* O'Marra J
   Rafferty, *supra*, at para 13
5. *R v McCarthy*, 2012 CanLII 10661 (NLSCTD), *per* Goodridge J [refused request to sit at counsel table]
6. *Gervais*, *supra*
   Ahmad, *supra*, at para 4
   R v Vickerson, 2006 CanLII 2409 (ONSC), *per* DiTomaso J, at para 18
7. see *R v Grandinetti*, 2003 ABCA 307 (CanLII), 178 CCC (3d) 449, *per* per McFadyen JA, at para 84
   R v Badhwar, 2009 CanLII 23890 (ON SC), *per* McIsaac J
8. *Ahmad*, *supra*, at para 5
   R v Smith, 2007 CanLII 24094 (ONSC), [2007] OJ No 2579 (SCJ), *per* Trafford J
   R v Ramanathan, 2009 CanLII 86223 (ONSC), , [2009] OJ No 6233 (ONSC), *per* Corbett J
9. *Ahmad*, *supra*, at para 7
   Gervais, *supra*, at para 16
10. *Gervais*, *supra*, at para 8
    Vickerson, *supra*, at para 15 - no violation of presumption of innocence
    Sinclair, *supra*
    R v JA, 2017 ONSC 2043 (CanLII), *per* O'Marra J, at para 13

Accused in Custody

An accused is custody should remain in the dock unless there are "exceptional circumstances", such as "the length of the trial and the defendant's necessities, such as note taking".[1]

While generally not considered prejudicial, in certain cases, trial fairness should warrant a jury instruction to not draw any inference from the accused's presence in the "prisoner's" dock or the presence of sheriffs flanking the accused.[2]

1. *R v Minoose*, 2010 ONSC 6129 (CanLII), [2010] OJ No 4830, *per* Kane J, at para 32
2. *R v Spagnoli and Shore*, 2011 ONSC 4656 (CanLII), *per* Hambly J, at para 7
   Minoose, *supra*, at para 33
   Rafferty, *supra*, at para 11

Sitting with Counsel

Recommendations from the Morin Inquiry suggested that the accused be permitted to sit with counsel absent risk of danger.[1]

The sitting location of the accused is entirely in the discretion of the trial judge.[2] This discretion should not be interfered with unless it affects the right to full answer and defence.[3]

Need to Consult with Counsel

The importance of the accused to be able to consult with counsel is not an important factor where the court may have a recess for the purpose of consultation.[4]

Weapons

There should be consideration of the risks involved with the accused bringing weapons and potentially attacking persons in court.[5]

Burden

The onus is on the accused to establish that he should be permitted to sit at counsel table.[6]

Factors

Factors have been suggested to determine whether to grant the request:[7]

- the defendant's rights to a fair trial, to make full answer and defence, including the right to instruct counsel and courtroom security;
- whether the defendant is in custody
- whether there are security risks in sitting with counsel; and
- whether visibility by the jury is affected

Security concerns such as the safety of having the accused flanked by Sheriffs at counsel table as opposed to the dock. [8]

The court can consider the likelihood that constant communication between counsel and accused may distract the jury.[9]

Where it is not practical to consider counsel table for seating of accused, it can be a compromise to set-up a table in between the dock and defence counsel table.[10]

1. see referenced in *R v MT*, 2009 CanLII 43426 (ONSC), 84 WCB (2d) 644, *per* Nordheimer J
2. *R v JA*, 2017 ONSC 2043 (CanLII), *per* O'Marra J, at para 4
3. *JA*, *ibid.*, at para 4
   R v Levogiannis, 1993 CanLII 47 (SCC), [1993] 4 SCR 475, *per* L'Heureux-Dubé J, at para 34
   R v Faid, 1981 ABCA 139 (CanLII), 61 CCC (2d) 28, *per* Harradence JA, at p. 40
4. *R v Arsoniadis*, 2007 CanLII 13505 (ONSC), *per* Sproat J
5. e.g. *R v Lehoux*, 1997 CanLII 14559 (BC CA), *per* Donald JA - accused obsessed with family court result attacks lawyer with weapon
6. *R v Davis*, 2011 ONSC 5567 (CanLII), *per* van Rensburg J, at para 11
7. *Minoose*, *supra*, at para 32
   see also *R v GC*, 2013 ONSC 2904 (CanLII), OJ No 2279, *per* O'Marra J
8. e.g. *Rafferty*, *supra*
9. *Arsoniadis*, *supra*, at para 11
   R v McCarthy, 2012 CanLII 10661 (NLSCTD), *per* Goodridge J, at para 6
10. e.g. *R v Turner*, 2000 CanLII 28390 (NLSCTD), , [2000] NJ No 379, *per* Dymond J

Court Appointed Counsel

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Procedure and Practice

General Principles

State-funded Counsel ("Rowbotham" applications)

There is no constitutional right to state-funded trial counsel.[1] However, the right to a fair trial under s. 7 and 11(d) of the Charter enables the accused to apply for state-funded counsel in certain circumstances.[2]

Burden

The onus is upon the accused seeking counsel to establish their impecuniosity and that representation by counsel is necessary to ensure a fair trial.[3]

Requirements for State-funded Counsel

The central issue is "whether the accused can receive a fair trial".[4]

In order for the court to grant an order requiring the attorney general to pay for counsel of an accused, the applicant must prove on a balance of probabilities:[5]

1. that he is ineligible for, or has been refused Legal Aid and has exhausted all available appeals;

2. that he is indigent and has no other means to retain counsel; and,
3. that counsel is essential to his right to a fair trial.

The third requirement for trial fairness includes the "concept of the ability to make full answer and defence and the appearance of trial fairness."[6]

Appointment of counsel should not limited to "exceptional cases".[7]

Conduct of Accused as a Factor

The right to counsel requires that the accused be "acting in good faith", sincerely wanting legal representation and has been diligent in attempting to retain counsel. It should not be used a tool of delay.[8] Whether the accused acted in good faith or attempted delay proceedings is a finding of fact and given considerable deference.[9]

An accused is the "author of his own misfortune" where he has "forfeited his right to counsel" by his own conduct.[10]

The safeguards for the represented or self-represented accused "cannot be allowed to give rise to a right ...to disrupt the orderly process of a trial."[11]

Reasons for Rejection by Legal Aid

When a person is rejected by legal aid, the court is not to do a review of the reasons for doing so. It largely does not matter why legal aid was refused.[12]

However, refusal for something the accused "has done or failed to do" is important. The applicant must establish that rejection was not due to their non-cooperation or honesty with legal aid in getting qualified.[13]

Financial Means

The case law suggests the applicant must demonstrate financial evidence that details:[14]

1. extraordinary financial circumstances;
2. attempts to obtain funds to retain counsel;
3. prudence with expenses and prioritization of payment of his legal fees;
4. efforts to save for the cost of counsel and to raise funds by earning additional income;
5. he has made all reasonable effort to use his assets to raise funds, for example by obtaining loans;
6. whether he is in a position to pay some of the costs of counsel;
7. the income and assets of his spouse and family.

It is not unusual for funding to be denied where the applicant was employed or had assets that could be sold.[15]

A lack of financial prudence may disentitle the accused from funding.[16]

Fair Trial

The right to fair trial may be affected where the case is complex.[17]

Those offences that are less serious as they attract lesser penalties will more likely be compelled to proceed to trial unrepresented.[18]

Limited Retainer

It is possible for the court to order a limited retainer for only part of a trial to prevent an unfair trial.[19]

Stay of Proceedings

The court has a limited authority to grant a conditional stay of proceedings where the accused cannot afford counsel and so cannot receive a fair trial without counsel.[20]

Where a provincial court is faced with a person who cannot have a fair trial without representation, it *cannot* order the province to fund his defence. Rather the only remedy available to the provincial court is a conditional stay of proceedings.[21]

1. *R v Ewing*, 1974 CanLII 1394 (BC CA), 18 CCC (2d) 356 (BCCA), *per* MacLean JA
   R v Rowbotham et al, 1988 CanLII 147 (ON CA), 41 CCC (3d) 1(CA) {{TheCourtONCA}
   R v Rockwood, 1989 CanLII 197 (NS CA), NSR (2d) 305 (CA), *per* Chipman JA
2. *R v Dow*, 2009 MBCA 101 (CanLII), 247 CCC (3d) 487, *per* Steel JA, at para 25
   R v Lichtenwald, 2017 SKQB 94 (CanLII), *per* Gabrielson J, at para 5
3. See *R v Baker*, 2012 MBCA 76 (CanLII), 280 Man R (2d) 284, *per* Hamilton JA
   Lichtenwald, *supra*, at para 9
4. *R v Drury (L.W.) et al.*, 2000 MBCA 100 (CanLII), 47 WCB (2d) 512, *per* Huband JA, at para 23
   Dow, *supra*, at para 26
5. *R v Imona-Russel*, 2019 ONCA 252 (CanLII), 145 OR (3d) 197, *per* Lauwers JA, at para 38
   R v Tang, 2015 ONCA 470 (CanLII), 122 WCB (2d) 411, *per curiam*, leave to appeal refused, 2016 CarswellOnt 5402 and 5403, at para 9 *R v Baksh*, 2013 ONCJ 57 (CanLII), 286 CRR (2d) 171, *per* McArthur J, at para 4
   See *Rowbotham*, *supra*
   R v Montpellier, 2002 CanLII 34635 (ON SC), [2002] OJ No 4279, *per* Gordon J, at paras 5 to 7
6. *Imona-Russel*, *supra*, at para 39
   R v Rushlow, 2009 ONCA 461 (CanLII), 96 OR (3d) 302, *per* Rosenberg JA, at para 39 ("The purpose of the right to counsel in the context of a Rowbotham case is reflected in the nature of the test itself. Counsel is appointed because their assistance is essential for a fair trial. In my view, fair trial in this context embraces both the concept of the ability to make full answer and defence and the appearance of fairness.")
7. *Rushlow*, *supra*, at paras 19 to 21
   Dow, *supra*, at para 28

8. *Dow*, *supra*, at para 16
9. *Dow*, *supra*, at para 21
10. *Dow*, *supra*, at para 17
R v Bitternose, 2009 SKCA 54 (CanLII), 244 CCC (3d) 218, *per* Wilkinson JA, at para 29
11. *R v Howell*, 1995 CanLII 4282 (NS CA), NSR (2d) 1 (CA), *per* Chipman JA, aff'd at 1996 CanLII 145 (SCC), [1996] 3 SCR 604, *per* Sopkina J, at para 55 [T]he many safeguards built into the criminal justice system for an accused, particularly an unrepresented one, cannot be allowed to give rise to a right in an accused person to disrupt the orderly process of a trial"
12. *Dow*, *supra*, at para 23
R v Peterman, 2004 CanLII 39041 (ON CA), 185 CCC (3d) 352, *per* Rosenberg JA, at para 22 ("when a court makes a Rowbotham order, it is not conducting some kind of judicial review of decisions made by legal aid authorities. Rather, it is fulfilling its independent obligation to ensure that the accused receives a fair trial")
13. *R v Plange*, 2017 ONSC 134 (CanLII), *per* O'Marra J, at para 8
R v Montpellier, 2002 CanLII 34635 (ON SC), [2002] OJ No 4279 (ONSC), *per* Gordon J, at para 34
14. *R v Malik*, 2003 BCSC 1439 (CanLII), 111 CRR (2d) 40, *per* Stromberg-Stein J, at para 23 *R v Rushlow*, 2009 ONCA 461 (CanLII), 66 CR (6th) 245, *per* Rosenberg JA, at para 20
15. e.g. *R v Darby*, 2001 BCSC 1868 (CanLII), BCTC 1868, *per* Grist J
16. *R v Crichton*, 2013 BCSC 416 (CanLII), *per* Bracken J, at para 41
17. *R v Moodie*, 2016 ONSC 3469 (CanLII), *per* Nordheimer J - Stay granted on drug trafficking trial with complex issues including severance, co-conspirator's exception, possible challenge for cause.
R v Rushlow, 2009 ONCA 461 (CanLII), 245 CCC (3d) 505, *per* Rosenberg JA, at para 24
18. *Moodie*, *supra*, at para 8
Rushlow, *supra*
19. *Dow*, *supra*, at paras 32 to 37
20. *R v Rowbotham*, 1988 CanLII 147 (ON CA), 41 CCC (3d) 1, *per curiam*
21. e.g. *R v Dobson*, 2016 NBCA 18 (CanLII), 129 WCB (2d) 420, *per curiam*

Cross-Examination

A self-represented accused will not be permitted to cross-examine a witness in a number of situations, including trials with witnesses under 18, trials for criminal harassment, or otherwise where requested. In such cases, the court may appoint counsel to conduct the cross-examination.

For details see Cross-Examinations#Cross-Examination by Self-Represented Accused

Appeals

> **Legal assistance for appellant**
>
> 684 (1) A court of appeal or a judge of that court may, at any time, 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.
>
> **Counsel fees and disbursements**
>
> (2) Where counsel is assigned pursuant to subsection (1) [*legal assistance for appellant*] 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) [*legal assistance for appellant – fees and disbursements*] 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 court of appeal and the registrar may tax the disputed fees and disbursements.
> R.S., 1985, c. C-46, s. 684; R.S., 1985, c. 34 (3rd Supp.), s. 9.
> [*annotation(s) added*]
>
> – CCC

In order for the court to appoint counsel in preparation of an appeal under s. 694, the accused must establish that it is in the "interests of justice". This requires that he show:[1]

1. the appeal has merit[2] and at least is arguable;[3]
2. the appellant cannot properly present the issue without counsel; or
3. the court may not be able to decide the appeal without counsel.

The factors to consider have been stated as:[4]

1. The merits of the appeal;
2. The complexity of the appeal;

3. The appellant's capability;
4. The court's role to assist; and
5. The responsibility of Crown counsel to ensure that the applicant is treated fairly.

Arguable Issue

An "arguable issue" requires there to be sufficient substance to the ground of appeal that the panel is capable of being convinced to allow the appeal.[5] This assessment must be mindful that there is not a complete record before the chambers justice and that the petitioner may have difficulty in identifying the potential errors.[6]

Complexity

On the second branch of the test, the court must assess the appellant's ability to understand the applicable principles and marshal the arguments.[7]

Consideration should include the appellant's ability to read and write, understand principles, relate principles to the facts, and articulate themselves.[8]

1. *R v Forrest*, 2019 NSCA 47 (CanLII), *per* Beveridge JA, at para 3
2. *R v Robinson*, 1989 ABCA 267 (CanLII), 51 CCC (3d) 452, *per* McClung JA
   R v Clark, 2006 BCCA 312 (CanLII), 227 BCAC 237, *per* Donald J
3. *R v Ewanchuk*, 2008 ABCA 78 (CanLII), 429 AR 254, *per* Berger JA
   R v Ermine, 2010 SKCA 73 (CanLII), 7 WWR 605, *per* Jackson JA
   R v BLB, 2004 MBCA 100 (CanLII), 190 Man R (2d) 6, *per* Freedman JA
   R v Murray, 2009 NBCA 83 (CanLII), 910 APR 178, *per curiam*
   R v Bernardo, 1997 CanLII 2240 (ON CA), 121 CCC (3d) 123, *per* Doherty JA
   R v Abbey, 2013 ONCA 206 (CanLII), 115 OR (3d) 13, *per* Watt JA, at para 32
4. *R v Kelsie*, 2016 NSCA 72 (CanLII), *per* Farrar JA
5. *Forrest*, *supra*, at para 5
6. *Forrest*, *supra*, at para 5
7. *Bernardo*, *supra*, at para 24 ("This inquiry looks to the complexities of the arguments to be advanced and the appellant's ability to make an oral argument in support of the grounds of appeal. The complexity of the argument is a product of the grounds of appeal, the length and content of the record on appeal, the legal principles" *Forrest*, *supra*, at para 5
8. *Bernardo*, *supra*, at para 24 (" An appellant's ability to make arguments in support of his or her grounds of appeal turns on a number of factors, including the appellant's ability to understand the written word, comprehend the applicable legal principles, relate those principles to the facts of the case, and articulate the end product of that process before the court.")

See Also

- Forms for Court Appointed Counsel (Alberta)

Amicus Curae

This page was last substantively updated or reviewed *July 2021*. (Rev. # 79573)

< Procedure and Practice < Trials

General Principles

A superior court and provincial court dealing with criminal matters, has the discretion to appoint an *amicus curiae* counsel who will assist the court in the proceedings. This power arises from their inherent authority to "control their processes in order to function as courts of law" as well as the jurisdiction to " permit a particular proceeding to be successfully and justly adjudicated".[1]

An amicus can play a variety of roles as determined by the Court. There is no fixed role that they must play.[2]

Right to Self-Representation

The accused has a right to represent himself and cannot be forced to apply for counsel through legal aid or by way of a Robotham application.[3] However, an accused has no ability to discharge an amicus.[4]

Duty is Always to the Court

In any circumstances, the "defining characteristic" of an amicus is that their primary duty is to the court and responsibility to ensure "the proper administration of justice".[5] The amicus is not a lawyer to the accused, but rather is effectively a lawyer to the court.[6]

An Amicus cannot "control the litigation strategy".[7]

Purpose

An *amicus curiae* is counsel appointed by the court to assist an accused in representing himself. This is a more limited role than accused's counsel and does not require the confidence or consent of the accused. The amicus will provide assistance such as

1. objecting to perceived legal errors;
2. assisting the appellant in drafting a statement of the defence position;
3. assisting the appellant in subpoenaing any defence witnesses; and
4. advising the appellant on any questions of law.[8]

The role played by an Amicus, depending on the case, can range from relatively detached to fully engaged in the accused's behalf.[9]

The meaning of an *amicus curiae* "implies the friendly intervention of counsel to remind the Court of some matter of law which has escaped its notice and in regard to which it is in danger of going wrong."[10]

Whether to Appoint

The court must consider whether it can provide adequate guidance to an unrepresented accused such that it would permit a fair and orderly trial without an amicus.[11]

The judge should be mindful of whether an amicus is necessary to ensure the trial proceeds reasonably.[12]

Terms and Conditions of *Amicus*

The court may also set the terms and conditions of the appointment related to counsel's compensation.[13]

There is no solicitor-client privilege between the amicus and accused but the necessary confidentiality can flow from a Crown undertakign in consenting to the appointment of amicus.[14]

Amicus for Step Six Garofoli hearings

There is no special or enhanced obligation to appoint an amicus on a "Step Six" Garofoli application.[15]However, it should be done in "particularly difficult cases".[16]

Appeal of Appointment

Where the accused discharges their counsel who is subsequently appointed as amicus curiae, the accused can only appeal the appointment if there is an actual conflict of interest between the accused and his counsel.[17]

1. *R v Russel*, 2011 ONCA 303 (CanLII), 270 CCC (3d) 256, *per curiam*
   R v Thompson, 2017 ONCA 204 (CanLII), *per curiam*, at paras 15 to 18
   Ontario v Criminal Lawyers' Association of Ontario, 2013 SCC 43 (CanLII), [2013] 3 SCR 3, *per* Karakatsanis J, at para 44 ("While courts of inherent jurisdiction have no power to appoint the women and men who staff the courts and assist judges in discharging their work, there is ample authority for judges appointing amici curiae where this is necessary to permit a particular proceeding to be successfully and justly adjudicated.")
2. *Criminal Lawyers*, *ibid.*, *per* Fish J (dissent), at para 117
   R v Cairenius, 2008 CanLII 28219 (ON SC), 232 CCC (3d) 13, *per* Durno J, at paras 52 to 59
3. *R v Imona-Russel*, 2019 ONCA 252 (CanLII), 145 OR (3d) 197, *per* Lauwens JA, at para 67
4. *Imona-Russel*, *ibid.*
5. *Criminal Lawyers*, *supra*, at para 118 ("Regardless of what responsibilities the amicus is given, however, his defining characteristic remains his duty to the court and to ensuring the proper administration of justice.")
6. *Criminal Lawyers*, *supra*, at para 118 ("An amicus's sole "client" is the court, and an amicus's purpose is to provide the court with a perspective it feels it is lacking — all that an amicus does is in the public interest for the benefit of the court in the correct disposal of the case")
7. *Imona-Russel*, *supra*, at para 68
8. *R v Amos*, 2012 ONCA 334 (CanLII), 292 OAC 298, *per* Watt JA
9. *Cairenius*, *supra*, at paras 55 to 56
   Imona-Russel, *supra*, at para 66
10. *R v Samra*, 1998 CanLII 7174 (ON CA), 129 CCC (3d) 144, *per* Rosenberg JA citing *R v Grice*, 1957 CanLII 375 (ON SC), 119 CCC 18, *per* Ferguson J
11. *Russel*, *supra*, at para 69
    R v Rushlow, 2009 ONCA 461 (CanLII), 245 CCC (3d) 505, *per* Rosenberg JA, at para 21
12. *Russel*, *supra*, at paras 73 to 75
13. *Russel*, *supra*
14. *Russel*, *supra*, at para 68
15. *Thompson*, *supra*
16. *Thompson*, *supra*, at para 17
    R v Shivrattan, 2017 ONCA 23 (CanLII), 346 CCC (3d) 299, *per* Doherty JA, at paras 65 to 66
17. *Samra*, *ibid.* at 160 per Rosenberg JA

Statutory Forms of Amicus Curae

Under 486.3(1), in any proceedings involving a cross-examination of a witness under 18 years of age and the accused is self-represented, the prosecutor or witness may apply to have counsel appointed to conduct the cross-examination unless the "proper administration of justice requires".

Under 486.3(2), in any proceedings involving a cross-examination of a witness and the accused is self-represented, the prosecutor or witness may apply to have counsel appointed to conduct the cross-examination where it is necessary "in order to obtain a full and candid account".

Under 486.3(4), in any proceedings involving a cross-examination of a witness with respect to an offence of criminal harassment (264) and the accused is self-represented, the prosecutor or witness may apply to have counsel appointed to conduct the cross-examination unless the "proper administration of justice requires".

Cross-Examination Counsel

Section 486.3 counsel must confer with the accused to "ensure that all appropriate lines of questioning consistent with the theory of the defence are pursued" during cross-examination.[1] They are not however required to have to be tied to a script approved by the accused.[2] Any objections that the accused has with the line of questions of the amicus can be "mediated" by the trial judge.[3]

1. *R v Lundrigan*, 2020 ABCA 281 (CanLII), at para 82
2. *R v Jerace*, 2021 BCCA 94 (CanLII), *per* JA, at para 101
3. *Jerace*, *ibid.*, at para 102

Role of Trial Judge

This page was last substantively updated or reviewed *July 2021*. (Rev. # 79573)

General Principles

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

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

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

Adversarial System

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

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

Presumed to Know the Law

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

Inherent Jurisdiction

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

Duty to Raise Issues

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

Duty of Restraint

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

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

Duty of Technological Competency

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

ex mero motu

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

History

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

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

16. *WORSOFF v MTCC 1168*, 2021 ONSC 6493 (CanLII), *per* Myers J, at para 32
17. *R v Powell*, 1965 CanLII 671 (BC CA), 4 CCC 349, *per* Bull JA (2:1)
    R v Spilchen, 2021 NSSC 131 (CanLII), *per* Coady J
18. *Spilchen*, *ibid. Powell*, *ibid.*
    R v Clark, 1974 ALTASCAD 59 (CanLII), 19 CCC 445, *per* Clehent JA

Right of Parties to be Heard

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

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

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

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

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

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

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

Timing of Interrim Rulings

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

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

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

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

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

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

Rules of Court

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

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

1. See also Case Management

Hearing Evidence at Trial

Must Consider All Admissible Evidence

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

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

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

Using Personal Experience

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

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

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

Exposure to Inadmissible Evidence

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

Considering Theories of Counsel

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

1. *R v Morin*, 1992 CanLII 40 (SCC), [1992] 3 SCR 286, *per* Sopinka J at 296 (SCR)
   R v DLW, 2013 BCSC 1327 (CanLII), BCJ No 1620, *per* Romilly J, at para 3
2. *Morin*, *supra*, at p. 296 (SCR)
3. *Morin*, *supra*, at p. 296
   R v Walle, 2012 SCC 41 (CanLII), [2012] 2 SCR 438, *per* Moldaver J, at para 46
4. *Morin*, *supra*, at p. 296
   Walle, *supra*, at para 46
5. *R v Howe*, 2005 CanLII 253 (ON CA), 192 CCC (3d) 480, *per* Doherty JA, at para 44
6. *R v JM*, 2021 ONCA 150 (CanLII), 154 OR (3d) 401, *per* Brown JA, at para 48
7. , *supra*, at para 51
8. *R v Potts*, 1982 CanLII 1751 (ON CA), 66 CCC (2d) 219, *per* Thorton JA at p. 204
   JM, *supra*, at para 51
9. *R v SS*, 2005 CanLII 791 (ON CA), *per curiam*, at para 3
   R v Novak, 1995 CanLII 2024 (BC CA), 27 WCB (2d) 295, *per* Prowse JA, at para 8
   See Reasonable Apprehension of Bias
10. *R v Dagenais*, 2018 ONCA 63 (CanLII), *per* McCombs JA (ad hoc), at para 55 ("It is well-established that, subject to due process concerns, a conviction may be founded on a theory of liability that has not been advanced by the Crown, provided that theory is available on the evidence")
    R v Pickton, 2010 SCC 32 (CanLII), [2010] 2 SCR 198, *per* Charron J, at para 19
    R v Khawaja, 2010 ONCA 862 (CanLII), 273 CCC (3d) 415, *per curiam*, at paras 143 to 145
    R v Ranger, 2003 CanLII 32900 (ON CA), 178 CCC (3d) 375, *per* Charron JA, at paras 34 to 35
    R v Pawluk, 2017 ONCA 863 (CanLII), *per* Paciocco JA

Control over Trial Process

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

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

Superior Court

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

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

Provincial Court

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

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

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

Reconsidering Judgements

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

Exclusion of Evidence

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

Prohibition Orders on Defence Conducting their Defence

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

Directing Crown Counsel

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

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

Judicial Intervention

- Judicial Intervention During Trial

Limiting Evidence

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

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

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

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

Reserving Questions for Decision

> **Trial continuous**
>
> 645
> [*omitted (1), (2) and (3)*]
>
> **Questions reserved for decision**
>
> (4) A judge, in any case tried without a jury, may reserve final decision on any question raised at the trial, or any matter raised further to a pre-hearing conference, and the decision, when given, shall be deemed to have been given at the trial.
>
> **Questions reserved for decision in a trial with a jury**
>
> (5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) [*manner of drawing cards*] or (3.1) [*power to order calling out names on cards*] and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence

of the jury after it has been sworn.
R.S., 1985, c. C-46, s. 645; R.S., 1985, c. 27 (1st Supp.), s. 133; 1997, c. 18, s. 76; 2001, c. 32, s. 43.
[*annotation(s) added*]

– CCC

Exclusion Public from Hearing

- Excluding People From Court

Fact Finding

Self-Represented Accused

see Right to Self-Representation

Sitting Position of Accused

- Accused in Court

Independent Research of the Judge

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

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

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

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

Judge Bound to Proceedings

Any justice may act before and after trial

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

Two or more justices

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

– CCC

Loss of Judge During Proceedings

- Loss of Judge During Proceedings

Doctrine of Functus Officio

- Functus Officio

Communications with Counsel Out of Court

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

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

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

Duty to Make a Record

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

> **Record of Proceedings**
> **How recorded**
>
> 624 (1) It is sufficient, in making up the record of a conviction or acquittal on an indictment, to copy the indictment and the plea that was pleaded, without a formal caption or heading.
>
> **Record of proceedings**
>
> (2) The court shall keep a record of every arraignment and of proceedings subsequent to arraignment.
> R.S., c. C-34, s. 552.
>
> – CCC

Endorsements on the Information

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

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

1. s. 536(4.1)
2. s. 536(3)

Maintaining Order

> **Preserving order in court**
>
> 484 Every judge or provincial court judge has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.
>
> R.S., 1985, c. C-46, s. 484; R.S., 1985, c. 27 (1st Supp.), s. 203.
>
> – CCC

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

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

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

Ordering Sheriff to Detain Accused

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

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

Misc Powers

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

Execution of Orders

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

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

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

View

- Demonstrative Evidence#View

Superior Court Inherent Jurisdiction

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

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

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

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

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

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

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

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

Limitations

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

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

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

Examples of Application

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

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

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

Doctrine of Mootness

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

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

Civility and Professionalism

Tone of Reasons

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

Sleeping

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

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

Validity of Orders

Validity of Forms (Part XXVIII)

> **Forms**
>
> 849 (1) The forms set out in this Part [*Pt. XXVIII – Miscellaneous (s. 841 to 849)*], varied to suit the case, or forms to the like effect are deemed to be good, valid and sufficient in the circumstances for which they are provided.

Seal not required

(2) No justice is required to attach or affix a seal to any writing or process that he or she is authorized to issue and in respect of which a form is provided by this Part [*Pt. XXVIII – Miscellaneous (s. 841 to 849)*].

Official languages

(3) Any pre-printed portions of a form set out in this Part, varied to suit the case, or of a form to the like effect shall be printed in both official languages.
2002, c. 13, s. 84.
[*annotation(s) added*]

– CCC

Judicial Decisions

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

Rulings and Orders

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

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

Relationship with the Legislatures

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

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

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

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

Judicial Neutrality and Bias

- Judicial Neutrality and Bias

Sufficiency of Reasons for Judgement

- Sufficiency of Reasons

Misc Authority of Youth Court Justice

- Miscellaneous Authority of a Youth Court Justice

Misc Other Authorities

Provincial Court Judges

Officials with powers of two justices

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

– CCC

Maintaining Records

Application of Parts XVI, XVIII, XX and XXIII

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

– CCC

Under Part XX relating to jury trials:

Taking evidence

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

– CCC

See Also

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

Other Parties

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

Judicial Intervention During Trial

This page was last substantively updated or reviewed *July 2021*. (Rev. # 79573)

General Principles

It is well recognized that judicial intervention may compromise trial fairness.[1] This will become an issue where the judge has created an appearance that they have placed their authority on a side.[2]

Generally, a judge may intervene safely where it is for the purpose of preserving the appearance of trial fairness.[3]

It should be expected on the part of counsel and the judge that a "trial is not a tea party", especially in a criminal case where the stakes are so high.[4] This also means that the judge must be cautious when intervening to balance the risk of trial unfairness against the obligation to control the process, which may require rebuking or correcting counsel.[5]

Presumption of Propriety

There is a "strong presumption" that a judge has not unduly intervened in a trial.[6]

Standard of Review

The issue of whether intervention is inappropriate asks whether the intervention lead to an unfair trial and result in a miscarriage of justice.[7] Assessment must be from the perspective of a "reasonable observer" who was present throughout the whole trial.[8]

Mere excessive intervention, without more, is not enough.[9]

The absence of objections from counsel is a factor to consider.[10]

1. *R v Fagbola*, 2019 ONSC 1119 (CanLII), *per* Schreck J, at para 10
   R v Hungwe, 2018 ONCA 456 (CanLII), 142 OR (3d) 22, *per* Nordheimer JA, at paras 39 to 46
   R v Stucky, 2009 ONCA 151 (CanLII), 240 CCC (3d) 141, *per* Weiler and Gillese JJA, at paras 61 to 72
   R v Valley, 1986 CanLII 4609 (ON CA), 26 CCC (3d) 207, *per* Martin JA, at pp. 230-232
2. *Fagbola*, *supra*, at para 10
   Hungwe, *supra*, at para 49
   Stucky, *supra*, at para 84
   Valley, *supra*, at p. 231
   R v Murray, 2017 ONCA 393 (CanLII), 138 OR (3d) 500, *per* Watt JA, at para 105
3. *R v Valley*, 1986 CanLII 4609 (ON CA), 26 CCC (3d) 207, *per* Martin JA
4. *R v Groia v Law Society of Upper Canada*, 2018 SCC 27 (CanLII), [2018] 1 SCR 772, *per* Moldaver J, at para 3
   R v Gager, 2020 ONCA 274 (CanLII), *per* Roberts JA, at para 152
5. *Gager*, *ibid.*, at para 152
6. *R v RB*, 2017 ONCA 75 (CanLII), *per curiam*, at para 4
   R v Hamilton, 2011 ONCA 399 (CanLII), 271 CCC (3d) 208, at para 29
7. *RB*, *ibid.*, at para 4
8. *RB*, *ibid.*, at para 4
   Hamilton, *supra*, at paras 29 to 30
9. *RB*, *supra*, at para 4
   R v Kitaitchik, 2002 CanLII 45000 (ON CA), 166 CCC (3d) 14
10. *RB*, *supra*, at para 4
    R v Lahouri, 2013 ONSC 2085 (CanLII), 280 CRR (2d) 249, *per* KL CAmpbell J, at para 10

Duty to Intervene

A judge is not permitted to act as a "referee who must sit passively while counsel call the case in any fashion they please".[1]

However, the traditional role of judges as "sphinx" who simply observe the proceedings is no longer acceptable. It should be accepted that judges will intervene "so for justice in fact be done".[2] Where necessary judge should ask questions of witnesses, interrupt testimony and call them to order.[3]

Judges should intervene when counsel make decisions that would "unduly lengthen the trial or lead to a proceedings that is almost unmanageable."[4] Judges are empowered by inherent jurisdiction to "make directions necessary to ensure that the trial proceeds in an orderly manner".[5]

1. *R v Felderhof*, 2003 CanLII 37346 (ON CA), 68 OR (3d) 481, *per* Rosenberg JA, at para 40
   Chippewas of Mnjikaning First Nation v Ontario (Minister of Native Affairs), 2010 ONCA 47 (CanLII), 265 OAC 247, *per* O'Connor ACJ and Blair JA, at para 232
2. *Brouillard (Chatel) v The Queen*, 1985 CanLII 56 (SCC), [1985] 1 SCR 39, *per* Lamer J, at p. 44 (SCR) ("...it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.")
3. *Borouillard*, *ibid.*
4. *Felderhof*, *supra*
5. *Felderhof*, *supra*

Intervention During Examinations

Right to Questioning

All counsel are entitled to question witnesses on direct and cross examination without undue intervention. [1] Undue intervention will exist where the intervention affect trial fairness.[2] This includes intervention that prevents the accused from "telling his story in his own way".[3]

Crown counsel is permitted present its evidence and question its witnesses even where the relevancy is not immediately apparent to the judge.[4]

Both defence and crown must be permitted to present their case before a decision is made.[5]

Presumption of Non-Intervention

There is a presumption that a trial judge has intervened in a trial properly.[6] The judge may often make comments, give directions or ask questions. [7] There is also a strong presumption against [8]

Intervention Alone Not Improper

Merely intervening frequently, by itself, it not enough to amount to a miscarriage of justice.[9]

The judge should not usurp the role of counsel or interfere with the defence.[10]

Trial Fairness

The key issue is whether the intervention affected trial fairness. [11] This is from the perspective of a reasonable observer. [12]

The main issue is not whether the intervention was such that a "reasonably minded person who had been present throughout the trial *could* conclude that the accused had not received a fair trial, but whether such a person *would* come to such a conclusion."[13]

Failure to Object

The presence or absence of objections by defence counsel is a factor but not determinative.[14]

Permissible Conduct

A judge may disrupt questioning in order to clear evidentiary ambiguities, pursue subjects left vague by the witness, and ask questions counsel should have asked.[15]

"Interlocutory remarks" of the judge during argument are not "judicial pronouncements"[16]

A judge is permitted to give the jury mid-trial instructions to disregard any erroneous comments made by counsel. If it is given promptly and with an explanation of why it should be disregarded, this can effectively correct any concern that a jury might misuse the information. [17]

There is a presumption that an accused not be restrained while in court. It is upon the Crown to establish grounds to order the restraint of the accused.[18]

The judge is entitled in:[19]

1. posing questions to a witness to clear up ambiguities in their evidence;
2. calling a witness to order and focusing him or her on the true matters in issue;
3. exploring some issue on which the witness's evidence has been left vague and uncertain; or
4. putting questions which should have been asked by counsel in order to elicit evidence on some relevant issue.

Impact on Examinations

Unnecessary and repeated interruptions that disrupt the flow and effectiveness of cross-examination may exceed permissible limits.[20] A judge should generally only ask questions after the examination is complete.[21]

Intrudes on Function and Strategy

Judges should not interfere in a manner that undermines the function of counsel and disrupts or destroys counsel's strategy.[22]

1. *R v Farmer*, 1985 ABCA 244 (CanLII), 64 AR 340, *per* Belzil JA - new trial ordered due to intervention
   R v Valley, 1986 CanLII 110 (ON CA), 26 CCC (3d) 207, *per* Martin JA, at p. 230 leave refused [1986] 1 SCR xiii
   R c Scianna, 1989 CanLII 7233 (ON CA), 47 CCC (3d) 81, *per* Krever JA
   Brouillard (Chatel) v The Queen, 1985 CanLII 56 (SCC), [1985] 1 SCR 39, *per* Lamer J, at p. 42
2. *R v Stucky*, 2009 ONCA 151 (CanLII), 240 CCC (3d) 141, *per* Weiler and Gillese JJA, at paras 68 to 73
   Valley, *supra*, at p. 232
3. *R v Fagbola*, 2019 ONSC 1119 (CanLII), *per* Schreck J, at para 12
   R v Lahouri, 2013 ONSC 2085 (CanLII), 280 CRR (2d) 249, *per* K.L. Campbell J, at para 9
   Valley, *supra*, at p. 231
4. *Darlyn*, *supra*
5. *R v Wong*, 1985 ABCA 54 (CanLII), 60 AR 301, *per* Stevenson JA Viger
   R v Jahn, 1982 ABCA 97 (CanLII), 66 CCC (2d) 307, *per* Haddad JA
   R v Atkinson, 1976 CanLII 1389 (MB CA), (1976), 36 CRNS 255, *per* Freedman CJ
6. *R v Lahouri*, 2013 ONSC 2085 (CanLII), 280 CRR (2d) 249, *per* Campbell J, at paras 4, 5
7. *Chippewas of Mnjikaning First Nation v Chiefs of Ontario*, 2010 ONCA 47 (CanLII), 265 OAC 247, *per* O'Connor ACJ and Blair JA, at para 231
8. *R v RB*, 2017 ONCA 75 (CanLII), *per curiam*, at para 4
9. *RB*, *ibid.*, at para 4
   R v Kitaitchik, 2002 CanLII 45000 (ON CA), 166 CCC (3d) 14, *per* Doherty JA
10. *Lahouri*, *supra*, at para 8
11. *Valley*, *supra*
    Lahouri, *supra*, at para 4
12. *R v Stucky*, 2009 ONCA 151 (CanLII), 240 CCC (3d) 141, *per* Weiler and Gillese JJA

13. *R v Dugas*, 2012 NSCA 102 (CanLII), 322 NSR (2d) 72, *per* Oland JA, at para 37
14. *RB*, *supra*, at para 4
Lahouri, *supra*, at para 10
15. *R v Watson*, 2004 CanLII 45443 (ON CA), 191 CCC (3d) 144, *per curiam*, at para 10
16. *R v Visscher*, 2012 BCCA 290 (CanLII), 323 BCAC 285, *per* Smith J, at para 25
17. see *R v Normand (D.G.)*, 2002 MBCA 95 (CanLII), 166 Man R (2d) 179, *per* Twaddle JA, at para 20
18. *R v WHA*, 2011 NSSC 166 (CanLII), 960 APR 155, *per* Rosinski J
19. *Lahouri*, *supra*, at para 8
R v Giovannini, 2018 NLCA 19 (CanLII), *per* Hoegg JA, at para 15
Valley, *supra*
20. *Watson*, *supra*
21. *Lahouri*, *supra*, at para 8
22. *R v Switzer*, 2014 ABCA 129 (CanLII), 572 AR 311, *per curiam*, at para 13

Questioning a Witness

Judges may pose any questions to the witness where it is in the interest of justice.[1]

The judge may ask questions to clarify evidence or have the witness repeat part of an unheard answer.[2]

Leading Questions

The judge should not cross examine the witness.[3] The judge should remain neutral.[4] However, this is not a strict rule and that the mere presence of some leading questions does not amount to the creation of partiality.[5]

Procedure

It is most proper if the judge wait until the end of the witnesses testimony before asking questions and once the questions are complete, invite counsel for further re-examination on the topics raised.[6]

1. *Lahouri*, *supra*
R v Darlyn, 1946 CanLII 248 (BCCA), 88 CCC 269, *per* O'Halloran JA
2. *R v Schmaltz*, 2015 ABCA 4 (CanLII), 320 CCC (3d) 159, *per* Brown JA (2:1), at para 19
R v Danial, 2016 ONCA 822 (CanLII), *per curiam*, at para 3
3. *Lahouri*, *supra*, at para 8
4. *Lahouri*, *supra*, at para 8
5. *Danial*, *supra*, at para 5
6. *Danial*, *supra*, at para 5
R v Stucky, 2009 ONCA 151 (CanLII), 240 CCC (3d) 141, *per* Weiler and Gillese JJA, at para 64

Intervening Outside of Examinations

A judge is well within their authority to ask questions of counsel after closing submissions to clarify submissions. It is commonplace, proper and lawful.[1]

Rules of Court

General Principles

Section 482 authorizes provincial and superior courts to make procedural rules so long as they are not "inconsistent" with any federal legislation.

> **Rules of Court**
> **Power to make rules**
>
> 482 (1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.
>
> **Power to make rules**
>
> (2) The following courts may make rules of court not inconsistent with this Act or any other Act of Parliament that are applicable to any prosecution, proceeding, including a preliminary inquiry or proceedings within the meaning of Part XXVII [*Pt. XXVII – Summary Convictions (s. 785 to 840)*], action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to the prosecution, proceeding, action or appeal:
>
> (a) every court of criminal jurisdiction for a province;
> (b) every appeal court within the meaning of section 812 [*definition of appeal court*] that is not a court referred to in subsection (1) [*powers of the superior and appellate court to make rules*];
> (c) the Ontario Court of Justice;
> (d) the Court of Quebec and every municipal court in the Province of Quebec;
> (e) the Provincial Court of Nova Scotia;
> (f) the Provincial Court of New Brunswick;
> (g) the Provincial Court of Manitoba;
> (h) the Provincial Court of British Columbia;
> (i) the Provincial Court of Prince Edward Island;
> (j) the Provincial Court of Saskatchewan;
> (k) the Provincial Court of Alberta;

(l) the Provincial Court of Newfoundland and Labrador;
(m) the Territorial Court of Yukon;
(n) the Territorial Court of the Northwest Territories; and
(o) the Nunavut Court of Justice.

Purpose of rules

(3) Rules under subsection (1) [*powers of the superior and appellate court to make rules*] or (2) [*powers of provincial and territorial coruts to make rules*] may be made

(a) generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;
(b) to regulate the sittings of the court or any division thereof, or of any judge of the court sitting in chambers, except in so far as they are regulated by law;
(c) to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences held under section 625.1 [*pre-hearing conference*], proceedings with respect to judicial interim release and preliminary inquiries and, in the case of rules under subsection (1) [*powers of the superior and appellate court to make rules*], proceedings with respect to mandamus, certiorari, habeas corpus, prohibition and procedendo and proceedings on an appeal under section 830 [*summary conviction appeal*]; and
(d) to carry out the provisions of this Act relating to appeals from conviction, acquittal or sentence and, without restricting the generality of this paragraph,

(i) for furnishing necessary forms and instructions in relation to notices of appeal or applications for leave to appeal to officials or other persons requiring or demanding them,
(ii) for ensuring the accuracy of notes taken at a trial and the verification of any copy or transcript,
(iii) for keeping writings, exhibits or other things connected with the proceedings on the trial,
(iv) for securing the safe custody of property during the period in which the operation of an order with respect to that property is suspended under subsection 689(1) [*restitution or forfeiture of property*], and
(v) for providing that the Attorney General and counsel who acted for the Attorney General at the trial be supplied with certified copies of writings, exhibits and things connected with the proceedings that are required for the purposes of their duties.

Publication

(4) Rules of court that are made under this section must be published or otherwise made available to the public.

Regulations to secure uniformity

(5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection prevail and have effect as if enacted by this Act.
R.S., 1985, c. C-46, s. 482; R.S., 1985, c. 27 (1st Supp.), s. 66; 1994, c. 44, s. 35; 2002, c. 13, s. 17; 2015, c. 3, s. 50; 2019, c. 25, s. 186.
[*annotation(s) added*]

– CCC

Manner of Interpretation

The rules created by a court should be subject to the "ordinary principles of statutory interpretation".[2]

1. *R v Kennedy*, 2021 NSSC 211 (CanLII), *per* Arnold J, at para 59
2. *R v Gowenlock*, 2019 MBCA 5 (CanLII), *per* Chartier CJ, at para 73
   Evans v Jensen, 2011 BCCA 279 (CanLII), 19 BCLR (5th) 350, *per* Prowse JA

See also Statutory Interpretation

Rules of the Provinces and Territories

Province	Level	Title	Citation
Alberta	Superior Court / Court of Appeal	Alberta Rules of Court	Alta Reg 124/2010
Alberta	Superior Court	Court of Queen's Bench for Alberta Summary Conviction Appeal Rules	SI/2012-39
British Columbia	Provincial Court	Provincial Court of British Columbia Criminal Caseflow Management Rules	SI/99-104
British Columbia	Superior Court	Criminal Rules of the Supreme Court of British Columbia	SI/97-140
British Columbia	Court of Appeal	British Columbia Court of Appeal Criminal Appeal Rules, 1986	BC Reg 145/86
Manitoba	Superior Court	Criminal Proceedings Rules of the Manitoba Court of Queen's Bench	SI/2016-34
New Brunswick	Superior Court	Criminal Procedure Rules of the Court of Queen's Bench of New Brunswick	SI/2015-81
New Brunswick	Superior Court	New Brunswick Court of Queen's Bench Summary Conviction Appeal Rules	SI/80-117
Newfoundland	Superior Court	Supreme Court of Newfoundland and Labrador — Court of Appeal Criminal Appeal Rules (2002)	SI/2002-96
Newfoundland	Provincial	Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings	SI/2004-134
Newfoundland	Superior	Supreme Court of Newfoundland, Trial Division Rules for Orders in the Nature of Certiorari, Habeas Corpus, Mandamus and Prohibition	SI/2000-33
Newfoundland	Superior Court	The Criminal Appeal Rules of the Supreme Court of Newfoundland, Trial Division	SI/87-28
Newfoundland	Superior Court	Newfoundland Rules of Practice Respecting Reduction in the Number of Years of Imprisonment Without Eligibility for Parole	SOR/89-297
Northwest Territories	Court of Appeal	Rules of the Court of Appeals for the Northwest Territories as to A. Criminal Appeals B. Bail on Appeals	SOR/78-68
Northwest Territories	Superior Court	Northwest Territories Rules of Practice Respecting Applications and Hearings concerning a Reduction in the Number of Years of Imprisonment Without Eligibility for Parole	SOR/98-392
Northwest Territories	Superior Court	Criminal Procedure Rules of the Supreme Court of the Northwest Territories	SI/98-78
Nova Scotia	Superior Court / Court of Appeal	Nova Scotia Civil Procedure Rules, Nova Scotia Civil Procedure Rules	Royal Gaz Nov 19, 2008
Nova Scotia	Provincial	Provincial Court Rules	website
Ontario	Superior Court	Criminal Proceedings Rules for the Superior Court of Justice (Ontario)	SI/2012-7
Ontario	Provincial	Criminal Rules of the Ontario Court of Justice	SI/2012-30, website
Prince Edward Island	Court of Appeal	Prince Edward Island – Criminal Appeal Rules of Court	SI/2011-109
Prince Edward Island	Superior Court	Prince Edward Island Criminal Rule of Practice Respecting Reduction in the Number of Years of Imprisonment Without Eligibility for Parole	SOR/92-383
Quebec	Court of Appeal	Rules of the Court of Appeal of Quebec in Criminal Matters	SI/2006-142
Quebec	Superior Court	Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002	SI/2002-46
Quebec	Provincial	Regulation of the Court of Québec	CQLR c C-25.01, r 9
Saskatchewan	Court of Appeal	The Court of Appeal Criminal Appeal Rules (Saskatchewan)	SI/2011-9
Saskatchewan	Superior Court	Saskatchewan Court of Queen's Bench Rules Respecting Pre-Trial Conferences	SI/86-158
Saskatchewan	Superior Court	Court of Queen's Bench for Saskatchewan Summary Conviction Appeal Rules	SI/2011-20
Yukon	Court of Appeal	Yukon Territory Court of Appeal Criminal Appeal Rules, 1993	SI/93-53
Yukon	Superior Court	Supreme Court of Yukon Summary Conviction Appeal Rules, 2009	SI/2012-64
Yukon	Superior Court	Yukon Territory Supreme Court Rules for Pre-hearing Conferences in Criminal Matters	SOR/88-427

Youth Court

Youth justice court may make rules

17 (1) The youth justice court for a province may, subject to the approval of the lieutenant governor in council of the province, establish rules of court not inconsistent with this Act or any other Act of Parliament or with any regulations made under section 155 regulating proceedings within the jurisdiction of the youth justice court.

Rules of court

(2) Rules under subsection (1) may be made

(a) generally to regulate the duties of the officers of the youth justice court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of this Act;

(b) subject to any regulations made under paragraph 155(b), to regulate the practice and procedure in the youth justice court; and
(c) to prescribe forms to be used in the youth justice court if they are not otherwise provided for by or under this Act.

Publication of rules

(3) Rules of court that are made under the authority of this section shall be published in the appropriate provincial gazette.

– YCJA

Forms, Regulations and Rules of Court
Forms

154 (1) The forms prescribed under section 155, varied to suit the case, or forms to the like effect, are valid and sufficient in the circumstances for which they are provided.

If forms not prescribed

(2) In any case for which forms are not prescribed under section 155, the forms set out in Part XXVIII [*Pt. XXVIII – Miscellaneous (s. 841 to 849)*] of the Criminal Code, with any modifications that the circumstances require, or other appropriate forms, may be used.

– YCJA

Regulations

155 The Governor in Council may make regulations

(a) prescribing forms that may be used for the purposes of this Act;
(b) establishing uniform rules of court for youth justice courts across Canada, including rules regulating the practice and procedure to be followed by youth justice courts; and
(c) generally for carrying out the purposes and provisions of this Act.

– YCJA

See Also

- Precedents, Court Forms and Checklists

Procedural Powers of a Preliminary Inquiry Judge

< Procedure and Practice < Preliminary Inquiry

General Principles

Powers of justice

537 (1) A justice acting under this Part [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] may

(a) adjourn an inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits or for any other sufficient reason;
(b) remand the accused to custody for the purposes of the *Identification of Criminals Act*;
(c) except where the accused is authorized pursuant to Part XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] to be at large, remand the accused to custody in a prison by warrant in Form 19 [*forms*];
(d) resume an inquiry before the expiration of a period for which it has been adjourned with the consent of the prosecutor and the accused or his counsel;
(e) order in writing, in Form 30, that the accused be brought before him, or any other justice for the same territorial division, at any time before the expiration of the time for which the accused has been remanded;

(f) grant or refuse permission to the prosecutor or his counsel to address him in support of the charge, by way of opening or summing up or by way of reply on any evidence that is given on behalf of the accused;
(g) receive evidence on the part of the prosecutor or the accused, as the case may be, after hearing any evidence that has been given on behalf of either of them;
(h) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing;
(i) regulate the course of the inquiry in any way that appears to the justice to be desirable, including to promote a fair and expeditious inquiry, that is consistent with this Act and that, unless the justice is satisfied that to do so would be contrary to the best interests of the administration of justice, is in accordance with any admission of fact or agreement recorded under subsection 536.4(2) [*agreement to be recorded*] or agreement made under section 536.5 [*agreement to limit scope of preliminary inquiry*];
[*omitted (j)*]
(j.1) permit, on the request of the accused, that the accused be out of court during the whole or any part of the inquiry on any conditions that the justice considers appropriate; and
[*omitted (k)*]

Power provided under paragraph (1)(i)

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

Section 715 or 715.01

(1.02) If a justice grants a request under paragraph (1)(j.1) [*power to permit accused to be absent during inquiry*], the Court must inform the accused that the evidence taken during their absence could still be admissible under section 715 [*evidence at preliminary inquiry may be read at trial in certain cases*] or 715.01 [*transcript of evidence of peace officer admissible at trial*].

Inappropriate questioning

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

Change of venue

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

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

R.S., 1985, c. C-46, s. 537; 1991, c. 43, s. 9; 1994, c. 44, s. 53; 1997, c. 18, s. 64; 2002, c. 13, s. 28; 2008, c. 18, s. 22; 2019, c. 25, s. 242.
[*annotation(s) added*]

– CCC

Organization

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

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

– CCC

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

Disclosure

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

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

Focus Hearings

> **Order for hearing**
>
> 536.4 (1) The justice before whom a preliminary inquiry is to be held may order, on application of the prosecutor or the accused or on the justice's own motion, that a hearing be held, within the period fixed by rules of court made under section 482 [*powers of the superior and appellate court to make rules*] or 482.1 [*powers of the superior and appellate court to make case management rules*] or, if there are no such rules, by the justice, to
>
> (a) assist the parties to identify the issues on which evidence will be given at the inquiry;
> (b) assist the parties to identify the witnesses to be heard at the inquiry, taking into account the witnesses' needs and circumstances; and
> (c) encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.
>
> **Agreement to be recorded**
>
> (2) When the hearing is completed, the justice shall record any admissions of fact agreed to by the parties and any agreement reached by the parties.
> 2002, c. 13, s. 27.
> [*annotation(s) added*]
>
> – CCC

> **Agreement to limit scope of preliminary inquiry**
>
> 536.5 Whether or not a hearing is held under section 536.4 [*order for preliminary inquiry hearing*], the prosecutor and the accused may agree to limit the scope of the preliminary inquiry to specific issues. An agreement shall be filed with the court or recorded under subsection 536.4(2) [*agreement to be recorded*], as the case may be.
>
> 2002, c. 13, s. 27; 2019, c. 25, s. 241(E)
> [*annotation(s) added*]
>
> – CCC

Publication Bans

There are several publication bans available for preliminary inquires:

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

Absence of Accused or Video-link Attendance

Statement of Issues and Witnesses Under Section 536.3

< Procedure and Practice < Preliminary Inquiry

General Principles

Under s. 536.3, where an accused elects to have a preliminary inquiry, counsel must provide the court and the other party with a statement that identifies the issues that the evidence should cover and a list of the witnesses expected to provide the evidence:

> **Statement of issues and witnesses**
>
> 536.3 If a request for a preliminary inquiry is made, the prosecutor or, if the request was made by the accused, counsel for the accused shall, within the period fixed by rules of court made under section 482 [*powers of the superior and appellate court to make rules*] or 482.1 [*powers of the superior and appellate court to make case management rules*] or, if there are no such rules, by the

justice, provide the court and the other party with a statement that identifies

(a) the issues on which the requesting party wants evidence to be given at the inquiry; and
(b) the witnesses that the requesting party wants to hear at the inquiry.

2002, c. 13, s. 27; 2011, c. 16, s. 3(F).

[*annotation(s) added*]

– CCC

Mandatory Rule

The provisions are said to be "mandatory".[1] However, these provision does not create a mandatory obligation upon the Crown to address all issues and call all witnesses on a list provided by the defence. [2]

Purpose and History

Section 536.3 came into force on June 1, 2004. Its objective was to address "concerns about the efficiency of the preliminary inquiry".[3] It was considered a compromise between those seeking to abolish the hearing and those wishing to keep it.[4]

The purpose of this section is to "streamline the preliminary inquiry process, reduce the number of witnesses who need to be called and shortened the length of the inquiry as a whole."[5]

Appropriate Issues

There is no fixed limitation on how many issues are permitted to be raised in a preliminary inquiry.[6]

The party requesting the inquiry must identify only those "issues" that "are in question in the proceeding and why they are important subjects of litigation".[7] The issues cannot be listed in a "perfunctory manner" or in "overbroad or obscure" terms.[8]

The provision assumes that the party filing notice "will do so in good faith and with a concern for the proper use of court resources".[9]

A Court may refuse to hold a preliminary inquiry where they are not satisfied that a viable issue has been raised.[10]

Improper issues include statements such as "all issues", "credibility", "mens rea and actus reus", "whether the accused was involved in or committed any criminal offence".[11]

The Criminal Rules of the Ontario Court of Justice, SI/2012-30 s. 4.3(3) sets out specific requirements for the list of issues.[12]

Crown Compliance with the List

The Crown has *no obligation* to call any witnesses listed on the defence's notice, especially if they are not required to address proper issues raised.[13] The only obligation of the Crown in calling evidence at the hearing is to establish a *prima facie* case.[14]

Defence Failure to List Issues or Witnesses

A failure to comply with s. 536.3 can result in the preliminary inquiry judge applying s. 537 to "deem" the request for a preliminary inquiry to be abandoned.[15]

1. *LeBlanc and Steeves v R*, 2009 NBCA 84 (CanLII), 250 CCC (3d) 29, *per* Richard JA
2. *R v Brufatto*, 2011 ABPC 347 (CanLII), 528 AR 78, *per* Ogle J, at para 10
   R v TP, 1976 CanLII 1335 (ONSC), , [2006] NJ No 278 (P.C.), *per* Cory J
3. *R v Stinert*, 2015 ABPC 4 (CanLII), 604 AR 151, *per* Rosborough J, at para 6
4. *Stinert*, *ibid.*, at paras 6 to 17
5. *Stinert*, *ibid.*, at para 24
   TP, *supra*, at paras 26 to 28 (The sections are "designed to expedite and to shorten the length of preliminary inquiries by requiring counsel to focus on issues which are being contested and the witnesses that are relevant to those issues") and ("Section 536.3 of the Criminal Code is designed to limit the scope of the preliminary inquiry").
6. *Stinert*, *supra*, at para 26
   R v Gallant, 2009 NBCA 409 (CanLII), 250 CCC (3d) 29, *per* Richard JA
7. *Stinert*, *supra*, at para 25
8. *Stinert*, *supra*, at para 26
9. *TP*, *supra*, at para 28
10. *R v Morgan*, 2006 YKTC 79 (CanLII), 70 WCB (2d) 693, *per* Faulkner J, at paras 20 and 21
11. See *Stinert*, *supra*, at para 29 - lists other examples as well *TP*, *supra*, at para 28 ("It assumes that counsel will not file such statements in a perfunctory manner and simply list every witness found in the disclosure provided by the Crown. Such an approach to section 536.3 by counsel would not be consistent with their responsibility as officers of the court to promote the appropriate functioning of the trial process.")
12. see *Stinert*, *supra*, at para 37
13. *TP*, *supra*, at para 28 ("It does not have the effect of requiring the Crown to call every witness listed by the accused in his or her notice.")
    Stinert, *supra*, at paras 24 to 25
    R v Ward, 1976 CanLII 1335 (ONSC), 31 CCC (2d) 466, 35 CRNS 117, *per* Cory J
14. *Ward*, *ibid.*
15. *Stinert*, *supra*, at paras 40 to 45
    R v Callender, 2007 ONCJ 86 (CanLII), *per* Duncan J, at paras 9 to 10

Rules by Province

Certain provinces have enacted rules under s. 482 or 482.1 relating to the requirements under s. 536.3.

Ontario

The Criminal Rules of the Ontario Court of Justice, SI/2012-30 state:

> **Focus hearing, preliminary inquiry**
>
> 4.3 (1) A proceeding that is to have a preliminary inquiry shall have a hearing under section 536.4 [*order for preliminary inquiry hearing*] of the Code if the preliminary inquiry judge so directs.
> (2) The hearing shall be attended by
>
> (a) counsel who will be conducting the preliminary inquiry, or another counsel designated by him or her with authority to make binding decisions; and
> (b) the accused, if he or she is self-represented.
>
> **Materials**
>
> (3) The party who requested the preliminary inquiry shall serve the following materials on the opposing parties, together with the statement of issues and witnesses required by section 536.3 of the Code, and file them with proof of service, at least three days before the hearing:
>
> (a) a list of witnesses whom the parties seek to have testify in person at the preliminary inquiry and, for each witness named in the list,
>
> (i) a brief synopsis of the expected evidence,
> (ii) an explanation of why in-person testimony is necessary, and
> (iii) an estimate of the time required to examine or cross-examine the witness;
>
> (b) a list of witnesses whom the parties propose to examine through a discovery process;
> (c) a brief statement as to whether committal for trial is in issue, and on what basis; and
> (d) a statement of admissions agreed upon between the parties.
>
> **Absence of agreement**
>
> (4) At the conclusion of the hearing, if the parties do not agree as to the witnesses to be called at the preliminary inquiry, either party may schedule a hearing in accordance with subsections 540(7), (8) and (9) of the Code.
>
> –

> **Discovery, preliminary inquiry**
>
> 4.4 (1) At any time before committal for trial, the evidence of a witness may be taken by means of a discovery process if the parties and the preliminary inquiry judge agree.
>
> **Official record**
>
> (2) Evidence taken under subrule (1) forms part of the official record of the preliminary inquiry.
>
> **Exception, vulnerable witness**
>
> (3) Subrule (1) does not apply to a witness who is
>
> (a) less than 18 years old; or
> (b) the complainant in a proceeding involving sexual or physical violence.
>
> ...
>
> – Rules

Alberta

- see Form A - Identifying Issues and Witnesses

Judicial Immunity

General Principles

The principle of judicial immunity protects judges from testifying to observations made during any proceedings they are administering. This principle derives from the principle of judicial independence which protects judges from certain consequences when making decisions.[1]

This typically means that a judge cannot be compelled to testify regarding "events experienced in the course of their judicial duties" or "matters encountered in the course of exercising a judicial function".[2] However, some suggestion is that this also means they are not competent to testify either.[3]

Where the evidence would concern events from prior to the judge's appointment then they will be compellable.[4]

Judicial immunity will cover chamber discussions in front of the preliminary inquiry judge.[5]

1. *R v Beauregard*, 1986 CanLII 24 (SCC), [1986] 2 SCR 56, *per* Dickson J (3:2)
   R v Parente, 2009 CanLII 18685 (ON SC), *per* Templeton J, at para 7
2. *Parente*, *ibid.*, at paras 6, 237tm12
   Ermina v Canada (Minister of Citizenship and Immigration), 1998 CanLII 8969 (FC), 167 DLR (4th) 764, *per* Tremblay-Lamer J, at para 5 - 11 citing *MacKeigan v Hickman*, 1988 CanLII 7124 (NS SC), 43 CCC (3d) 287, *per* Glube CJ
   Beauregard, *supra*, at p. 69
3. *Parente*, *supra*, at para 10
4. e.g. *R v Wolf*, 2007 ONCA 327 (CanLII), *per curiam* (3:0), at para 10
5. *Parente*, *supra*, at para 16

Giving Evidence and Compelling Attendance

A judge is not compellable to give evidence concerning their "process of adjudication".[1] However, a judge may be compellable concerning their administrative functions.[2]

1. *Mackeigan v Hickman*, 1989 CanLII 40 (SCC), [1989] 2 SCR 796, *per* Lamer J
2. R v Butler, 2014 NLTD 36(*complete citation pending*)

Judicial Independence

Tribunals are generally not protected by the constitutional rules around judicial independence as their role is largely to affect government policy.[1]

In order to resolve disputes, interpret the law and defend the Constitution it is necessary that courts be "completely separate in authority and function from all other participants in the justice system".[2]

Sources of Judicial Independence

Judicial Independence comes from an "unwritten constitutional principle"[3]

Independence is also derived from the separation of powers between the branches of government.[4]

Two Aspects of Independence

Judicial independence involves two aspects. Independence must have "both an individual and a collective or institutional aspect".[5]

Individual (or personal) independence means that a judge has a "right to refuse to answer to the executive or legislative branches of government ... as to how and why the judge arrived at a particular judicial conclusion".[6]

Purpose

The objective of judicial independence is "to ensure a reasonable perception of impartiality".[7] Independence is a "necessary prerequisite for judicial impartiality".[8]

Salaries

Judicial salaries are a means by which judicial independence is preserved.[9]

Independence requires that independence commissions play a role in the setting of salary rates.[10]

1. *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 (CanLII), [2001] 2 SCR 781, *per* McLachlin CJ, at para 24
2. *R v Beauregard*, 1986 CanLII 24 (SCC), [1986] 2 SCR 56, *per* Dickson J (3:2)
3. *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3, *per* Lamer CJ
4. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (CanLII), [2013] 3 SCR 3, *per* Karakatsanis J (5:4), at para 28
5. *Beauregard*, *ibid.*
   MacKeigan v Hickman, 1989 CanLII 40 (SCC), [1989] 2 SCR 796, *per* McLachlin J (5:2)
6. *MacKeigan*, *ibid.*
7. *R v Lippe*, 1990 CanLII 18 (SCC), [1991] 2 SCR 114, *per* Gonthier J
8. *Lippe*, *ibid.*
9. *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3, *per* Lamer CJ
   Provincial Court Judges' Assn. of New Brunswick v New Brunswick (Minister of Justice), 2005 SCC 44 (CanLII), [2005] 2 SCR 286, *per curiam*
   Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General), 2017 BCCA 63 (CanLII), 409 DLR (4th) 492, *per* Saunders JA (3:0)
10. *PEI Reference*, *supra*

See Also

- Competence and Compellability
- Judicial Neutrality and Bias
- Role of the Trial Judge

Judicial Neutrality and Bias

This page was last substantively updated or reviewed *January 2021*. (Rev. # 79573)

General Principles

Obligation of Neutrality

The judge must be neutral. This requires that the judge should "confine himself as much as possible to his own responsibilities and leave to counsel and members of the jury their respective functions."[1]

Appearance of Impartiality

It is not sufficient that the courts simply be impartial, but rather they must appear to be impartial as well.[2]

The appearance of neutrality is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[3]

Judge's Degree of Participation

Judge's are not expected to be "silent observers" in a trial.[4]

I judge can "enter the arena" for "the purpose of insisting the counsel move the case forward".[5]

A judge can participate in legal debate, challenge counsel's position and state preliminary views without creating a perception of bias.[6]

Conduct that involves the "[u]njustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality".[7]

Purpose of Neutrality

The justice system only works if it has "the respect and confidence of its society". That requires "trials that are fair" and that appear to be fair to the "informed and reasonable observer". [8]

Disqualification of Judges

The mere fact that a judge previously ruled against a litigant does not automatically disqualify them from future cases.[9] Such a history does not support an apprehension of bias.[10] Judges are presumed capable of disabusing themselves of the accused's history in their future judgement.[11]

The assessment of bias is highly fact specific.[12]

1. *R v Torbiak and Campbell*, 1974 CanLII 1623 (ON CA), , 18 CCC (2d) 229, *per* Kelly JA, at pp. 230-231
2. *Wewaykum Indian Band v Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259, *per curiam*, at para 66 ("the manifestation of a broader preoccupation about the image of justice [because] there is an overriding public interest that there should be confidence in the integrity of the administration of justice")
3. *R v Sussex Justices, Ex parte McCarthy* , [1924] 1 K.B. 256 (UK), at p. 259
4. *R v Potter; R v Colpitts*, 2020 NSCA 9 (CanLII), *per curiam*, at para 743
5. *R v Clarke*, 2014 NSSC 431 (CanLII), *per* Coady J, at para 34
6. *R v Baccari*, 2011 ABCA 205 (CanLII), 527 WAC 301, *per curiam*
7. *Clarke*, *supra*, at para 20 citing Canadian Judicial Council, "Ethical Principles for Judges", at p. 33
8. *R v RDS*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, *per* Cory J
9. *Broda v Broda*, 2001 ABCA 151 (CanLII), 286 AR 120, *per curiam*, at para 16
   R v Collins, 2011 FCA 171 (CanLII), 202 ACWS (3d) 820 *per* Mainville JA , at para 11 ("[t]he simple fact that judges render a judgment which is unfavourable to a party cannot in itself result in a conclusion of bias. Were it otherwise, no judgment could ever be issued. A reasonable apprehension of bias must be shown to exist either in the judgment itself, in the comportment of the judge or by some other means.")
   R v JNS, 2019 ABQB 557 (CanLII), *per* Mandziuk J
   R v Heisinger, 2007 NWTTC 11 (CanLII) *per* Schmaltz J, at para 6 ("The case law is clear: an accused having appeared previously before a judge will not require that the judge cannot preside on subsequent matters involving that accused. This applies whether or not an accused appeared as an accused, a party, or a witness, and whether or not credibility findings were made.")
10. *Alberta Health Services v Wang*, 2018 ABCA 104 (CanLII), *per* Slatter JA, at para 9 ("... Making decisions is the essence of the judicial function, and a reasonable person, properly informed, would not conclude that a judge would have a bias towards any one party just because that party was unsuccessful on one particular application.")
11. *R v Bolt*, 1995 ABCA 22 (CanLII), 26 WCB (2d) 18, *per* Russell JA, at para 2 ("… It is inevitable that there will be occasions when an experienced trial judge will have had some prior judicial contact with an accused. We are confident that trial judges are capable of disabusing their minds of that fact in considering the guilt or innocence of the accused in relation to the specific charge before them…")

12. *R v Potter; R v Colpitts*, 2020 NSCA 9 (CanLII), at para 742
Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General), 2015 SCC 25 (CanLII), [2015] 2 SCR 282, *per* Abella J

Reasonable Apprehension of Bias

- Reasonable Apprehension of Bias

See Also

- Appeals
- Role of the Trial Judge
- Judicial Immunity

Reasonable Apprehension of Bias

This page was last substantively updated or reviewed *May 2021*. (Rev. # 79573)

< Procedure and Practice < Trials
< Procedure and Practice < Pre-Trial and Trial Matters

General Principles

A judge must not only be unbiased but also appear unbiased.[1] A judgement of a court cannot be valid where there is a reasonable apprehension of bias.

Presumption of Integrity

There is a strong presumption of impartiality and that the judge will carry out his oath of impartiality.[2] This presumption arises from the "presumption of judicial integrity".[3]

The presumption of integrity is rebutted where there is "cogent evidence showing that, in all the circumstances, an informed and reasonable observer would think that the reasons are an after-the-fact justification for the decision rather than an articulation of the reasoning that led to the decision".[4]

Burden and Standard of Proof

The burden of establishing bias is upon the claimant.[5] The burden is a "heavy" to dislodge the presumption of impartiality.[6]

Test for Bias

The test for bias is on an objective standard.[7] The focus of consideration should not be on whether the accused was prejudiced, but whether he would reasonably consider that he did not have a fair trial or whether reasonable-minded people who watched the trial would have believed the trial was not fair.[8]

The test for reasonable apprehension of bias requires the reviewing judge to consider whether a reasonable person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that ... judges swear to uphold" would apprehend that there was bias.[9] It has also been phrased as requiring that "a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias."[10]

When the judge's conduct is at play, it must not be considered in isolation. It must be considered in context, including in light of the whole proceeding.[11]

An apprehension of bias triggered by allegedly improper cross-examination requires that the court consider whether the "improperly questions" would lead a fully informed person to reasonably conclude the court's ability to decide the case to be impaired.[12]

"Cogent evidence" is required to overcome the presumption.[13]

Circumstances

Where a judge has made findings of fact on sentencing a co-accused for an offence may give rise to an apprehension of bias that would require the judge to withdraw.[14]

The fact that the applicant lost a motion or hearing before the judge, regardless of the similarity of the case, does not preclude the judge from judging the new issue.[15]

A judge referring to the accused as "Mr. Guilty" before a jury will not on its own be sufficient to create an apprehension of bias.[16]

A judge can be "openly critical of the Crown of defence counsel where such is appropriate" and still not create an apprehension of bias.[17]

A judge sighing at an accused with an extended record whom the judge had previously represented and calling him by his first name is not enough.[18]

Procedure

An application for recusal of a judge must be made before the judge against whom bias is alleged.[19]

Appeals

A reasonable apprehension of bias is grounds for appeal under either s. 686(1)(a)(i) or (iii) for unreasonable verdict or miscarriage of justice. There is a presumption to judicial integrity. Thus, there needs to be substantial grounds and cogent evidence to support an apprehension.[20]

1. *R v Sussex Justice, Ex Parte McCarthy* [1923] All ER Rep 233 (UK) ("Not only must justice be done, it must also be seen to be done")
2. *R v Pepe*, 2013 ONSC 643 (CanLII), *per* MacDonnell J, at para 11
   Malton v Attia, 2016 ABCA 130 (CanLII), 398 DLR (4th) 350, *per curiam*
3. *Malton v Attia*, *ibid.*, at para 82 ("There is a presumption of judicial impartiality, which must be displaced by the appellants. The threshold is a high one, and properly so.")
4. *R v Arnout*, 2015 ONCA 655 (CanLII), 328 CCC (3d) 15, *per curiam*, at para 19
5. *R v Slaney*, 2013 NLCA 70 (CanLII), 344 Nfld & PEIR 144, *per* Barry JA, at para 7
   Miglin v Miglin, 2003 SCC 24 (CanLII), [2003] 1 SCR 303, *per* Bastarache and Arbour JJ, at para 26
   R v RDS, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, *per* Cory J, at para 114
6. *R v Esseghaier*, 2021 ONCA 162 (CanLII), *per curiam*, at para 19
   R v Dowholis, 2016 ONCA 801, 341 CCC (3d) 443, *per* Benotto JA, at para 18
   R v Ibrahim, 2019 ONCA 631 (CanLII), 379 CCC (3d) 414, *per curiam*, at para 84
7. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 (CanLII), [2015] 2 SCR 282, *per* Abella J, at para 22
8. *R v Valley*, 1986 CanLII 110 (ON CA), 26 CCC (3d) 207, *per* Martin JA, at p. 232
9. *RDS*, *supra*, at para 111
10. *Miglin v Miglin*, *supra*, at para 26
    Committee for Justice and Liberty v National Energy Board, 1976 CanLII 2 (SCC), [1978] 1 SCR 369, *per* De Grandpre J(dissent) at 394-395
11. *R v Gager*, 2020 ONCA 274 (CanLII), OJ No 1886, at para 144 ("...a judge's individual comments or interventions must not be seen in isolation. Rather, the impugned conduct must be considered in the context of the circumstances and in the light of the whole proceeding.")
12. *R v Mallory*, 2007 ONCA 46 (CanLII), 217 CCC (3d) 266, *per curiam*, at para 318
    Yukon Francophone School Board v Yukon (Attorney General), 2015 SCC 25 (CanLII), [2015] 2 SCR 282, *per* Abella J, at para 37
13. *RDS*, *supra*, at paras 113, 116, 117
    Committee for Justice and Liberty, *supra*, at p. 395 ("The grounds for [an] apprehension [of bias] must...be substantial")
14. *R v Hayes and Lowe*, 2009 NLTD 114 (CanLII), 888 APR 212, *per* Dymond J
15. *Broda v Broda*, 2001 ABCA 151 (CanLII), 286 AR 120, *per curiam*, at para 16
16. *R v Wilson*, 2013 ONCA 222 (CanLII), *per curiam*, at paras 5 to 8
17. *R v Colpitts*, 2014 NSSC 431 (CanLII), *per* Coady J, at para 18
    R v LL, 2013 ABQB 531 (CanLII), 570 AR 287, *per* Thomas J, at paras 29 and 31
18. *R v Lapointe*, 2010 NBCA 63 (CanLII), 936 APR 129, *per* Robertson JA
19. *R v Doung*, 1998 CanLII 14950 (ONSC), 129 CCC (3d) 430), *per* Smith ACJ
20. *R v Lupyrypa*, 2011 ABCA 324 (CanLII), *per curiam*, at para 6
    R v S(RD), 1997 CanLII 324 (SCC), [1997] 3 SCR 484, *per* Cory J, at para 142
    Wewaykum Indian Band v Canada, 2003 SCC 45 (CanLII), [2003] 2 SCR 259, *per curiam*, at paras 57 to 60, 76 to 78

See Also

- Role of Trial Judge
- Judicial Intervention During Trial

Functus Officio

< Procedure and Practice < Trials

General Principles

The doctrine of "functus officio" (Latin for "having performed his or her office") determines when the judge no longer has authority or competence over a proceeding they have previously dealt with because their duties are fully accomplished.[1]

A judge has jurisdiction over an outstanding charge up to the point where the charge has been resolved by way of a stay, withdraw, dismissal, acquittal, or sentencing. The doctrine of *functus officio* refers to the principle that a court no longer has jurisdiction to change any decisions once a charge has reached its ultimate conclusion.

In the case of a conviction being entered, the judicial role of the judge ends once a sentence has been imposed. After that, any changes to or issuance of orders are "ministerial or administrative act[s]".[2]

This common law rule states that the final judgement of a court cannot be reopened. [3] The power to review a decision is transferred by the Judicature Act to the appellate division.

This rule only applies to judgments that have been drawn up, issued and entered.[4]

The purpose of the doctrine is to provide finality of court judgments to allow for potential review by an appellate level of court.[5]

A court has limited power to reconsider or vary judgments so long as it is not functus.[6]

History

The doctrine originates from 19th century english case law.[7]

1. *R v E(J)*, 2013 ONCJ 247 (CanLII), *per* Nakatsuru J, at para 17
   Chandler v Alberta association of architects, 1989 CanLII 41 (SCC), [1989] 2 SCR 848, *per* Sopinka J, at para 19
2. *R v Melvin*, 2005 NSSC 368 (CanLII), 772 APR 38, *per* Murphy J, at para 13

R v Fuller, [1969] 3 CCC 349(*no CanLII links)
3. originates from *Re St. Nazaire Co* (1879), 12 Ch. D. 88 (UK)
4. *Chandler v Alberta association of architects*, *supra*
R v Adams, 1995 CanLII 56 (SCC), [1995] 4 SCR 707, *per* Sopinka J , at para 29
5. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 SCR 3, *per* Iacobucci and Arbour JJ, at para 79
6. *Adams*, *supra* , at para 29
7. *Doucet-Boudreau*, *supra*, at para 113
In re St. Nazaire Co. (1879), 12 Ch. D. 88 (UK)

Timing of Conclusion

It is said that a court is functus if and only if "the duties and functions of the [court's] original commission have been fully accomplished"[1]

A trial judge sitting without a jury is *functus officio* only after he has imposed his sentence.[2]

In a judge-alone case, the judge becomes functus when he "endorses the indictment".[3]

An intermittent jail sentence cannot be varied by the sentencing court to a non-intermittent.[4] There is some authority suggesting that the court may vary the entry and exit times of the intermittent sentence based on the power of the court to control its own process.[5]

A judge is not *functus* simply by reason that he has given a decision for conviction. In certain circumstances, the judge may hear further evidence on an issue raised in trial after finding of guilt and has the option to reopen the case.[6]

An error made in making a SOIRA order of an illegal duration cannot be amended unless it was the judge's manifest intention to make an order of a lawful duration in which case the court has inherent jurisdiction to amend.[7]

A court will not be *functus* up until the Court enters an official judgement into the rolls.[8]

Where a mandatory order such as a DNA or 109 Weapons order was omitted there is some suggestion that the court may go back and remedy the omission.[9]

Appeal Court

An appellate court is not functus until the formal judgement has been drawn up and entered.[10] The essential elements for an appellate court to be *functus* is:[11]

1. the appeal has been argued and decided on the merits;
2. the court has issued reasons for its decision; and
3. a formal order has been entered or issued recording the disposition of the appeal.

To prevent the appeal from being re-opened, the respondent must establish that there is "no reasonable prospect of success".[12]

The court should consider as factors to re-open an appeal that has been decided:[13]

1. the principle of finality;
2. the interests of justice including finality and the risk of a miscarriage of justice;
3. whether the applicant has established a clear and compelling case to justify a re-opening;
4. whether, in hearing and deciding the appeal on the merits, the court overlooked or misapprehended the evidence or an argument advanced by counsel; and
5. whether the error alleged concerns a significant aspect of the case.

1. *Jacobs Catalytic Ltd. vs International Brotherhood of Electrical Workers, Local #353*, 2009 ONCA 749 (CanLII), 312 DLR (4th) 250, *per* Epstein JA, at para 60
2. *R v MacDonald*, 1991 CanLII 2424 (NSCA), NSR (2d) 374, *per* Clarke CJ
3. *R v Malicia*, 2006 CanLII 31804 (ON CA), 211 CCC (3d) 449, *per* MacPherson JA, at para 16
4. *R v Germaine* (1980) 39 NSR (2d) 177(*no CanLII links) , at para 5 - no jurisdiction to make intermittent to non-intermittent because not in text of 732
R v Jules, [1988] BCJ 1605(*no CanLII links)
5. *R v EK*, 2012 BCPC 132 (CanLII), *per* Gouge J
cf. *R v Crocker*, 2012 CanLII 42379 (NL PC), *per* Gorman J
6. e.g. *R v Boyne*, 2012 SKCA 124 (CanLII), 293 CCC (3d) 304, *per* Ottenbreit JA - judge heard disclosure arguments after conviction at trial
7. *R v DM*, 2013 ONSC 141 (CanLII), [2013] OJ No 83 (SCJ), *per* Daley J
R v E(J), 2013 ONCJ 247 (CanLII), *per* Nataksuru J
8. *R v Villeda*, 2010 ABCA 410 (CanLII), 502 AR 78, *per curiam*
9. e.g. *R v Field*, 2013 NSPC 92 (CanLII), *per* Scovil J
10. jbvd0, 2020 ONCA 759 (CanLII), *per* Watt JA, at para 40
11. *Smithen-Davis*, *ibid.*, at para 37
12. *Smithen-Davis*, *supra*, at para 68 ("To succeed in quashing the respondent's application to re-open the appeal, the Crown must be able to establish on the record, as it currently exists, that the application to re-open has no reasonable prospect of success.")
13. *Smithen-Davis*, *supra*, at para 37

Exception

There are exceptions to this rule. The court may still interfere with a prior decision where:[1]

1. where there had been a slip in drawing it up, and,
2. where there was an error in expressing the manifest intention of the court

A error on the notation of a jury verdict by a judge may be corrected if spotted shortly after the verdict is rendered.[2]

However where the error correction is "in reality" a "reconsideration of the verdict (or sentence}" then it is prohibited.[3] It is also in error "where issues of unfairness or injustice to the accused or reasonable apprehension of bias arise."[4]

Administrative Amendments

The judge may make corrections to warrants of committal as an administrative act through the clerk of the court.[5]

1. *Chandler v Alberta association of architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848, *per* Sopinka J
2. *R v Burke*, 2002 SCC 55 (CanLII), [2002] 2 SCR 857, *per* Major J
3. *R v Krouglov*, 2017 ONCA 197 (CanLII), 346 CCC (3d) 148, *per* Epstein JA, at para 40
4. *Krouglov*, *ibid.*, at para 40
5. *R v Melvin*, 2005 NSSC 368 (CanLII), 772 APR 38, *per* Murphy J, at para 14
   Ewing v Warden of Mission Institution, 1994 CanLII 2390 (BCCA), 92 CCC (3d) 484, *per* Ryan JA - regarding warrants of committal

See Also

- Role of the Trial Judge
- Reasonable Apprehension of Bias)

Role of the Victim and Third Parties

This page was last substantively updated or reviewed *May 2020*. (Rev. # 79573)

< Procedure and Practice < Role of Parties in Proceedings

Introduction

The victim of crime is not generally a party to criminal proceedings beyond their role as a witness.

Before the finding of guilt, a victim shares the same role as a member of the public or a witness in the proceedings. They can only become a party to proceedings in the limited situations such as:

- An application for third party records, where the records relate to that person;
- An application on the part of the Crown or victim for the use of any number of testimonial aids;
- An application on the part of the Crown or victim for a publication ban identifying the victim; or
- An application of the victim for a peace bond.

Once there is a finding of guilt, the victim is primarily entitled to participate by way of:

- a victim impact statement at sentencing;
- a request for restitution at sentencing;
- a victim impact statement in a parole ineligibility reduction hearing; and
- a victim impact statement in a Review Board hearing for persons determined to be not criminally responsible due to mental disorder.

The victim is entitled to notice of proceedings in certain circumstances. Notice may include:

- notice of release conditions when accused is granted bail;
- notice of right to file restitution at sentencing;
- notice of right to file a victim impact statement at sentencing;
- notice on request of dispositions from a Review Board hearing relating to an offender found "not criminally responsible"; and
- notice of a "high risk" designation and right to file a victim statement on a review board hearing relating to an offender found "not criminally responsible".

Under ss. 26(1) and 142(1) Corrections and Conditional Release Act requires Corrections Canada and the Parole Board to provide victims of crime with details on the offender. Certain of this information is released on a "case-by-case basis".

Complainants and Victims Defined

> 2 In this Act,
> ...
> **"complainant"** means the victim of an alleged offence;
> ...
> **"victim"** means a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence and includes, for the purposes of sections 672.5 [*procedure at disposition hearing*], 722 [*victim impact statements*] and 745.63 [*hearing before a jury*], a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person.
> ...
> R.S., 1985, c. C-46, s. 2; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 2, 203, c. 31 (1st Supp.), s. 61, c. 1 (2nd Supp.), s. 213, c. 27 (2nd Supp.), s. 10, c. 35 (2nd Supp.), s. 34, c. 32 (4th Supp.), s. 55, c. 40 (4th Supp.), s. 2; 1990, c. 17, s. 7; 1991, c. 1, s. 28, c. 40, s.

1, c. 43, ss. 1, 9; 1992, c. 20, s. 216, c. 51, s. 32; 1993, c. 28, s. 78, c. 34, s. 59; 1994, c. 44, s. 2; 1995, c. 29, ss. 39, 40, c. 39, s. 138; 1997, c. 23, s. 1; 1998, c. 30, s. 14; 1999, c. 3, s. 25, c. 5, s. 1, c. 25, s. 1(Preamble), c. 28, s. 155; 2000, c. 12, s. 91, c. 25, s. 1(F); 2001, c. 32, s. 1, c. 41, ss. 2, 131; 2002, c. 7, s. 137, c. 22, s. 324; 2003, c. 21, s. 1; 2004, c. 3, s. 1; 2005, c. 10, s. 34, c. 38, s. 58, c. 40, ss. 1, 7; 2006, c. 14, s. 1; 2007, c. 13, s. 1; 2012, c.1, s. 160, c. 19, s. 371; 2013, c. 13, s. 2; 2014, c. 17, s. 1, c. 23, s. 2, c. 25, s. 2; 2015, c. 3, s. 44, c. 13, s. 3, c. 20, s. 15; 2018, c. 21, s. 12; 2019, c. 13, s. 140; 2019, c. 25, s. 1.
[*annotation(s) added*]

– CCC

While "victim" encompasses alleged victims, it is considered "improper" for use in court as it is "obnoxious to the presumption of innocence". The use of the term pre-conviction may be in violation of the right to a presumption of innocence.[1]

Publication Bans

For the purpose of a publication ban under s. 486.4, the meaning of victim does not include the siblings of the deceased victim.[2]

Victim Impact Statements

For the purpose of filing a victim impact statement, the term "victim" has been found to include the support professional who received a confession from the accused.[3]

1. *R v Villota*, 2002 CanLII 49650 (ON SC), 163 CCC (3d) 507, *per* Hill J, at para 79
2. *R v Clark*, 2015 ABQB 729 (CanLII), AJ No 1247, *per* Strekaf J at para 20 ("Under this definition, the siblings of the deceased child do not qualify as victims for the purposes of section 486.4 and, therefore, no application was properly before the Court on their behalf, nor was there jurisdiction to grant an order on their behalf.")
3. *R v KJ*, 2019 ONSC 2335 (CanLII)

Notices

Bail

For any order relating to bail that is made under s. 515, a victim of the offence charged can request a copy of the order.

515
[*omitted (1), (2), (2.01), (2.02), (2.03), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12) and (13*]

Copy to victim

(14) If an order is made under this section, the justice shall, on request by a victim of the offence, cause a copy of the order to be given to the victim.
R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.

– CCC

NCR/Fitness

Under s. 674.5(5.1) and (5.2), a victim is entitled to notice on request of any disposition hearings relating to an NCR/Fitness findings and further notice of discharge and accused's intended place or residence.[1]

Under s. 674.5(13.3) to (15.3), a victim is entitled to notice and to file a statement with the court should a review board make a finding of "high risk".[2]

1. see s. 674.5(5.1)
2. see s. 674.5(13.3)

Notice to Victim of Plea Deal

Under s. 606(4.1), Judges are required after accepting the guilty plea for a serious personal injury offence to inquire with the Crown attorney whether "reasonable steps" have been taken to "inform the victims" of the agreement. Failing to take reasonable steps before the guilty plea requires the prosecutor to "as soon as feasible, take reasonable steps to inform the victim of the agreement and the acceptance of the plea."

Under s. 606(4.2), judges are required after accepting a guilty plea for an indictable offence with a maximum penalty no less than 5 years to inquire whether "any of the victims had advised the prosecutor of their desire to be informed if such an agreement were entered into, and, if so, whether reasonable steps were taken to inform that victim of the agreement". Failing to take reasonable steps before the guilty plea requires the prosecutor to "as soon as feasible, take reasonable steps to inform the victim of the agreement and the acceptance of the plea."

606
[*omitted (1), (1.1), (1.2), (2), (3) and (4)*]

injury offences

(4.1) If the accused is charged with a serious personal injury offence, as that expression is defined in section 752 [*dangerous Offenders and Long-term Offenders – definitions*], or with the offence of murder, and the accused and the prosecutor have entered into an agreement under which the accused will enter a plea of guilty of the offence charged — or a plea of not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence — the court shall, after accepting the plea of guilty, inquire of the prosecutor if reasonable steps were taken to inform the victims of the agreement.

Inquiry of court — certain indictable offences

(4.2) If the accused is charged with an offence, as defined in section 2 of the *Canadian Victims Bill of Rights*, that is an indictable offence for which the maximum punishment is imprisonment for five years or more, and that is not an offence referred to in subsection (4.1) [*inquiry of court – murder and serious personal injury offences*], and the accused and the prosecutor have entered into an agreement referred to in subsection (4.1) [*inquiry of court – murder and serious personal injury offences*], the court shall, after accepting the plea of guilty, inquire of the prosecutor whether any of the victims had advised the prosecutor of their desire to be informed if such an agreement were entered into, and, if so, whether reasonable steps were taken to inform that victim of the agreement.

Duty to inform

(4.3) If subsection (4.1) [*inquiry of court – murder and serious personal injury offences*] or (4.2) [*inquiry of court – certain indictable offences*] applies, and any victim was not informed of the agreement before the plea of guilty was accepted, the prosecutor shall, as soon as feasible, take reasonable steps to inform the victim of the agreement and the acceptance of the plea.

Validity of plea

(4.4) Neither the failure of the court to inquire of the prosecutor, nor the failure of the prosecutor to take reasonable steps to inform the victims of the agreement, affects the validity of the plea.
[*omitted (5)*]
R.S., 1985, c. C-46, s. 606; R.S., 1985, c. 27 (1st Supp.), s. 125; 2002, c. 13, s. 49; 2015, c. 13, s. 21.
[*annotation(s) added*]

– CCC

Representation of Victims

Acting on victim's behalf

2.2 (1) For the purposes of sections 606 [*pleas*], 672.5 [*procedure at disposition hearing*], 715.37 [*application for court approval, victim interests and other requirements*], 722 [*victim impact statements*], 737.1 [*restitution*] and 745.63 [*hearing before a jury*], any of the following individuals may act on the victim's behalf if the victim is dead or incapable of acting on their own behalf:

(a) the victim's spouse, or if the victim is dead, their spouse at the time of death;
(b) the victim's common-law partner, or if the victim is dead, their common-law partner at the time of death;
(c) a relative or dependant of the victim;
(d) an individual who has in law or fact custody, or is responsible for the care or support, of the victim; and
(e) an individual who has in law or fact custody, or is responsible for the care or support, of a dependant of the victim.

Exception

(2) An individual is not entitled to act on a victim's behalf if the individual is an accused in relation to the offence or alleged offence that resulted in the victim suffering harm or loss or is an individual who is found guilty of that offence or who is found not criminally responsible on account of mental disorder or unfit to stand trial in respect of that offence.

2015, c. 13, s. 4; 2018, c. 12, s. 403.

– CCC

Complainants in Sexual Offences

The complainant has standing to participate in trial *voir dires* relating to the use of evidence of the complainant's prior sexual history and the access to the complainant's personal records.

Under s. 278.94(2) and s. 278.94(3) the complainant has a right to make submissions and be represented by counsel.[1] This right under s. 278.94 includes the right to cross-examine any witness called relating to the protected personal information.[2]

1. *R v Boyle*, 2019 ONCJ 253 (CanLII), *per* Doody J
2. *Boyle*, *ibid.*, at para 17

Victim Impact Statement

- Victim Impact Statements

Victims Bill of Rights

As of August 2013, the Federal Government is in a consultation phase before enacting a Victims' Bill of Rights.

Young Offenders

A victim of a young offender has a right to be informed by the police, Attorney General, or victim services of "the identity of the young person and how the offence has been dealt with."

> **Victim's right to information**
>
> 12 If a young person is dealt with by an extrajudicial sanction, a police officer, the Attorney General, the provincial director or any organization established by a province to provide assistance to victims shall, on request, inform the victim of the identity of the young person and how the offence has been dealt with.
>
> – YCJA

Intervenors

Generally, only those who are parties to a criminal proceeding can participate.[1] For criminal matters, there is a risk that by permitting intervention it runs the risk of creating unfairness by requiring the accused to face two prosecutors.[2] Consideration should be given on the purpose and usefulness of intervention.[3]

1. *R v Fraser*, 2010 NSCA 106 (CanLII), 940 APR 281, *per* Beveridge JA, at para 7 ("I would venture it is trite to say that as a general principle in our adversarial system of justice only the actual parties to the litigation may make written or oral submissions or otherwise participate in legal proceedings before any court or tribunal.")
2. *Fraser*, *ibid.*, at para 7 ("Where the proceeding is criminal, there is a heightened concern about the fairness of permitting intervention lest the accused end up, in effect, facing two prosecutors...")

   see also *R v Finta*, 1990 CanLII 6824 (ON CA), , 1 OR (3d) 183, *per* Morden ACJ
   R v Neve, 1996 ABCA 242 (CanLII), 108 CCC (3d) 126, *per* Irving JA
   R v BP, 2010 ABQB 204 (CanLII), AJ No 352, *per* Strekaf J
3. *R v KAR*, 1992 CanLII 4829 (NSCA), , 116 NSR (2d) 418, *per* Chipman JA, at paras 23 to 25
   Fraser, *supra*, at para 10

See Also

- Victims Rights (GC)
- Victim Impact Statements
- Victims as a Factor in Sentencing
- Victim Fine Surcharge

Other Parties

- Role of the Accused
- Role of the Defence Counsel
- Role of the Trial Judge
- Role of Law Enforcement
- Role of the Crown

Disclosure

This page was last substantively updated or reviewed *June 2021*. (Rev. # 79573)

General Principles

The Crown must disclose all materials and information that is in its possession or control that is not clearly irrelevant, regardless of if the evidence is to be called at trial or is inculpatory or exculpatory.[1]

The right to disclosures premised upon (1) the right to know the case to meet and (2) the right to make full answer in defence of an offence charged.[2]

Materials in possession of the Crown are not the "property" of the Crown but rather is the "property of the public to be used to ensure that justice is done".[3]

Purpose

The right to disclosure is founded in the principle of fair play between parties[4] as well as the right to make full answer and defence. [5]

When the Crown receives evidence it is not information that it holds in trust for the witness, rather it is "property of the public, to ensure that justice is done."[6]

The right to disclosure is "among the most important and fundamental rights guaranteed to an accused in the criminal process".[7]

The right is guaranteed by the right to full answer and defence under s. 7 of the Charter.[8]

The Crown is not an "ordinary litigant". It's "undivided loyalty is to the proper administration of justice".[9]

There is also a common law duty to provide "full and fair disclosure is a fundamental aspect of the Crown's duty to serve the Court as a faithful public agent, entrusted not with winning or losing trials".[10]

The obligation also arises from "the premise that material in possession of the prosecutorial authorities that is relevant to a criminal prosecution is not the 'property' of the Crown, but is rather 'the property of the public to be used to ensure that justice is done'"[11]

This right is found codified under s. 650(3) and s. 802 of the Criminal Code which state:

> s.650
> [*omitted (1), (1.1), (1.2) and (2)*]
>
> **To make defence**
>
> (3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.
> R.S., 1985, c. C-46, s. 650; 1991, c. 43, s. 9; 1994, c. 44, s. 61; 1997, c. 18, s. 77; 2002, c. 13, s. 60; 2003, c. 21, s. 12.
>
> – CCC

> **Right to make full answer and defence**
>
> 802 (1) The prosecutor is entitled personally to conduct his case and the defendant is entitled to make his full answer and defence.
> [*omitted (2) and (3)*]
> R.S., c. C-34, s. 737.
>
> – CCC

The Crown has an obligation to obtain from an investigative agency any relevant information that it is aware of and must "take reasonable step to inquire about ...relevant information".[12]

The duty to make disclosure creates a duty upon the crown to obtain the disclosure from the police and, likewise, the police have a corresponding duty to provide disclosure to the crown. [13]

These obligations are jointly held by both Crown and police.[14]

The "Stinchcombe disclosure regime" only applies to "material relating to the accused's case" that are "in the possession or control" of the Crown.[15]

When confronted by a "pure fishing expedition", the Crown has no obligation to discover or disclose records.[16]

Police records from an unrelated file that is not in possession of the prosecuting Crown is not subject to first-party disclosure.[17]

The right does not distinguish between inadmissible and admissible evidence.[18]

The Crown should advise a self-represented accused of the right to disclosure. The judge should not take a plea until satisfied that the accused has been notified.[19]

Case-to-Meet Principle

The doctrine of the "case-to-meet" is a fundamental requirement of a fair trial. It is protected by the common law and the Constitution.[20]

History

Prior to the 1991 release of the decision of R v Stinchcombe, the general duty to disclosed varied between jurisdictions. The Crown had some discretion to withhold evidence that was deemed uncredible.[21]

1. *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, *per* Sopinka J (7:0) at 339 and 343 (Stinchcombe #1)
   See also *Stinchcombe #1*, *ibid.*, at para 20 ("[w]hile the Crown must err on the side of inclusion, it need not produced what is clearly irrelevant")
   R v Stinchcombe, 1995 CanLII 130 (SCC), [1995] 1 SCR 754, *per* Sopinka J (7:0) at 755 (Stinchcombe #2)
   R v Wickstead, 1997 CanLII 370, [1997] 1 SCR 307, *per* Sopinka J (9:0)
   R v McNeil, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0), at para 17 d(the crown need not produce records that have no "reasonable possibility" of relevance)
   R v Girimonte, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0), at pp. 41 to 42 ("The Crown must disclose to the defence all information whether inculpatory or exculpatory under its control, unless the information is clearly irrelevant or subject to some privilege")
2. *R v Bottineau*, 2005 CanLII 63780 (ON SC), 32 CR (6th) 70, *per* Watt J, at para 31
   R v Mills, 1999 CanLII 637 (SCC), [1999] 3 SCR 668, *per* McLachlin and Iacobucci JJ (7:1), at pp. 682 to 683 ("the right of an accused ot make full answer and defence is a pillar of criminal justice on which we rely heavily to prevent the conviction of the innocent... The Crown's constitutional and ethical duty to disclose all information in its possession reasonably capable of affecting the accused's ability to raise a reasonable doubt concerning his innocence"
3. *R v Darwish*, 2010 ONCA 124 (CanLII), 252 CCC (3d) 1, *per* Doherty JA, at para 33
4. *R v Lemay*, 1951 CanLII 27 (SCC), [1952] 1 SCR 232, *per* Locke J (8:1)
   R v Boucher, 1954 CanLII 3 (SCC), [1955] SCR 16, *per* Kerwin J (7:2)
5. *R v Carosella*, 1997 CanLII 402 (SCC), [1997] 1 SCR 80, *per* Sopinka J (5:4), (stated disclosure by the crown is "one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter.")
   Girimonte, *supra*
6. *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, *per* Sopinka J (7:0) , at para 12
7. *R v Floria*, 2008 CanLII 57160 (ON SC), *per* Croll J, at para 19
8. *R v Chaplin*, 1995 CanLII 126 (SCC), [1995] 1 SCR 727, *per* Sopinka J (9:0), at p. 742
   R v Carosella, 1997 CanLII 402 (SCC), [1997] 1 SCR 80, *per* Sopinka J, at p. 106 ("The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. ")
9. *R v Esseghaier*, 2021 ONCA 162 (CanLII), *per curiam*, at para 26
   R v McNeil, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0), at paras 17, 49(*complete citation pending*)
10. *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, *per* L'Heureux-Dubé J (6:3)
11. *Darwish*, *supra*, at para 33
    R v Stinchcombe, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, [1991] SCJ No 83, *per* Sopinka J (7:0), at p. 333 [SCR]
12. *Darwish*, *supra*, at para 31
    R v LAT, 1993 CanLII 3382 (ON CA), 84 CCC (3d) 90, *per* Lacourcière JA (3:0) ("The Crown has a duty to obtain from the police -- and the police have a corresponding duty to provide to the Crown -- all relevant information and material concerning the case.")
    R v Vokey, 1992 CanLII 7089 (NL CA), 72 CCC (3d) 97, *per* Goodridge CJ ("The duty rests upon Crown counsel to obtain from the police all material that should be properly disclosed to defence counsel.")
13. *LAT*, *supra*
14. *R v McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0), at para 14
15. *McNeil*, *supra*, at para 22
16. *R v Gingras*, 1992 CanLII 2826 (AB CA), 71 CCC (3d) 53, *per curiam*
17. *R v Thompson*, 2009 ONCA 243 (CanLII), 243 CCC (3d) 331, *per* Goudge JA (3:0)
    R v Schertzer, 2011 ONSC 65 (CanLII), *per* Pardu J, at para 41
18. *Bottineau*, *supra*, at para 31
19. *Stinchcombe*, *supra*, at p. 343 ("In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of his right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done.")
20. *R v Heaton*, 2014 SKCA 140 (CanLII), 318 CCC (3d) 115, *per* Jackson JA (3:0), at para 24
    R v Underwood, 1998 CanLII 839 (SCC), [1998] 1 SCR 77, *per* Lamer CJ (5:0), at para 5
21. *Stinchcombe*, *supra*

First-Party Disclosure Principles and Obligations ("Stinchcombe")

The Martin Committee produced a report considering the decision. The report detailed the principles of the case, at p. 146:

1. The fruits of the investigation which are in the possession of the Crown are not the property of the Crown for the use in securing a conviction, but, rather, are the property of the public to ensure that justice is done.[1]
2. The general principle is that all relevant information must be disclosed, whether or not the Crown intends to introduce it in evidence. The Crown must disclose relevant information, whether it is inculpatory or exculpatory, and must produce all information which may assist the accused. If the information is of no use, then it is irrelevant and will be excluded by Crown counsel in the exercise of the Crown's discretion, which is reviewable by the trial judge.

Satisfaction of the obligation to disclosure must be read in context and does not have to be "perfect".[2]

Identity of Crown

In the context of all first party or Stinchcombe disclosure issues, the term "Crown" refers only to the "prosecuting crown" and not all crown entities including police. All Crown entities other than the "prosecuting crown" are considered "third-parties". [3]

Disclosure to Crown

The obligations upon the Crown are not reciprocal and there is no obligations upon the defence to disclose anything prior to trial.[4]

1. *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326 (SCC), *per* Sopinka J (7:0), at para 12
2. *R v Dunn*, 2009 CanLII 75397 (ON SC), [2009] OJ No 5749, *per* Boswell J ("Disclosure must be considered within this context. It does not have to be perfect, but it does have to be fundamentally fair and sufficient to allow an accused to exercise his or her constitutional right to make full answer and defence.")
   R v Eddy, 2014 ABQB 164 (CanLII), 583 AR 217, *per* Acton J, at para 177
3. *Elkins*, *supra*, at para 27
   R v Jackson, 2015 ONCA 832 (CanLII), 332 CCC (3d) 466, *per* Watt JA, at para 80
   Quesnelle, *supra*, at para 11
   McNeil, *supra*, at para 22
4. *R v Mitchell*, 2018 BCCA 52 (CanLII), *per* Fisher JA, at para 51

Preservation of Evidence

Stinchcombe obligation also requires the Crown to preserve all relevant evidence.[1]

At common law, there is a principle of “Omnia praesumuntur contra spoliatorem” that suggests that a party who destroys documents must rebut the presumption that the documents were unfavourable to their case.

1. *R v La*, 1997 CanLII 309 (SCC), [1997] 2 SCR 680, *per* Sopinka J, at para 17
   R v FCB, 2000 NSCA 35 (CanLII), 142 CCC (3d) 540, *per* Roscoe JA (3:0), at para 10

Sufficiency for Election and Plea

Initial disclosure should be provided before the accused should be required to make election and plea.[1] This is so that the accused can make an informed decision at "all fundamental steps that affect his rights in a crucial way".[2] Many tactical factors can come into play that would influence the choice of manner of trial.[3]

1. *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, *per* Sopinka J (7:0), at pp. 342-3
   R v Egger, 1993 CanLII 98 (SCC), [1993] 2 SCR 451, *per* Sopinka J (5:0), at paras 19 to 20
   R v Girimonte, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0), ("Initial disclosure must occur sufficiently before the accused is called upon to elect or plead so as to permit the accused to make an informed decision as to the mode of trial and the appropriate plea. In a perfect world, initial disclosure would also be complete disclosure. However, as is recognized in *Stinchcombe*, *supra*, at p. 343 [SCR], at p. 221 [CRR], at p. 14 [CCC], the Crown will often be unable to make complete disclosure at the initial stage of the disclosure process")
   R v NNM, 2006 CanLII 14957 (ON CA), 209 CCC (3d) 436, *per* Juriansz JA (3:0), at para 37 ("Even when the Crown has clearly failed to make mandated disclosure, the defence is not necessarily entitled to refuse to proceed to the next step or to set a date for trial. .”")
   R v Kovacs-Tator, 2004 CanLII 42923 (ON CA), 192 CCC (3d) 91, *per curiam* (3:0), at para 47 (Ont. C.A.) ("the Crown is not obliged to disclose every last bit of evidence before a trial date is set")
2. *Egger*, *supra*, at paras 19 to 20
   R v Lahiry, 2011 ONSC 6780 (CanLII), 283 CCC (3d) 525, *per* Code J, at para 114 ("It is only when the missing disclosure is truly material to "crucial steps" in the process, like election and plea, that it will justify delay at these early stages.")
3. e.g. *R v Black*, 1998 CanLII 5042 (NS SC), 515 APR 297, *per* Saunders J- judge lists tactical factors that come into play in making election

Delaying and Withholding Disclosure

The entitlement to disclosure "is neither absolute or unlimited".[1]

Where disclosure is delayed or withheld is it the burden of the Crown to justify it.[2]

Delayed Disclosure

The Crown has a limited discretion to delay disclosure in "rare circumstances" in order "to protect the integrity of an ongoing investigation".[3] Or where it is necessary to protect the safety of certain witnesses.[4]

The Crown also has discretion to determine the most effective manner in which to produce disclosure.[5]

A great amount of deference should be given to the manner and timing of disclosure.[6]

The defence's choice to have a preliminary inquiry before setting a matter for trial cannot be used as an excuse for delay of disclosure.[7]

Withheld Disclosure

The most obvious reasons for withholding disclosure in where it is (1) "clearly irrelevant"; (2) the information was privileged; (3) disclosure of the information was governed by law; and (4) premature disclosure may result in harm to an individual or public interest.[8]

Where any disclosure is withheld, the Crown must make it know that they are in possession of those records.[9]

1. *R v Basi*, 2009 SCC 52 (CanLII), [2009] 3 SCR 389, *per* Fish J (7:0), at para 1
   R v McNeil, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0), at para 18
2. *R v Egger*, 1993 CanLII 98 (SCC), [1993] 2 SCR 451, *per* Sopinka J (5:0), at p. 466
3. *Stinchcombe*, *supra*, at p. 339
4. *R v Vokey*, 1992 CanLII 7089 (NL CA), 72 CCC (3d) 97, *per* Goodridge CJ
5. *Stinchcombe*, *supra*, at p. 339
   R v Chaplin, 1995 CanLII 126 (SCC), [1995] 1 SCR 727, *per* Sopinka J (9:0), at para 21
   R v Egger, 1993 CanLII 98 (SCC), [1993] 2 SCR 451, *per* Sopinka J (5:0)
   R v Durette, 1994 CanLII 123 (SCC), [1994] 1 SCR 469, *per* Sopinka J (4:3)
6. *Stinchcombe*, *supra*, at p. 340
7. *R v Girimonte*, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0)
8. *McNeil*, *supra*
9. *R v Piaskowski*, 2007 MBQB 68 (CanLII), 213 Man R (2d) 283, *per* Sinclair J, at para 84 ("The Crown's disclosure obligation requires that it must make known to an accused all relevant materials in its possession or under its control.")

When the Obligations Exist

The Crown will only be subject to disclosure obligation where there is evidence in its possession or control *and* is sufficiently relevant. This is will only apply once the defence seeks to exercise its right to disclosure.

Information in possession of the government but not discovered in the course of the investigation is *not* governed by Stinchcombe. [1] Stincombe will generally only apply to the "fruits of the investigation". [2] The exception to this exists for records in the possession or control of Crown that is "obviously relevant" to the accused's case.[3] The meaning of "obviously relevant" does not create a new standard of relevance, but applies the normal standard of relevance. However, the certainty to which it would go to full answer and defence is beyond merely "likely" and is something where the use if "easily seen or understood".[4]

1. *R v Elkins*, 2017 BCSC 245 (CanLII), *per* Sewell J, at para 24
2. *Elkins*, *ibid.*, at para 25
3. *R v Pascal*, 2020 ONCA 287 (CanLII), at para 106 ("However, the police obligation of disclosure to the prosecuting Crown extends beyond the "fruits of the investigation". The police should also disclose to the prosecuting Crown any additional information that are "obviously relevant" to the accused's case. This "obviously relevant" information is not within the investigative files, but must be "disclosed under Stinchcombe because it relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence": Gubbins, at para. 23.")
   R v Gubbins, 2018 SCC 44 (CanLII), [2018] 3 SCR 35, *per* Rowe J
4. *R v Sandhu*, 2020 ABQB 459 (CanLII), *per* Achkerl J, at para 36

Defence Engaging Disclosure Obligations

The right to disclosure is triggered once defence counsel requests it.[1]

The obligation will exist for all evidence for which there is a "reasonable possibility" that the evidence will used in making full answer and defence.[2]

The duty to disclose is engaged once the accused requests information from the crown any time after the charge has been laid. [3] If the defence fails to raise the issue and remains passive, they are less able to claim that non-disclosure affected trial fairness.[4]

Duty of Diligence

The defence has an obligation to diligently pursue disclosure by actively seeking and pursuing disclosure once they become aware or ought to have been aware of it.[5] This means the defence should bring any failure to disclose to the Court's attention at the earliest opportunity so that the judge can remedy any trial unfairness.[6] The defence should review the disclosure and identify anything missing as soon as possible.[7]

The defence cannot claim a lack of disclosure affected trial fairness when they remain passive a tactical decision or due to lack of diligence.[8]

A failure to read the disclosure and discover defects cannot be used to support a finding that there was a Crown breach of the duty to disclose.[9]

Fishing Expeditions

The defence should not engage in disclosure requests that amount to mere "fishing expeditions" as they tend to "undermine the good faith and candour which should govern the conduct of counsel."[10]

1. *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, *per* Sopinka J (7:0),, at p. 342 ("The obligation to disclose will be triggered by a request by or on behalf of the accused. Such a request may be made at any time after the charge.")
   R v O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, *per* Lamer CJ and Sopinka J (dissenting on other issues), at para 5 ("The Crown's duty to disclose information in its possession is triggered when a request for disclosure is made by the accused")
   R v Anderson, 2013 SKCA 92 (CanLII), 300 CCC (3d) 296, *per* Ottenbreit JA (3:0), at para 17 ("The obligation to disclose will be triggered by a request by or on behalf of the accused")
   R v Girimonte, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0), ("The Crown's obligation to disclose is triggered by a request for disclosure from counsel for an accused.")
2. *R v Chaplin*, 1995 CanLII 126 (SCC), [1995] 1 SCR 727, *per* Sopinka J (9:0), at paras 26 to 27 ("The Crown's disclosure obligations are triggered when there is a *reasonable possibility* the evidence will be useful to the accused in making full answer and defence.")
   see also *R v Taillefer*, 2003 SCC 70 (CanLII), [2003] 3 SCR 307, *per* LeBel J (9:0), at para 61
3. *Stinchcombe #1*, *supra*, at p. 342
4. *R v Dixon*, 1998 CanLII 805 (SCC), [1998] 1 SCR 244, *per* Cory J (5:0), at para 38 ("Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information yet remained passive as a result of a tactical decision or lack of due diligence it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial. ...")
5. *Stinchcombe #1*, *supra*, at p. 341
   Dixon, *supra*, at para 37 ("In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure

affected the fairness of the trial process. ... The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.")

6. *Stinchcombe*, *supra* at 341
7. *R v Barbour*, 2017 ABCA 231 (CanLII), *per curiam*, at para 32 ("Once disclosure is obtained, the accused has an obligation to review that disclosure, and identify anything that appears to be missing. The defence must 'exercise due diligence in actively seeking and pursuing Crown disclosure'")
   Dixon, *supra*, at para 37
   Stinchcombe, *supra*, at p. 341
8. *Dixon*, *supra*, at para 38
   Barbour, *supra*, at para 32 ("If the Crown disclosure, or the facts of the case, make it apparent that third parties may have records that will assist in making answer and defence, the accused must act diligently in obtaining that information or in bringing an O'Connor application. The court will not be sympathetic where a tactical decision was made not to pursue known documents")
9. *Barbour*, *supra*, at para 32
10. *Girimonte*, *supra*

Burden

Once the right to disclosure has been invoked by the Defence the onus is upon the Crown to comply with the obligation. The Crown may refuse to disclose certain information, but has the burden of proving why full disclosure should not be applied.[1]

Bases for Refusing Disclosure

The information will not be considered disclosure where it is: [2]

1. Irrelevant
2. Not in the control of the Crown
3. Privileged
4. Barred by statute

Satisfying any one of these requirements will eliminate any disclosure obligations upon the Crown. The Crown may then refuse the request.[3]

Standard of Proof

The grounds to disclose must be established on a balance of probabilities.[4]

Crown Disputing Relevance

If the crown disputes the existence of any particular material, the applicant "must establish the basis that could enable to court to conclude that further material exists that is potentially relevant. The existence of the disputed material must be sufficiently identified, not only to reveal its nature but also to permit the court to conclude that it made meet the test required for prosecutorial disclosure".[5]

The Crown must satisfy the court that the evidence sought is "clearly irrelevant".[6]

1. *R v Durette*, 1994 CanLII 123 (SCC), 88 CCC (3d) 1, *per* Sopinka J, at para 44
   In contrast, if the disclosure is third-party records, the burden is upon the accused.
2. *Chaplin*, *supra*, at para 25 (The Crown "must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged")
   see also *R v Bottineau*, 2005 CanLII 63780 (ON SC), [2005] OJ No 4034, *per* Watt J, at para 45
3. *Stinchcombe*, *supra*, at p. 339
   Stinchcombe #2, *supra*, at p. 755
4. *R v Dixon*, 1998 CanLII 805 (SCC), [1998] 1 SCR 244, *per* Cory J (5:0) , at para 32
5. *R v Chaplin*, 1995 CanLII 126 (SCC), [1995] 1 SCR 727, *per* Sopinka J (9:0), at paras 30 to 33
6. *R v Gubbins*, 2018 SCC 44 (CanLII), [2018] 3 SCR 35, *per* Rowe J (8:1), at para 29
   R v Stipo, 2019 ONCA 3 (CanLII), 370 CCC (3d) 311, *per* Watt JA, at para 79
   In comparison the standard for third party disclosure is "likely relevant" (see Stipo, at para 80)

Possession or Control

Just because a record is in the possession of a Crown entity, does not amount to possession or control.[1]

The law cannot impose an obligation of the crown in relation to materials that "does not have or cannot obtain". [2]

Where evidence is not in the control of the Crown it may be the subject of a common law third party records application, also known as an "O'Connor Application".[3]

In an *O'Connor* application, the Defence must show that the evidence is "likely relevant".[4]

The prosecuting Crown has an obligation to "make reasonable inquiries of other Crown entities and other third parties" of whether they may be in possession of relevant evidence.[5]

1. *R v McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0)
   R v Oleksiuk, 2013 ONSC 5258 (CanLII), 55 MVR (6th) 107, *per* James J, at para 26
2. *R v Elkins*, 2017 BCSC 245 (CanLII), *per* Sewell J, at para 25
   McNeil, *supra*, at para 22
3. *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411 (SCC), *per* L'Heureux-Dubé J
   McNeil, *supra*

4. *O'Connor*, *supra*
5. *McNeil*, *supra*, at paras 13, 49

Relevance

Not all information in possession of police must be disclosed. It must only be "relevant" evidence.[1] The "threshold question in any instance of non-disclosure is whether the evidence was relevant"[2]

The threshold of relevancy is quite low. The relevancy exists where there is "a reasonable possibility of the information being useful to the accused in making full answer and defence".[3] Full answer and defence is engaged where the evidence can be used:[4]

1. in meeting the Crown's case;
2. "advancing a defence";
3. "otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence".

The scope of relevancy is "broad" and will include materials that "may have only marginal value to the ultimate issues at trial."[5] The Crown "must err on the side of inclusion" when deciding whether to include the materials in disclosure.[6]

Relevance is not limited solely to inculpatory evidence nor only evidence that the Crown would adduce at trial. "Relevant materials" includes all materials for which there is a "reasonable possibility" that it may be useful for the defence. All possible exculpatory evidence must be provided as well, however, this obligation does not extend to a duty to examine the exculpatory evidence.[7]

Relevance can be related to the usefulness for defence as far as decisions on conducting the defence including whether to call evidence.[8]

Relevant evidence is not limited to admissible evidence and can include that evidence which is not inadmissible at trial.[9]

Limitations on Relevance

Relevancy however can be limited by the need for a "realistic standard of disclosure consistent with fundamental fairness."[10] It must still permit the sustem to be "workable, affordable and expeditious". It should not be so broad as to include "anything that might conceivably be used in cross-examination".[11] It is not meant to include "every scintilla of information" that may have utility to the defence.[12]

There is some authority to suggest that when the relevancy only relates to a voir dire on admissibility of evidence, and not the trial itself, the burden is upon the accused.[13]

Refusal to disclose clearly irrelevant disclosure

The burden is upon the Crown to prove that the information was "clearly irrelevant".[14]

Refusal to disclose is reviewable by the trial judge.[15]

1. *R v Banford*, 2011 SKQB 418 (CanLII), [2012] 3 WWR 835, *per* McLellan J, at para 5 citing Stinchcombe, among others
2. *R v Banford*, 2010 SKPC 110 (CanLII), 363 Sask R 26 (SKPC), *per* Toth J, at para 13
3. *R v McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0), at para 14 (includes “any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence.”)
   R v Taillefer, 2003 SCC 70 (CanLII), [2003] 3 SCR 307, *per* LeBel J (9:0), at para 60
   R v Chaplin, 1995 CanLII 126 (SCC), 96 CCC (3d) 225, *per* Sopinka J (9:0), at p. 236
   R v Dixon, 1998 CanLII 805 (SCC), (1998) 1 SCR 244, *per* Cory J (5:0), at paras 20 to 22
   R v Girimonte, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0), at pp. 41 to 42 (information is relevant if "there is a reasonable possibility that withholding the information will impair the accused's right to make full answer and defence.")
   R v Egger, 1993 CanLII 98 (SCC), [1993] 2 SCR 451, *per* Sopinka J (5:0), at p. 467
   R v Banford, 2011 SKQB 418 (CanLII), 386 Sask R 141, *per* McLellan J, at para 5
4. *Egger*, *supra*, at p. 467
   Dixon, *supra*, at paras 20 to 22
   R v Anderson, 2013 SKCA 92 (CanLII), 300 CCC (3d) 296, *per* Ottenbreit JA (3:0)
5. *Dixon*, *supra*, at para 23
6. *Chaplin*, *supra*
7. *R v Daley*, 2008 BCCA 257 (CanLII), [2008] BCJ No 1341, *per* Lowry JA, at paras 13 to 15 and by the Ontario Court of Appeal in *R v Darwish*, 2010 ONCA 124 (CanLII), 252 CCC (3d) 1, *per* Doherty JA (3:0)
   , 252 CCC (3d) 1, at paras 28 to 30 and 39 to 40 leave to SCC denied
8. *R v Egger*, 1993 CanLII 98 (SCC), [1993] 2 SCR 451, *per* Sopinka J (5:0), at p. 467 ("if it is of some use, it is relevant and should be disclosed ...This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.")
9. *R v Barbosa*, 1994 CanLII 7549 (ON SC), 92 CCC (3d) 131, *per* Hill J, at p. 140
   R v Derose, 2000 ABPC 67 (CanLII), 264 AR 359, *per* Allen J
10. *O'Connor*, *supra*, at para 194
11. *O'Connor*, *supra*, at para 194
12. *O'Connor*, *supra*, at para 194
13. *R v Ahmed*, 2012 ONSC 4893(*no CanLII links) - disclosure of source handler notes
    R v Cater, 2011 NSPC 86 (CanLII), 985 APR 46, *per* Derrick J, at para 26
14. *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326 (SCC), *per* Sopinka J (7:0)
    R v Pena, 1996 CarswellBC 2885(*no CanLII links) , at para 17
15. *Stinchcombe*, *supra*, at p. 12

Privilege

Privileged materials can take many forms:[1]

1. protection of persons from harassment or injury[2]
2. protect informer privilege [3]
3. protect confidential investigative techniques [4]
4. protection of confidential information while an investigation is ongoing [5]
5. Litigation Privilege, Crown work-product privilege
6. statutory privilege such as under the Code and CEA

Any materials in control of the Crown that is claimed to be privileged cannot be compelled to disclose to either the defence or the court unless there are proper grounds. [6] The McClure threshold test determines the grounds which requires the materials could raise a reasonable doubt of guilt.[7] The threshold test requires:[8]

1. there be no other source of the information sought;
2. the accused cannot raise a reasonable doubt in any other way.

Materials that "may put at risk the security and safety of persons who have provided prosecution with information" is protected by informer privilege.[9]

Where the materials are privileged there is no need to address threshold relevance.[10]

Burden

Where the defence seek disclosure of claimed privileged materials, "the accused has the burden of demonstrating *why* privilege is wrongly claimed".[11]

Crown Counsel's Notes

Where the interview of Crown witnesses discloses new information to the Crown or police, any notes of counsel may be subject to disclosure.[12]

1. e.g. *R v Eddy*, 2014 ABQB 164 (CanLII), 583 AR 217, *per* Acton J, at para 23
2. see *Stinchcombe #1*, *supra*, at p. 336
3. see *Stinchcombe #1*, *supra*, at p. 336
4. *R v Richards*, 1997 CanLII 3364 (ON CA), 115 CCC (3d) 377, *per curiam*
5. *R v Egger*, 1993 CanLII 98 (SCC), [1993] 2 SCR 451, *per* Sopinka J (5:0)
6. *R v Polo*, 2005 ABQB 250 (CanLII), 195 CCC (3d) 412, *per* Clackson J, at para 27
   R v McClure, 2001 SCC 14 (CanLII), [2001] 1 SCR 445, *per* Major J (9:0), at para 27
7. *McClure*, *supra*, at para 27
8. *Polo*, *supra*, at para 15
9. *R v Stinchombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, *per* Sopinka J (7:0), at para 16
10. *R v Leipert*, 1997 CanLII 367 (SCC), [1997] 1 SCR 281, *per* McLachlin J (9:0), at para 36
11. *R v Eddy*, 2014 ABQB 164 (CanLII), 583 AR 217, *per* Acton J, at para 92
    See also *R v Polo*, 2005 ABQB 250 (CanLII), 195 CCC (3d) 412, *per* Clackson J
12. *R v Reagan*, [1991] N.S.J. No 482(*no CanLII links)
    R v Ladouceur (1992), B.C.J. No 2854 (S.C.)(*no CanLII links)
    R v O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, 103 CCC (3d) 1, *per* L'Heureux-Dubé J

Duration of the Obligation

The obligation to provide disclosure only begins once charges have been laid. There is no right prior to that.[1]

The duty is engaged upon the request of the accused. It is continuous throughout the proceedings up to and including the trial. The Crown may object to the request on the basis that it is irrelevant, outside of their control, or otherwise privileged.[2] The burden is on the Crown to justify the refusal to disclose.

The duty to disclose is ongoing and so any new information received must also be disclosed.[3]

Once the Crown alleges that it has fulfilled the disclosure obligation it has no obligation to justify the "non disclosure of materials the existence of which it is unaware or denies." Unless the applicant is able to "establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant...".[4]

1. *R v Gillis*, 1994 ABCA 212 (CanLII), 91 CCC (3d) 575, *per* Fraser CJ (3:0), at para 7
2. *R v Chaplin*, 1995 CanLII 126 (SCC), [1995] 1 SCR 727, *per* Sopinka J (9:0)
3. *Stinchcombe #1*, *supra*, at p. 343
4. *Chaplin*, *supra*, at p. 743

After Verdict

Fresh Evidence

The right to disclosure may not extend to the into a conditional sentence breach hearing as there is less of a right to full answer and defence.[1]

The obligation to disclose remains in effect through the appellate process.[2] This obligation covers any materials in the possession of the crown that "may reasonably assist the appellant in the prosecution of his or her appeal, subject to any privilege or overriding third-party privacy interest".[3]

There are some "reasonable parameters" around disclosure post-conviction. The court must be mindful that the "justice system does not become disproportionately overburdened" and cause delay in addressing the "more important issues".[4]

Where in applicant seeks further disclosure on appeal to support a fresh evidence application, he must establish that:[5]

- There is a connection between "the request for production and the fresh evidence proposed, or in other words the applicant must show that there is a reasonable possibility that the material sought could assist on the application for fresh evidence"
- There is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal.

1. *R v Sitaram*, 2011 ONCJ 199 (CanLII), 277 CCC (3d) 421, *per* Nakatsuru J
2. *R v Trotta*, 2004 CanLII 60014 (ON CA), 23 CR (6th) 261, *per* Doherty JA (3:0)
   R v Meer, 2015 ABCA 163 (CanLII), *per* Veldhuis JA (alone)
3. *Trotta*, *supra*, at para 25
   Meer, *supra*, at para 8
   R v Johnston, 2019 BCCA 107 (CanLII), at paras 56 to 61
4. *hznmd*, *supra*, at para 64
5. *Trotta*, *supra*, at para 23
   Meer, *supra*, at para 9

Timing of Disclosure

see also: Delayed Disclosure, above

Conceptually, Disclosure can be divided into three phases:[1]

1. "Initial disclosure": evidence required before there can be an election of mode of trial;[2]
2. "Intermediate disclosure": evidence required before a plea is entered; and
3. "Final disclosure": all Disclosure must be provided prior to trial.

It is not always necessary to provide full disclosure prior to a preliminary inquiry as long as full disclosure is made early enough before trial so as not to violate the right to full answer and defence.[3] Where sufficient but incomplete evidence is disclosed, the defence are not entitled "to refuse to proceed to the next step or to set a date for trial".[4]

Consequence of Late Disclosure

Where the late disclosure does not amount to a Charter breach that would require a stay of proceedings, the judge can consider a mistrial, a refusal to admit the evidence or an adjournment.[5]

Witnesses Changing Evidence

Where the Crown learns of a recanting witness and provides immediate notice to the defence counsel on the night before the witness is to testify, it does not violate the right to full answer and defence.[6]

1. *R v Valdirez-Ahumada*, 1992 CanLII 875 (BC SC), *per unknown* J
2. See also *R v Girimonte*, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0) ("Initial disclosure must occur sufficiently before the accused is called upon to elect or plead so as to permit the accused to make an informed decision as to the mode of trial and the appropriate plea. In a perfect world, initial disclosure would also be complete disclosure.")
3. *R v Nova Scotia Pharmaceutical Society*, 1992 CanLII 4513 (NS SC), 320 APR 431, *per* A Boudreau J
   R v Biscette, 1995 ABCA 234 (CanLII), 99 CCC (3d) 326, *per* Côté JA (2:1)
   R v Adam, 2006 BCSC 350 (CanLII), 70 WCB (2d) 1008, *per* Romilly J
4. *R v NNM*, 2006 CanLII 14957 (ON CA), 209 CCC (3d) 436, *per* Juriansz JA (3:0)
5. *R v Barrette*, 1976 CanLII 180 (SCC), 29 CCC (2d) 189, *per* Pigeon J
   R v Davis, 1998 CanLII 18030 (NL CA), 159 Nfld & PEIR 273 (NLCA), *per* Green JA
6. *R v Buric*, 1996 CanLII 1525 (ON CA), 106 CCC (3d) 97, *per* Labrosse JA (2:1)

Sufficiency of Existing Disclosure

It is not appropriate for the "Stinchcombe obligations" to be interpreted as creating any sort of duty investigate.[1]

Experts

See Expert Evidence#Notice to Call Expert Evidence for details on sufficiency of disclosure summarizing the expert's evidence. A failure to provide sufficient disclosure in relation to the experts could result in a mistrial.[2]

1. see below regarding "Where the Obligation Does Not Exist"
2. e.g. *R v BB*, 2016 ABQB 647 (CanLII), *per* Pentelechuk J - motion for mistrial denied
   R v LAT, 1993 CanLII 3382 (ON CA), 84 CCC (3d) 90, *per* Lacourcière JA (3:0) - new trial ordered for calling rebuttal witness without sufficient disclosure of rebuttal witness.

Duty to Inquire and Obtain Disclosure ("McNeil" Obligations)

In "appropriate cases", the Crown has an obligation "to make reasonable inquiries" with third-party state authorities who are believed to be in possession of threshold relevant materials and it would be "reasonably feasible to do so".[1] This duty may also extend to making inquiries as to the existence of some fact.[2]

For the purpose of first-party disclosure obligations, the "Crown" refers to the "prosecuting Crown" only.[3]

It is not a valid argument to simply assert that the inquiry should be made because it is "easy".[4]

Threshold relevance

Where the evidence is “obviously relevant” the Crown must disclose unprompted.[5]

The test for McNeil record is “likely relevant” or “reasonably possible” relevance. [6] This standard includes all materials that have a "reasonable possibility" to be useful in making full answer and defence.[7]

Duty of Inquiry

Where an inquiry has failed the crown must notify the accused.[8]

The duty is engaged once the prosecuting Crown becomes aware of the relevancy of certain records.[9]

Example organizations

Relevant records held by Health Canada would be considered McNeil records that the Crown is obliged to seek out.[10]

This may include the provincial securities commission who are known to have undertaken a investigation related to the prosecution. [11]

1. *R v McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0), at para 13 and 49
   R v Ahluwalia, 2000 CanLII 17011 (ON CA), 149 CCC (3d) 193, 138 OAC 154 (CA), *per* Doherty JA, at paras 71 to 72
2. e.g. *R v Esseghaier*, 2021 ONCA 162 (CanLII), *per curiam*, at para 27
3. *R v Quesnelle*, 2014 SCC 46 (CanLII), [2014] 2 SCR 390, *per* Karakatsanis J (7:0)
   McNeil, *supra*
4. *R v Woods*, 2015 ABPC 23 (CanLII), *per* Lepp J, at para 31 ("it is important to remember that the accused does not overcome the hurdle of providing evidence that the information sought actually exists and is relevant by showing only that the inquiry is easy to make. If it were otherwise, “easy inquiries” would quickly become the equivalent of first party disclosure and the authorities would suffer death by a thousand cuts.")
5. *McNeil*, *supra*
6. *McNeil*, *supra*, at paras 43 and 44
7. *McNeil*, *supra*, at para 44 ("As we have seen, likely relevance for disclosure purposes has a wide and generous connotation and includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence.")
8. *McNeil*, *supra*
9. McNeil
10. *R v King (No. 5)*, 2017 CanLII 15296 (NLSCTD), *per* Marshall J, at para 53
11. *R v Clarke, Colpitts and Potter*, 2013 NSSC 386 (CanLII), *per* Hood J

Procedure For Enforcing Right

Where disclosure issues arise, the court should consider the issues as follows: [1]

1. establish a violation of the right to disclosure;
2. demonstrate on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose;
3. discharge this burden by demonstrating that there is a reasonable possibility that the non-disclosure affected the outcome at trial or the overall fairness of the trial process.

Jurisdiction

A preliminary inquiry judge has no jurisdiction to order the crown to provide disclosure.[2]

Only the *trial* judge may make an order directing the Crown to disclose information in its control.[3] Accordingly, a provincial court judge cannot order disclosure unless the mode of trial was by provincial court judge.

A preliminary inquiry judge has no power to order disclosure and is *not* a "court of competent jurisdiction" to make such an order.[4]

Where defence believe initial disclosure is insufficient for making election, the justice may adjourn the election to allow the accused to seek remedy from a superior court.[5]

Where a superior court is the trial court, it will be a "court of competent jurisdiction" under s. 24(1) of the Charter.[6]

A superior court should generally defer motions until the matter is before the trial court rather than still with the inferior court.[7]

In "unusual" or "exceptional" cases a superior court justice may exercise jurisdiction under s. 24(1) of the Charter to order disclosure while the matter is still before a preliminary inquiry judge.[8] The limited jurisdiction to order disclosure does not affect the Crown obligation to provide timely disclosure.[9]

Issues relating to the "manner of disclosure tend to fall within the category of exceptional cases".[10]

Laporte Inventory

Where there is a dispute over whether there disclosure is complete, the defence may request a "Laporte Inventory", which itemizes all records in the possession of the Crown identifying which records have been disclosed and which records are being held back.[11]

1. *R v Ginnish*, 2014 NBCA 5 (CanLII), 1076 APR 156, *per* Green JA (3:0) , at para 24
2. *R v Girimonte*, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0)
3. *R v SSS*, 1999 CanLII 15049 (ON SC), 136 CCC (3d) 477, *per* Watt J, at para 34
4. *SSS*, *ibid.*, at para 36
   Girimonte, *supra*, at p. 43
5. *Girimonte*, *supra*

6. *R v Mills*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863, *per* McIntyre J
   R v Rahey, 1987 CanLII 52 (SCC), [1987] 1 SCR 588, *per* Lamer J (superior courts have "constant, complete and concurrent jurisdiction" with respect to s. 24(1) of the Charter, even when the matter is still before an inferior court)
7. *R v Smith*, 1989 CanLII 12 (SCC), [1989] 2 SCR 1120, *per* Sopinka J (9:0)
   Rahey, *supra*, at para 16 ("But it was therein emphasized that the superior courts should decline to exercise this discretionary jurisdiction unless, in the opinion of the superior court and given the nature of the violation or any other circumstance, it is more suited than the trial court to assess and grant the remedy that is just and appropriate.") cf. *R v Blencowe*, 1997 CanLII 12287 (ON SC), 118 CCC (3d) 529, *per* Watt J - the superior court has "constant, complete and concurrent jurisdiction with the trial court for applications under Charter s. 24(1)"
8. *R v Girimonte*, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0) - CA dismisses appeal on disclosure order
   R v Mohammed, 2007 CanLII 5151 (ON SC), 152 CRR (2d) 129, *per* Dawson J, at para 2 - relates to application while matter is before preliminary inquiry judge
   R v Hallstone Products Inc, 1999 CanLII 15107 (ON SC), 140 CCC (3d) 145, *per* LaForme J
   R v Mincovitch, 1992 CanLII 7585 (ON SC), 74 CCC (3d) 282, *per* A Campbell J
9. *Girimonte*, *supra*
10. *Mohammed*, *supra*, at para 2
    Hallstone, *supra*
    Blencowe, *supra*
11. *R v Laporte*, 1993 CanLII 6773 (SK CA), 113 Sask R 34 (CA), *per* Sherstobitoff JA
    R v Anderson, 2013 SKCA 92 (CanLII), 300 CCC (3d) 296, *per* Ottenbreit JA (3:0), at para 10

Crown Disclosure Decisions

Review of Decisions

It is the Crown's decision to determine "what material is properly subject to disclosure to the defence".[1]

The decisions of Crown to disclosure certain information and not other is reviewable the *trial* judge.[2]

In exceptional circumstances any superior court of criminal jurisdiction may review the disclosure under s. 24(1) of the Charter.[3]

Remedy for improper disclosure decisions are "largely, but not exclusively, Charter based."[4]

1. *R v SSS*, 1999 CanLII 15049 (ON SC), 136 CCC (3d) 477, *per* Watt J, at para 33
   R v Girimonte, 1997 CanLII 1866 (ON CA), 121 CCC (3d) 33, *per* Doherty JA (3:0), at p. 42
2. *SSS*, *supra*, at para 34
   Girimonte, *supra*, at p. 43
   R v Laporte, 1993 CanLII 9145 (SK CA), 84 CCC (3d) 343, *per* Sherstobitoff JA
3. *SSS*, *supra*, at para 34
   Stinchcombe, *supra*, at pp. 11 to 12
   R v Mohammed, 2007 CanLII 5151 (ON SC), 152 CRR (2d) 129, *per* Dawson J, at para 2B
   R v Hallstone Products Inc, 1999 CanLII 15107 (ON SC), 140 CCC (3d) 145, *per* LaForme J, at para 17
   R v Mincovitch, 1992 CanLII 7585 (ON SC), 74 CCC (3d) 282, *per* A Campbell J ("The Supreme Court of Canada and the Court of Appeal have consistently preferred the trial court to resolve Charter applications because trial courts are best suited to resolve conflicting viva voce evidence and because of the great risk of delay and fragmentation of the trial process inherent in the likelihood of interlocutory appeals.")
4. *Girimonte*, *supra*

Form and Types of Disclosure

- Types of Disclosable Materials

Where the Obligation Does Not Exist

It is not appropriate for the "Stinchcombe obligations" to be interpreted as creating any sort of duty investigate or defend.[1]

1. *R v Eddy*, 2014 ABQB 164 (CanLII), 583 AR 217, *per* Acton J, at para 137
   R v Darwish, 2010 ONCA 124 (CanLII), 252 CCC (3d) 1, *per* Doherty JA (3:0), at paras 32 to 40
   R v Dias, 2010 ABCA 382 (CanLII), 265 CCC (3d) 34, *per curiam* (3:0), at para 38

Vetting Disclosure

When documents are to be released for disclosure, the police and crown are permitted to vet the materials for the purpose of removing information that may not be disclosable. Types of information that can be validly redacted from the disclosure before going out to the defence include:

1. clearly irrelevant information
2. information tending to identify a confidential police source
3. police investigative techniques
4. advice that would be covered by solicitor-client privilege (either defence counsel or crown counsel)

See further details on Privilege section.

Restricting Access to Disclosure

- Limitations on Access to Disclosure

Breach of Disclosure Obligation

To engage Stinchcombe the Applicant accused has the burden of proving that there was a "reasonable possibility" that his right to make full answer and defence was impaired by the Crown's actions.[1]

Not every failure to comply with Stinchcombe obligations will result in a Charter breach. There will no Charter breach if the failure "could not possibly affect the reliability of the result reached or the overall fairness of the trial process."[2]

Where relevancy is in dispute, the burden rests on the accused to prove on a balance of probabilities that breach of the Charter right to disclosure has been violated.[3]

Where a breach of the right to full disclosure is found it does not necessarily follow that the right to make full answer and defence was violated.[4] Where the right to make full answer and defence is not implicated, the usual remedy is either an adjournment or order of production.[5] In fact in general, where disclosure has not been given or is given late, the usual remedy is an adjournment.[6]

Where there is a failure on the part of the Crown to meet the Stinchcombe obligations, there is an obligation on the part of the defence to raise the issue.[7]

A failure to disclose will invoke s. 7 and 11(d) of the Charter.[8]

To establish a breach of s. 7 due to non-disclosure does not require that the claimant show actual prejudice.[9] However, a remedy under s. 24(1) to a breach to s. 7 or 11(d) of the Charter "will generally require a showing of actual prejudice to the accused's ability to make full answer and defence".[10]

When considered in the civil context, not all breaches of disclosure are equivalent.[11]

1. *R v Carosella*, 1997 CanLII 402 (SCC), [1997] 1 SCR 80, *per* Sopinka J
2. *R v Greganti*, 2000 CanLII 22800 (ON SC), 142 CCC (3d) 77, *per* Stayshyn J
3. see *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411 (SCC), *per* L'Heureux-Dubé J J
   R v Bjelland, 2009 SCC 38 (CanLII), [2009] 2 SCR 651, *per* Rothstein J (4:3)
4. *Dixon*, *supra*, at paras 23 and 24
5. see *Dixon*, *supra*, at paras 31 and 33
6. *R v Demeter*, 1975 CanLII 685 (ON CA), (1975) 10 OR 321 (CA), *per curiam*
   R v Caccamo, 1975 CanLII 11 (SCC), [1976] 1 SCR 786, *per* de Grandpré J
   Bjelland, *supra*, at para 25
7. *Greganti*, *supra* ("When the defence is aware of a failure ... to disclose relevant material, there is an obligation to bring that failure to disclose to the attention of the Crown, and ... the Court.")
8. *O'Connor*, *supra*}, at para 73
   R v Khela, 1995 CanLII 46 (SCC), [1995] 4 SCR 201, *per* LeBel J, at para 18
9. *R v Carosella*, 1997 CanLII 402 (SCC), [1997] 1 SCR 80, *per* Sopinka J, at para 37 ("The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.")
10. *Carosella*, *ibid.*, at para 37
    O'Connor, *supra*, at para 74
    R v La, 1997 CanLII 309 (SCC), [1997] 2 SCR 680, *per* Sopinka J, at para 25
11. *Henry v British Columbia (Attorney General)*, 2015 SCC 24 (CanLII), [2015] 2 SCR 214, at para 69

Defence Counsel Duties

Obligation to Raise Disclosure Issues

The accused should openly communicate with the court on any issues with disclosure. Likewise, the Crown is entitled to rely on those representations to determine whether disclosure has been completed.[1]

Change of Counsel

When there is a change of counsel or a loss of counsel, previous counsel has a duty to facilitate the transfer disclosure to the accused or their new counsel.[2]

1. *R v Barbour*, 2017 ABCA 231 (CanLII), *per curiam* (3:0), at para 32 ("The accused must communicate openly with the Court and Crown with respect to disclosure issues. The Court and the Crown are entitled to take assurances by the accused at face value. When the appellant represented that she had disclosure, and had spent significant amounts of time reviewing it, the Crown was entitled to assume that its obligation to disclose had been discharged.")
2. *Barbour*, *ibid.*, at para 32 ("When there is a change of counsel, or the accused becomes self-represented, there is an obligation on counsel and the accused to ensure that the disclosure is passed along or otherwise obtained by the new counsel or the accused")
   R v Dugan (1994), 149 AR 146(*no CanLII links) , at para 5

See Also

- Disclosure (Cases)
- Production of Records for Sexual Offences
- Types of Disclosable Materials

External Links

- Lesage Code Report (2008)
- Report of the Criminal Justice Review Committee, Executive Review (1999)

Types of First-Party Disclosable Materials

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

General Principles

There is no constitutional obligation to "production of documentary originals".[1] Simply providing access to originals for inspection is sufficient.[2]

Materials including statements and police notes are required to be disclosed under s. 603:

> **Right of accused**
>
> 603. An accused is entitled, after he has been ordered to stand trial or at his trial,
>
> (a) to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and
> (b) to receive, on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney General of the province, a copy
>
> (i) of the evidence,
> (ii) of his own statement, if any, and
> (iii) of the indictment;
>
> but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused.
>
> R.S., 1985, c. C-46, s. 603; R.S., 1985, c. 27 (1st Supp.), s. 101(E).
>
> – CCC

At a minimum, the Crown should disclose "can say" or "will say" statements from any witnesses it proposes to call at trial.[3]

Evidence that is in an undecipherable form, such as unlockable encrypted data, does not need to be given to defence as disclosure as the Crown cannot properly vet it for disclosable and non-disclosable information. [4]

It is defence counsel's obligation to ensure that the accused has been given an opportunity to review any recordings.[5]

The phrase " his own statement" includes both unsworn statements given at the preliminary inquiry as well as statements given to the police.[6] It will include statements made by the accused at the time of arrest.[7] However, it does not include any statement ever taken of the accused.[8]

A judge has the power to order the disclosure of any statements or documents in order to ensure "fundamental fairness to the accused".[9]

1. *R v Stinchcombe*, 1995 CanLII 130 (SCC), [1995] 1 SCR 754, *per* Sopinka J, at paras 1 to 2
   R v Blencowe, 1997 CanLII 12287 (ON SC), 118 CCC (3d) 529, *per* Watt J
2. *Blencowe*, *ibid.*
   Stinchombe (1995), *supra*
3. *R v Stinchombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, *per* Sopinka J, at para 30
4. *R v Beauchamp*, 2008 CanLII 27481 (ON SC), 58 CR (6th) 177, *per* R Smith J
5. *MRW*, *supra*, at paras 27, 28
   see also s. 10 of CEA
6. *R v Savion*, 1980 CanLII 2872 (ON CA), 52 CCC (2d) 276, *per* Zuber JA, at para 25
7. *R v Hieng*, 2011 ONSC 4245 (CanLII), *per* Ramsay J
8. *Hieng*, *ibid.*
9. *Re Regina and Arviv*, 1985 CanLII 161 (ON CA), 19 CCC (3d) 395, *per* Martin JA

Format of Disclosure

Accessibility

The disclosure must be in a reasonably "workable" format.

Before disclosure can be "meaningful", the materials must be "organized and formatted" is such a way as to be "reasonably accessible".[1]

The meaningfulness of disclosure is a factual determination based on all the circumstances of the case.[2]

Accused Obligation to Raise Accessibility Issues

The defence has an obligation to review electronic disclosure to ensure that all files can be accessed properly, whether any files are unreadable, and whether additional necessary software would be required to properly access it. [3]

In-custody Accused

In evaluating the reasonableness of the format consideration must be taken where the accused is in custody.[4]

The remand facility must have the equipment to facilitate access to disclosure.[5]

1. *R v Oszenaris*, 2008 NLCA 53 (CanLII), 236 CCC (3d) 476, *per* Barry JA, at para 19 ("... that electronic disclosure is meaningful if the disclosure materials are reasonably accessible -- a matter to be assessed in the circumstances of each case. I also agree a significant factor in assessing accessibility is the manner in which the material is electronically organized and formatted. Accessibility may also depend upon the circumstances of the accused, including accused's counsel.")
   R v Beckett, 2014 BCSC 731 (CanLII), *per* Meiklem J, at paras 7 to 8
2. *R v Zanolli*, 2018 MBCA 66 (CanLII), *per* Hamilton JA, at para 68
3. *Zanolli*, *ibid.*, at paras 70 to 71
4. *R v Therrien*, 2005 BCSC 592 (CanLII), 72 WCB (2d) 116, *per* Barrow J (custody "is an important circumstance to consider when assessing the reasonableness with which he can access the disclosed material.")
5. *R v Chan*, 2003 ABQB 759 (CanLII), [2003] AJ No 1117, *per* Sulyma J - remand facility must buy computer to let accused listen to wiretap recording on CD-ROM
   See also: *R v Cheung*, 2000 ABPC 86 (CanLII), [2000] AJ No 704 (ABPC), *per* Maher J and *R v Grant*, [2003] MJ No 382 (MBQB)(*no CanLII links)

Electronic and Paper Form

The accused is not entitled to disclosure in their form of choice. It is in the discretion of the Crown what form it will take. This discretion is reviewable.[1] The main reviewable element of disclosure is whether it is "reasonably accessible" and can include whether electronic disclosure was "organized and searchable".[2] Reasonableness must take into account the circumstances and abilities of the particular accused and counsel.[3]

Where the form of disclosure is "such that an accused person is unable to access the information, then it is not meaningful disclosure.".[4]

The "greater the volume of material disclosed, the greater the need for organization and reasonable search capabilities".[5]

The mere absence of computer skills of the accused or counsel will not prevent the use of electronic disclosure so long as the skills are "acquired relatively easily".[6]

Counsel should be able to print out the disclosure in a readable manner so that they can communicate effectively with their client.[7]

There is no absolute right to original documents, however, the Crown must explain if the Crown no longer has possession of it. Lost or destroyed documents due to unacceptable negligence will breach the duty to disclose.[8]

Computer Literacy Expected

There is unlikely merit to suggest that the disclosure should accommodate counsel who is computer illiterate.[9] Counsel are expected to be "in a position to utilize a computer for the management of large volumes of materials".[10]

Index Required on Voluminous Cases

When electronic disclosure becomes particularly voluminous, there is an obligation to provide a meaningful index.[11]

Crown Duty to Familiarize Counsel with Tools

Where the Crown uses electronic disclosure, the Crown has an obligation to ensure that counsel is familiar with necessary software tools to review the materials.[12]

1. *R v Beckett*, 2014 BCSC 731 (CanLII), *per* Meiklem J, at para 8
   cf. *R v Hallstone Products*, 1999 CanLII 15107 (ON SC), 140 CCC (3d) 145, *per* LaForme J - suggests disclosure requires paper copy, likely not relevant given the change in technology
2. Beckett
   R v Dunn, 2009 CanLII 75397 (ON SC), 251 CCC (3d) 384, *per* Boswell J - ("form of disclosure must be accessible and adequate to enable an accused to exercise his or her constitutional right to make full answer and defence") and para 55
3. *Beckett*, *supra*
4. *Dunn*, *supra*, at para 53
5. *Dunn*, *supra*, at para 59
6. *Beckett*, *supra*
7. *R v Piaskowski*, 2007 MBQB 68 (CanLII), 5 WWR 323, *per* Sinclair J, at para 84 ("Electronic disclosure must permit counsel to be able to print copies of the documents and images in a readable manner so as to be able to communicate effectively with his or her client.")
8. *R v FCB*, 2000 NSCA 35 (CanLII), 142 CCC (3d) 540, *per* Roscoe JA, at para 10
   see Lost or Destroyed Evidence
9. *R v Rose*, 2002 CanLII 45358 (QC CS), , [2002] QJ 8339, *per* Martin J, at paras 13 to 14
   R v Jonsson, 2000 SKQB 377 (CanLII), [2000] SJ No 571 (SKQB), *per* Klebuc J
10. *R v Oszenaris*, 2008 NLCA 53 (CanLII), 236 CCC (3d) 476, *per* Barry JA, at para 20
11. *R v Jarvie*, 2003 CanLII 64366 (ONSC), , [2003] OJ No 5570 (ONSC), *per* Templeton J
    R v Barges, 2005 CanLII 34815 (ONSC), , [2005] OJ No 4137 (ONSC), *per* Glithero J
12. *Piaskowski*, *supra*, at para 84 ("Where the Crown wishes to make electronic disclosure as opposed to paper disclosure, the Crown has a further obligation to assist counsel lacking familiarity with the software utilized, and an unrepresented accused who bona fide has limited or no computer skills with reasonable access to materials that form part of the disclosure. This further obligation may range from training on the use of the software through the provision of computer equipment and may include the obligation to provide paper copies of all disclosure. This would depend on the circumstances of each case. ")

Tools and Equipment to Examine Evidence

The crown does not necessarily have to provide the proper software necessary to examine the evidence. Software is not "information" and so does not have to be disclosed.[1]

The Crown does not need to pay for the necessary training required to use the software either.[2]

1. *R v Cox*, 2003 ABQB 212 (CanLII), *per* Nation J, at para 15 - Crown does not need to provide copy of EnCase forensic software to defence *R v Radwanski*, 2006 CanLII 43496 (ONSC), *per* Roccamo J
2. Radwanski - judge rules no need to give software or training when they could attend the RCMP station and use the police copy

Typical Components of a Disclosure Package

Police compile a package of the evidence consisting of the notes, reports and statements generated during their investigation that is forwarded to the Crown Attorney's office. This usually comprises the initial disclosure package that is made available to the Defence counsel.

Disclosure packages can contain any of the following:

1. the **Information** outlining the charges laid;
2. the **Crown Sheet** or **Crown Brief** summarizing in the evidence in narrative form and listing the witnesses that are available;
3. the **Police Notes** consisting of handwritten notes made by all the officers involved in the case during their investigation;
4. the **Witness statements** consisting of the verbatim recollection of the potential witnesses to the offence (written, audio, or video form);
5. A **Cautioned Statement** of the accused
6. the **Criminal record** of the accused as recorded in provincial databases or CPIC (Canadian Police Information Centre) printout;
7. Copies of **Court Orders** (Probation Orders; Prohibition Orders; Recognizances)
8. **Expert Reports**
9. **Certificates of analysis** (often for breathalyzer machine results; drug analysis; or firearms test results);
10. the **Medical records** of the victim in cases of resultant injuries;
11. **Restitution claims** where property has been lost or damaged;
12. **Photographic evidence** often consisting of photos of the scene of the incident or injuries.

Further material requested often includes:

1. **Videos or images** of accused while in police custody
2. computer printouts of any police database searches related to the accused
3. **Demands** made to client by the police from a script (e.g. Charter caution, breath demand, etc)
4. **Printed logs** and **audio recordings** of police, 911 dispatch, or ambulance transmissions
5. **Notes** of any professionals, such as doctors, ambulance crew, fire crew, etc. who was present at scene of incident
6. records of testing, maintenance, usage, and calibration of breath device used by accused
7. notes and reports regarding searches of accused (including strip searches)
8. Police action reports: Use of Force Reports, Use of Pepper Spray Reports
9. reports and materials related to police procedure on (use of force, taking statements, crowd control, parking violations, use of taser)
10. discipline record of officers
11. criminal records of witnesses
12. police reports regarding witnesses
13. records of outstanding charges of witnesses
14. **Computer Aided Dispatch** (CAD) printouts of the log of all dispatch activities[1]
15. recordings of dispatch communications

1. e.g. see *R v Holowaychuk*, 2013 ABPC 38 (CanLII), 277 CRR (2d) 319, *per* Thietke J, at paras 20 to 22

Specific Disclosable Materials

Can Says

There is no disclosure obligations to obtain and disclose a can-say for a witness who is uncooperative in giving a statement.[1]

All witness statements obtained must be disclosed even if they are not going to be witnesses called by the Crown.[2]

Where there are no statements, other information about the witness, including police notes and records concerning the witness, address and occupation, should be disclosed.[3]

1. *Ministry of Labour v C.S. Bachly Builders Limited et al*, 2007 ONCJ 120 (CanLII), *per* Quon J, at para 51
2. *Stinchcombe*, *supra*, at p. 344
3. *Stinchcombe*, *supra*, at p. 344

Crown Notes

The Crown has an obligation to disclose new information, including inconsistencies in statements, that it learns from pre-trial interviews.[1]

Any Crown notes that relate to opinion or analysis are not disclosable.[2]

Notes of the Crown may be subject to solicitor-client privilege and work product privilege.[3] The burden is upon the Crown to establish that the privilege exists.[4]

Investigative statements taken by the Crown must be disclosed.[5] It should normally be in written form but if time does not permit it should be done in writing and followed up in writing.[6] Disclosing Crown notes may be dangerous as they are often only intended to be an *aide memoire* and not an accurate rendition of facts. This could be used unfairly at trial.[7]

A peace officer or secretary will usually sit in on meetings with witnesses and take any new statements.[8]

Defence have the burden to prove that the notes exist and are likely relevant.[9] If established, the Crown then has the burden to establish the justification for not disclosing the notes.

1. *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, *per* J
   R v Armstrong, 2005 CanLII 63811 (ON SC), 77 OR (3d) 437, *per* Himel J
2. *Armstrong*, *ibid.*
3. *R v Brown*, [1997] OJ No 6163(*no CanLII links)
4. *Brown*, *supra*
5. *R v Regan* (1997), 174 NSR (2d) 72 (SC)(*no CanLII links) , at para 23
6. *Regan*, *supra*
7. *R v Johal*, 1995 CanLII 2426 (BCSC), *per* Braidwood J
8. E.g. *R v Lalo*, [2002] NSJ No 3432 (SC)(*no CanLII links)
   R v Johal, [1995] BCJ No 1271(*no CanLII links) - will say statement produced by third party used to avoid crown being a witness
9. *Chaplin*, *supra*

Contact Information of Witnesses

Witholding contact information of crown witnesses is in the discretion of the Crown.[1]

It was recommended from the Donald Marshall Inquiry that the name and address of persons with relevant information be disclosed.[2]

Vetting on Security and Privacy Concerns

The contact information of crown witnesses can be withheld for specific security or privacy concerns.[3] This would include situations where threats have been made against witnesses.[4]

Analysis Considerations

Interests to disclose must be balanced against the accused right to make full answer and defence which is enhanced by the ability to contact witness independently.[5]

Courts must still recognize the witnesses right to privacy, and so no party can force a witness to be interviewed.[6] Courts must also protect witnesses from "abusive, harassing, threatening or otherwise improper conduct and to protect witnesses against abusive treatment in and out of Court"[7]

Suggested Protocol

It has been suggested that the following protocol be taken for allowing defence to access crown witnesses:[8]

1. At the request of the defence, the Crown Attorney shall make available to the defence a room within the courthouse suitable for a confidential interview of the named witnesses by counsel of record;
2. The interviews are to be strictly confidential; no Crown Attorney or police officer is to be present unless requested by the defence;
3. The fact of an interview and any and all information obtained during it is to remain strictly confidential. No person, including the witness, the defence counsel, the accused and any other person present for any such interview may disclose any information relating to the interview except as may be necessary in the conduct of the trial itself.
4. The named witnesses shall be written a letter jointly signed by all principal counsel of record advising them of the request of the defence to interview them at the courthouse. The letter is to advise the witnesses in the clearest of terms of the existence of this ruling and of the right of the accused to interview them subject to their right to decline to participate in any such interview - the decision is strictly theirs to make. Care is to be taken to ensure the witnesses are not left with the impression they should not grant the defence an interview. The letter is to convey to the witnesses that any such interview will be by the defence counsel of record without any police officer or Crown Attorney present. Moreover, they are to be informed of the order of the Court requiring all persons involved in the interview to maintain the confidentiality of the interview process strictly.

Disclosure on Undertakings

When contact information is provided, it may be ordered that the information be disclosed to counsel but only on undertaking not to disclose personally to the accused.[9]

1. *R v Mearow et al*, 2013 ONSC 1865 (CanLII), OJ No 1442, *per* Koke J, at para 25 citing the Martin Report
2. see Stinchcombe
3. e.g. *R v Charlery*,[2011] O.J. No. 2669(*no CanLII links) - required disclosure due to "general" not "specific" concerns
4. *R v Brown* [1997] OJ No. 6165(*no CanLII links)
5. *Mearow*, *supra*, at para 21
6. *Mearow*, *ibid.*, at para 26
7. *Mearow*, *supra*, at para 26
8. *Mearow*, *ibid.*, at para 74
9. *R v Hitchings*, 2017 SKPC 56 (CanLII), *per* Penner J, at para 33

Source Handler Notes and Source Debriefing Reports

A police officer is assigned as an informer's "handler" who will typically create notes that detail the reliability of the informer, these are the debriefing notes, also known as source debriefing notes (SDRs).[1]

For the purpose of challenging a warrant, the right to full answer and defence only requires that the materials provided to the authorizing justice be made available.[2]

Judges must be "exceedingly cautious" if they engage in editing out information that might disclose a confidential informer as innocuous information may reveal the person's identity.[3] Accordingly, judges should give a great amount of deference to the editing suggested by Crown and investigators.[4]

There is some authority suggesting that there is blanket informer privilege over all SDR and SHN.[5]

1. *R v Barzal*, 1993 CanLII 867 (BCCA), 84 CCC (3d) 289, *per curiam* see also *R v Croft*, 2013 ABQB 705 (CanLII), 576 AR 333, *per* Burrows J
2. *Barzal*, *supra*, at para 44
3. *R v Leipert*, 1996 CanLII 471 (BC CA), 106 CCC (3d) 375, *per* Southin JA, at para 35
4. *R v Steeves*2004 NBQB 039(*no CanLII links) , at para 23
5. *R v Omar*, 2007 ONCA 117 (CanLII), 218 CCC (3d) 242, *per* Sharpe JA, at paras 38 to 43
   *R v Tingley*2010 NBQB 284(*no CanLII links)
   cf. *R v Way*, 2014 NSSC 180 (CanLII), 345 NSR (2d) 258, *per* Arnold J

Preparation of Transcripts

There is no obligation on the crown under s. 10 of the Evidence Act to prepare a transcript of a K.G.B. statement for the purpose of cross-examination.[1]

The request for a transcript takes issue with the form in which the disclosure was provided.[2]

If the Crown obtains a transcript of a defence expert's testimony from a previous hearing that is relevant to the trial it must be disclosed.[3]

1. *R v MRW*, 2013 ABCA 56 (CanLII), 544 AR 61, *per curiam*, at paras 27, 29
2. *R v Burns*, 2010 SKPC 6 (CanLII), 349 Sask R 258, *per* Morgan J
3. *R v L(SE)*, 2012 ABQB 71 (CanLII), 537 AR 32, *per* Hillier J
   See also Expert Evidence

Video Statements

Child Pornographic Materials

Expert Evidence

Under s. 657.3(3)(c), the Defence must disclose a copy of their expert's report or a can-say of their expert witnesses no later than upon the closing of the Crown's case.

Either side intending to submit expert evidence must disclose "the expert's report and any materials which contributed to the foundation of the report or which are clearly relevant to the witness's credibility must be disclosed."[1]

1. *R v Friskie*, 2001 CanLII 392 (SK PC), 49 WCB (2d) 375, *per* Snell J, at para 27

List of Witnesses to be Called

The Crown does not need to disclose what witnesses will be called.[1]

1. *R v Pinkus*, 1999 CanLII 15054 (ONSC), , [1999] O.J. No. 5464, *per* McKinnon J, at paras 7 to 9, 11 ("The decision whether to call a witness is solely within the discretion of the Crown. ...For the Court to order the Crown to inform defence as to whether a particular witness will be called would effectively trump Crown discretion.")

Device Calibration Records

The "rolling logs" made by Drug Recognition Expert (DRE) of every evaluation they have done is "first party" disclosure.[1]

Historical records relating to the performance of "approved instruments" for an impaired driving investigation are not "first-party" records.[2]

Operational records are not "fruits fo the investigation".[3]

1. *R v Stipo*, 2019 ONCA 3 (CanLII), 370 CCC (3d) 311, *per* Watt JA
2. *R v Gubbins*, 2018 SCC 44 (CanLII), [2018] 3 SCR 35, *per* Rowe J (8:1)
3. *Stipo*, *supra*, at para 113

Records of Police Misconduct

- See Police Misconduct Records

Misc Police Records

Under RCMP practice, detainees who are brought into cells are logged using a C-13 Form.[1]

1. *R v Schira*, 2011 SKPC 140 (CanLII), 382 Sask R 188, *per* O'Hanlon J, at para 33

Specific Non-Disclosable Materials

Any details on the Crown's review of the records including time, date and completeness of their review is not disclosable.[1]

1. *R v Black*, 1998 CanLII 5042 (NS SC), 515 APR 297, *per* Saunders J

See Also

- Limitations on Access to Disclosure

Limitations on Access to Disclosure

This page was last substantively updated or reviewed *January 2018*. (Rev. # 79573)

General Principles

Normally, the Crown must give the accused copies of disclosure without conditions. Any deviation, such as imposing "trust conditions" or undertakings, must be justified by the Crown.[1]

The "facts and complexity" of the case should dictate the "nature and extent" of the crown disclosure.[2]

When considering whether to impose any restrictions on disclosing sensitive materials, a balance of factors are considered including the right to full answer and defence, privacy rights of third parties, and the administration of justice.[3]

1. *R v Mercer*, 1992 CanLII 7230 (NLSCTD), 105 Nfld. & PEIR 1; 331 APR 1 (Nfld. T.D.), *per* Aylward J
   R v Little, 2001 ABPC 13 (CanLII), 82 CRR (2d) 318, *per* Meagher J, at paras 33 to 34
   Christopher Sherrin and Philip Downes, “The Criminal Lawyers’ Guide to Disclosure and Production” (Aurora: Canada Law Book Inc, 2000) at 53
2. *R v Petten*, 1993 CanLII 7763 (NL CA), 81 CCC (3d) 347, *per* Gushue JA, at para 8
   R v Luff, 1992 CanLII 7113 (NL CA), 11 CRR (2d) 356, *per* Gushue JA
3. *R v Blencowe*, 1997 CanLII 12287 (ON SC), 118 CCC (3d) 529, *per* Watt J

Undertakings and Trust Conditions

The discretionary imposition of explicit conditions upon defence counsel is reviewable by the court.[1]

The Crown has an obligation to protect the privacy of victims when affecting disclosure obligations.[2]

A court may also order "trust conditions" to be binding upon a self-represented accused.[3]

Requirements to Return Disclosure

A trust condition requiring defence counsel to return all disclosure to the Crown should the accused obtain new counsel is not unreasonble.[4] Under this condition, the Crown's refusal to make a second copy for new counsel does not breach the duty to disclose.[5]

Experts

Where access is given for the purpose of analysis by a defence expert, the court may order that the expert be identified.[6]

Excessive Conditions

Where the conditions of an undertaking are too onerous, they may be in violation of the Charter including the right to full answer and defence.[7] Remedy can include judicial direction to amend the proposed undertaking.[8]

Example undertakings: *R v Floria*, 2008 CanLII 57160 (ON SC), *per* Croll J

1. *R v WAO*, 2001 SKCA 64 (CanLII), 154 CCC (3d) 537, *per* Cameron JA, at para 17
   R v Vokey, 1991 CanLII 6987 (NLSCTD), (1991), *per* Bartlett J, at p. 18 ("The manner of disclosure must, for now, be regarded as one of reviewable discretion on the part of Crown counsel. It ought generally to be accomplished by the delivery of photostatic copies of the materials required to be disclosed. There will be circumstances where the provision of photostatic copies is not desirable.")
2. *R v Smith*, 1994 CanLII 5076 (SKQB), [1994] SJ 38, *per* Walker J
3. *R v Muirhead*, 1995 CanLII 4064 (SK CA), 134 WAC 242, *per* Jackson JA
4. *R v Barbour*, 2017 ABCA 231 (CanLII), *per curiam* (3:0), at para 33
5. *Barbour*, *ibid.*
6. e.g. *R v Hathway*, 2006 SKQB 206 (CanLII), *per* Rothery J

7. *R v Mohammed*, 2007 CanLII 5151 (ON SC), 152 CRR (2d) 129, *per* Dawson J
8. e.g. *Mohammed*, *ibid.*

Defence Obligations Accepting Disclosure

The defence must be made aware of the existence of all disclosure including circumstances where the Crown exercises discretion not to release certain parts of it.[1]

1. *R v Petten*, 1993 CanLII 7763 (NL CA), 81 CCC (3d) 347, *per* Gushue JA, at para 8

Limiting Sensitive Videos

In sensitive cases of sexual assault involving self-represented accused, the Crown obligation to disclose video statements of a complainant may be satisfied by allowing for a viewing at the Crown office so long as there is no reasonable possibility of impeding the right to full answer and defence.[1]

1. e.g. *R v Papageorgiou*, 2003 CanLII 52155 (ON CA), 176 CCC (3d) 246, *per curiam*

Limiting Child Pornography

It is not settled in law whether the defence should get copies of the alleged child pornography in order to prepare for their defence.

It is recognized that child pornographic imagery "do not depict the crime — they are the crime."[1]

Possession and access to child pornography is permitted under s. 163.1(6):

> 163.1
> [*omitted (1), (2), (3), (4), (4.1), (4.2), (4.3) and (5)*]
>
> **Defence**
>
> (6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence
>
> (a) has a legitimate purpose related to the administration of justice...; and
> (b) does not pose an undue risk of harm to persons under the age of eighteen years.
>
> [*omitted (7)*]
> 1993, c. 46, s. 2; 2002, c. 13, s. 5; 2005, c. 32, s. 7; 2012, c. 1, s. 17; 2015, c. 23, s. 7.
>
> – CCC

Courts have been divided on what form the disclosure of alleged child pornographic materials should take in order to satisfy disclosure obligations. Certain jurisdictions have found that disclosure of the recordings must be given in full subject to a restrictive undertaking.[2] Others have found that simply permitting the accused counsel to review the materials in a controlled, private setting is sufficient. The defence is not therefore entitled to a copy of the materials.[3]

Where the defence seeks mirror copies of the hard drives to perform their own forensic analysis, the Crown is obliged to provide them.[4]

Courts in England and Wales have permitted the limited disclosure of child pornography to defence counsel to prepare for trial.[5]

1. *R v Hunt*, 2002 ABCA 155 (CanLII), 166 CCC (3d) 392, *per curiam*, at para 16
2. *R v Blencowe*, 1997 CanLII 12287 (ON SC), 118 CCC (3d) 529, *per* Watt J
   R v Garbett, 2007 ONCJ 576 (CanLII), 165 CRR (2d) 165, *per* MacDonnell J, at para 9
   R v Cassidy, 2004 CanLII 14383 (ON CA), , 69 OR (3d) 585, *per curiam*
3. *R v WAO*, 2001 SKCA 64 (CanLII), 154 CCC (3d) 537, *per* Cameron JA, at paras 32 to 34 - re video tape of sex assault
   R v Papageorgiou, 2003 CanLII 52155 (ON CA), 176 CCC (3d) 246, *per curiam* - re video tape statements
4. *R v Cassidy*, 2004 CanLII 14383 (ON CA), 182 CCC (3d) 294, *per curiam*
5. see Crown Prosecution Service v LR [2010] EWCA Crim 924 (28 April 2010) URL: http://www.bailii.org/ew/cases/EWCA/Crim/2010/924.html

Self-represented Accused

Self-represented accused are generally entitled to the same materials as counsel except where "safety, security or privacy interests of any person" are endangered. [1]

However, the courts may restrict a self-represented accused's access to disclosure in certain circumstances.[2]

Where the accused has a history of inappropriate use of disclosure it may be appropriate to impose restrictions such as:[3]

- accessing disclosure at the crown office in a private setting. No copies can be made but they may take notes;
- accessing a copy of disclosure kept in the courtroom during trial;
- keeping copies of transcripts and exhibits;

1. e.g. see *R v Papageorgiou*, 2003 CanLII 52155 (ON CA), 176 CCC (3d) 246, *per curiam*
2. *R v Kelly*, 2015 ABCA 200 (CanLII), 325 CCC (3d) 136, *per curiam*, at paras 6 and 7
3. *Kelly*, *ibid.*, at para 7

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Police Duty to Collect Evidence

< Procedure and Practice < Disclosure

This page was last substantively updated or reviewed *August 2021*. (Rev. # 79573)

General Principles

See also Analyzing Testimony#Lack of notes

There is no free-standing constitutional right to an "adequate investigation of the charges against him or her". They do not violate the right to full answer and defence.[1]

The Crown does not have an obligation to investigate possible defences.[2]

The Crown has no obligation to send police or other authorities to secure additional statements from witnesses requested by defence.[3]

The police has a duty to provide Crown all relevant materials that are in their possession.[4]

When considering officer conduct as it relates to the integrity of an investigation or officer safety, police should be given "a good deal of leeway".[5]

1. *R v Darwish*, 2010 ONCA 124 (CanLII), 252 CCC (3d) 1, *per* Doherty JA, at para 29 ("An accused does not have a free-standing constitutional right to an adequate investigation of the charges against him or her...Inadequacies in an investigation may lead to the ultimate failure of the prosecution, to a specific breach of a Charter right or to a civil remedy. Those inadequacies do not, however, in and of themselves constitute a denial of the right to make full answer and defence."), leave to SCC refused
   R v Barnes, 2009 ONCA 432 (CanLII), [2009] OJ No 2123, *per curiam*, at para 1
2. *Darwish*, *supra*
3. *Darwish*, *supra*, at paras 29 to 41
   R v Dias, 2010 ABCA 382 (CanLII), 265 CCC (3d) 34, *per curiam*, at para 38
   R v Levin, 2014 ABCA 142 (CanLII), 572 AR 382, *per curiam*, at para 45
4. *R v Jackson*, 2015 ONCA 832 (CanLII), 332 CCC (3d) 466, *per* Watt JA, at paras 80 to 81
   R v McNeil, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J, at paras 23 to 24
5. *R v Wight*, 2007 ONCA 318 (CanLII), 47 CR (6th) 271, *per* Moldaver JA, at para 54 ("...when it comes to officer safety and preserving the integrity of their investigation, police officers should be given a good deal of leeway and second guessing should be avoided.")

Duty to Inquire

There is a "Stincombe-like" duty on the part of the Crown to inquire into areas of potential evidence.[1]

It is recognized that the accused has "limited means to access relevant materials in the hand of those third parties. The Crown is in a better position to bridge the gap between first-party and third-party records by attempting to obtain records when "put on notice of its existence" and it is "reasonably feasible to do so".[2]

Where the Crown can secure third-party cooperation, the Crown may be able to avert the need for court applications.[3]

The Crown should "take reasonable steps to assist an accused in obtaining disclosure of relevant material in the possession of a third party". [4] This, however, does not go so far as to require the Crown to "conduct investigations that may assist the defence". Otherwise, the prosecution will "effectively surrender control of the investigation to the defence, or ultimately face a stay of the criminal charges"[5]

This duty is engaged where the accused provides evidence of “serious misconduct” and identifies third-party information that it believes is “relevant” to that “serious misconduct”. This includes evidence of attempts to fabricate evidence. Where such evidence is put forward the Crown has a duty to make inquiries to third parties and if unsuccessful provide notice to the Defence to make their own O'Connor application. Where any information is retrieved it will be subject to a standard of relevancy.[6]

The duty to inquire does not extend into seeking out forensic audit reports that may support the defence.[7]

1. *R v McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J
   R v Levin, 2013 ABQB 31 (CanLII), 549 AR 264, *per* Shelley J, at para 40
2. *McNeil*, *supra*, at paras 48 to 49
   R v JEK, 2016 ABCA 171 (CanLII), 337 CCC (3d) 222, *per* Dinkel JA, at para 57

3. *R v Levin*, 2014 ABCA 142 (CanLII), 572 AR 382, *per curiam*, at para 44
4. *R v Darwish*, 2010 ONCA 124 (CanLII), 252 CCC (3d) 1, *per* Doherty JA
5. *Darwish*, *ibid.*
6. *Levin*, *supra*, at para 40
7. *Darwish*, *supra*

Collection of Evidence

Generally, there is no violation of the disclosure obligation arising from a failure to collect information.[1]

There is no burden on the police to record evidence of all conversations with witnesses, even important ones.[2]

The police do not have a general obligation to collect evidence in a certain manner or create specific material disclosure and so a failure to do so would not amount to a failure to provide disclosure or impact the right to make full answer and defence.[3]

The police have no obligation "to conduct their investigation in any particular way, to record every word spoken in an interview or to take a written statement from every potential witness who is interviewed."[4]

Investigative police strategies and "tactical information are presumptively not disclosable absent a particularized claim to relevance".[5]

The defence cannot direct the course of an investigation.[6] Accordingly, the defence cannot "conscript the police to undertake investigatory work for the accused" through the use of disclosure demands.[7]

Notes

Notes are an important part of the criminal justice system. They are often the closest recording to what a witness saw or experienced. They can be the most accurate record of events.[8]

There is a general duty for an officer "to take complete, accurate and comprehensive notes."[9]

Police are required to record "significant events". What constitutes significant events and the level of detailed recorded is granted wide discretion.[10]

This duty does not include a duty to take photos or videos of events.[11]

The failure to photograph the purse and identification card was not a violation of any duty owed by Cst. Feser. Photographs might have supported the narrative of events provided by Cst. Feser and reduced prospects for challenge. The case must simply be decided on the evidence that there was. And this is not a case where any significant inferences can be drawn from the absence of evidence.

Where the handwritten notes of an officer are illegible, then the obligation of disclosure can require the crown to transcribe the notes or otherwise provide them in legible form.[12]

Preservation of Evidence

The Crown must preserve evidence on a "close case" for the purpose of disclosing it should charges arise.[13]

There is a duty to preserve evidence that arises from the right to full answer and defence.[14]

Police are not obliged "to preserve everything that comes into their hands on the off-chance that it will be relevant in the future."[15]

1. *R v Hanano*, 2006 MBQB 202 (CanLII), 41 CR (6th) 177, *per* Spivak JA, at para 20
2. *R v Wicksted*, 1996 CanLII 641 (ON CA), [1996] OJ No 1576, 29 OR (3d) 144, *per* Goodman JA, at p. 155: ("As pointed out by the trial judge, counsel were unable to provide him, nor were counsel able to provide this court with any Canadian authority wherein a stay was granted for the failure of investigating police officers to record conversations with important witnesses.")
3. *R v Korski*, 2007 MBQB 185 (CanLII), 218 Man R (2d) 69, *per* Beard J
   Darwish, *supra*
   R v Barnes, 2009 ONCA 432 (CanLII), OJ No 2123, *per curiam*
4. *Korski*, *supra*
5. *R v Pickton*, 2005 BCSC 1240 (CanLII), *per* Williams J, at para 44
6. *R v Darwish*, 2010 ONCA 124 (CanLII), 252 CCC (3d) 1, *per* Doherty JA, at para 30
7. *R v West*, [2001] OJ No 3406, [2001] O.T.C. 711 (SCJ)(*no CanLII links) , *per* Hill J, at para 75
   Darwish, *supra*, at para 30
8. *Wood v Schaeffer*, 2013 SCC 71 (CanLII), [2013] 3 SCR 1053(*complete citation pending*) ("The notes of an investigator are often the most immediate source of the evidence relevant to the commission of a crime. The notes may be closest to what the witness actually saw or experienced. As the earliest record created, they may be the most accurate")
9. *R v Bailey*, 2005 ABPC 61 (CanLII), 32 CR (6th) 344, *per* Van de Veen J
   Wood v Schaeffer, *ibid.*, at para 67 (“that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Drawing on the remarks of Mr. Martin, such a duty to prepare notes is, at a minimum, implicit in an officer’s duty to assist in the laying of charges and in prosecutions ….”) See also *R v Mascoe*, 2017 ONSC 4208 (CanLII), *per* Hill J(*complete citation pending*), at paras 112 to 115
10. *R v Medwed*, 2011 ABQB 231 (CanLII), 12 MVR (6th) 186, *per* Miller J, at para 3 ("Upon reviewing the authorities it can be safely stated that an officer is required to note “significant observations”, but the officer is permitted a wide degree of discretion in deciding what is “significant” and how detailed the notes must be...")
11. *R v Johnstone*, 2019 ABQB 965 (CanLII), *per* J(*complete citation pending*), at para 54
12. *R v Bidyk*, 2003 SKPC 124 (CanLII), 236 Sask R 230, *per* Whelan J
    R v Abrey, 2007 SKQB 213 (CanLII), 157 CRR (2d) 367, *per* Ball J
13. *R v Satkunananthan*, 2001 CanLII 24061 (ON CA), 152 CCC (3d) 321, *per curiam*, at para 75 (Ont. C.A.) ("As it was disclosable, the police had an obligation to preserve it so that it could be disclosed")
14. *R v La*, 1997 CanLII 309 (SCC), [1997] 2 SCR 680, *per* Sopinka J, at para 20
15. *R v Lees*, 2011 SKPC 98 (CanLII), [2011] S.J. No 507 (SKPC), *per* Kalmakoff J

Note-taking

It has been recognized that the "sheer passage of time" can reduce the reliability of memories.[1]

Police officers have a duty to take contemporaneous notes, recording their observations accurately and comprehensively.[2]

The failure to take notes does not "automatically" affect the reliability of the officer's recollections. Rather it is determined on a case-by-case basis.[3]

Methods of Notekeeping

The court has no authority to direct officers on how they should keep their notes.[4] They should not be micromanaging the police's handling of a case.[5]

Possible Charter Breach

Incomplete notes do not breach the right to full answer and defence. As long as the majority of the officer's evidence is recorded in some fashion there will be no violation.[6]

A complete inconsistency between notes and testimony may result in a violation of s. 7 and stay of proceedings.[7]

1. *R v Clark*, 2017 ABQB 643 (CanLII), *per* Renke J, at para 19
2. *Wood v Schaeffer*, 2013 SCC 71 (CanLII), [2013] 3 SCR 1053, *per* Moldaver J, at paras 62 to 68 ("The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent invetigator")
   R v Davidoff, 2013 ABQB 244 (CanLII), *per* Graesser J, at paras 25 to 27
3. *R v Turgeon-Myers*, 2019 ABQB 493 (CanLII), *per* Renke J, at para 68 ("Nonetheless, the gap in Cst. Burrows' notes does not have an automatic consequence respecting his reliability ... The effect of absent notes must be assessed on a case-by-case basis.")
   R v Skookum, 2019 YKSC 8 (CanLII), *per* Campbell J, at para 75 ("The absence of a notation in an officer's notes regarding a relevant observation or event does not automatically lead to the conclusion that the observation was not made or the event did not occur. The testimony of an officer is the evidence at trial, not his or her notes. The absence of a note is however a factor to consider in assessing the reliability and the credibility of the officer's testimony")
   Davidoff, *supra*, at para 27 (" There is no rule of law that says a police officer's testimony, unsupported by notes, is inadmissible or deemed to be incredible or untrustworthy. Notes, the absence of notes and the quality of notes, are only factors in assessing credibility.")
4. *R v Pickton*, 2007 BCSC 2029 (CanLII), [2007] BCJ No 3100 (B.C. S.C.), *per* Williams J, at para 9
5. *R v Bailey*, 2005 ABPC 61 (CanLII), 32 CR (6th) 344, *per* Van de Veen J, at paras 38, 46
6. *Bailey*, *supra*, at paras 38, 46
7. e.g. *R v Karunakaran*, 2008 ONCJ 397 (CanLII), *per* Armstrong J

Originals

There is no "absolute right to originals" of records seized by police. However, when originals are not available the Crown should explain their absence.[1]

1. *R v Williams*, 2017 ONSC 572 (CanLII), *per* Munroe J, at para 124

See Also

- Lost or Destroyed Evidence

Lost or Destroyed Evidence

This page was last substantively updated or reviewed *May 2021*. (Rev. # 79573)

< Procedure and Practice < Disclosure
< Procedure and Practice < Pre-Trial and Trial Matters < Abuse of Process

General Principles

Where evidence is in the possession of the Crown or Police, there is a duty to preserve this evidence. Where this evidence goes missing or is destroyed, it can in certain circumstances, form grounds for a stay of proceedings under s. 7 and 11(d) of the Charter. The stay is on the basis that the rights under s. 7 of the Charter to make full answer and defence and under s. 11(d) to a fair trial have been violated.

Lost Originals

There is a limited right to review original documents. Where the originals have gone missing the Crown has an obligation to explain how it went missing.[1]

Reason for Loss

The loss of evidence will not result in the breach of the duty to disclose so long as the conduct of the police was reasonable.[2]

Full Answer and Defence

Where the loss of evidence deprives the accused of an ability to make full answer and defence, such as were the evidence would have *likely* would have assisted in the accused to meet the case, it may be stayed as abuse of process.[3]

Notice of Destruction

Notifying the accused ahead of the destruction of property inviting inspection may cure the prejudice caused by the loss of evidence from the destruction of property.[4]

Offence-related Circumstances

Discarding of the mouthpiece used in an alcohol roadside screening device will not violate the right to full answer and defence under s. 7 of the Charter.[5]

Lost Court Record

The loss or destruction of the recording and transcripts of a preliminary inquiry will be sufficient for an acquittal due to failure to make full answer and defence.[6]

Destruction by Third Party

Where records held by a third party are destroyed there may be a stay of proceedings.[7]

Remedy

Where the circumstances permit, a remedy for loss of evidence may include a jury instruction on the importance of the evidence lost.[8]

1. *R v FCB*, 2000 NSCA 35 (CanLII), 142 CCC (3d) 540, *per* Roscoe JA, at pp. 547-48 (N.S. C.A.)
   R v Bero, 2000 CanLII 16956 (ON CA), 151 CCC (3d) 545, *per* Doherty JA, at para 30
2. *R v La*, 1997 CanLII 309 (SCC), [1997] 2 SCR 680, *per* Sopinka J, at para 21
3. *R v PSL*, 1995 CanLII 8939 (BC CA), 103 CCC (3d) 341, *per* Cumming JA, at para 51("if the defence can establish that the missing evidence was of such potential importance that its destruction deprived the accused of his ability to make full answer and defence, a judicial stay of proceedings may be warranted. This threshold will be met where it is shown that the missing material would have likely assisted the defence in meeting the Crown's case.")
4. e.g. *R v Berner*, 2012 BCCA 466 (CanLII), 329 BCAC 275, *per* Ryan JA - car in collision destroyed by police prior to trial. Officer sent registered mail letter to accused prior to releasing vehicle.
5. *R v Lee*2010 ONSC 4117(*no CanLII links)
   R v Boylan, 2011 BCPC 235 (CanLII), 20 MVR (6th) 234, *per* Frame J
   R v Goosen, 2014 SKQB 135 (CanLII), SJ No 290, *per* Tholl J
   cf. *R v Dhillon* (1999), 41 WCB (2d) 48(*no CanLII links) - stay of proceedings
6. *R v MacLeod*, 1994 CanLII 5243 (NB CA), 93 CCC (3d) 339, *per* Ryan JA
7. *R v Carosella*, 1997 CanLII 402 (SCC), [1997] 1 SCR 80, *per* Sopinka J - rape crisis centre destroyed nurses notes per centre's policy
8. *Hersi*, *supra*, at para 39

Unacceptable Negligence Standard

There can only be a breach of the duty to disclose where the loss or destroyed evidence was found to due to "unacceptable negligence" [1] A reach of this duty will result in a violation of s. 7 of the Charter.[2] Additionally, it may amount to an abuse of process.[3] The only available remedy would be a stay.[4]

Not every instance where negligence that results in the loss of evidence will result in a Charter breach.[5] Nor will every case loss of evidence will infringe the accused's right to make full answer and defence. "Owing to the frailties of human nature, evidence will occasionally be lost" [6]. The Crown must explain the loss and satisfy the trial judge that it was not due to unacceptable negligence or an abuse of process. If satisfactorily explained, the onus is on the accused to "establish actual prejudice to his or her right to make full answer and defence" [7]. The principal consideration, in the explanation, "is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence" [8]

Even where it does not amount to "unacceptable negligence", there may still be a breach of section 7 of the Charter where " the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. " The only available remedy would be a stay.[9]

The inquiry should be upon the "reasonableness of the officer's conduct that resulted in the loss of the evidence.[10] The more obvious the importance of the evidence the greater care is expected from the officer.[11]

1. *FCB*, *supra*
   Bero, *supra*, at para 30
2. *FCB*, *supra*
   Bero, *supra*, at para 30
3. *FCB*, *supra*
   Bero, *supra*, at para 30
4. *Bero*, *supra*, at para 30
5. *R v Lipovetsky*, 2007 ONCJ 484 (CanLII), [2007] OJ No 4135, *per* Kenkel J, at para 19 ("Even where there is negligence on the part of the Crown, the loss of a videotape does not automatically violate the Charter. A Charter breach is established only where the lost evidence is shown by the applicant to be relevant to the issues at trial.")
   See also *R v Dulude*, 2004 BCPC 524 (CanLII), [2004] OJ No 3576, *per* Stansfield J, at para 30
6. *La*, *supra*, at para 20
7. *La*, *supra*, at para 25
8. *La*, *supra*, at para 21
   and see *R v Kociuk (R.J.)*, 2011 MBCA 85 (CanLII), 278 CCC (3d) 1, *per* Chartier JA
9. *RCB*, *supra*
   Bero, *supra*, at para 30
10. *R v Hersi*, 2019 ONCA 94 (CanLII), 373 CCC (3d) 229, *per* Doherty JA, at para 30
11. *Hersi*, *ibid.*, at para 30

Lost Statements of the Complainant

When considering whether a stay is appropriate for a lost statement, the Court should consider "all the surrounding background facts and circumstances of the complainant's evidence" such as:[1]

- "the emotional or psychological status of the complainant at the time the allegations were made"

- "the time when the complaints were made in relation to when the allegations occurred, i.e. before or after therapy"
- "whether the investigating officers who took the statement were available for questioning"
- "whether the complainant made other statements prior to trial that the defence can use to attack her credibility"
- "whether the Crown concedes that proposed substitute evidence is a statement of the complainant and may be used for the purposes of cross-examination of the complainant"
- "whether the statements that do exist appear to contain the same amount of detail as the lost statement"
- "the extent of the complainant's present ability to recall the contents of the earlier statements"
- "the complainant's present ability to recall the details surrounding the various alleged incidents of abuse"
- "any apparent or potential inconsistencies in the complainant's trial testimony or between her other statements and her evidence at the preliminary hearing"
- "whether the accused was made aware of the contents of the lost evidence before its destruction or disappearance"
- "whether the Crown gave any undertaking to the accused at the time that matters would not proceed with the result that the accused did not retain his own records" and
- "what other witnesses had to say at the time in support or contradiction of the complainant's allegations"

The emphasis of consideration should be on "whether other available evidence contains essentially the same information as the lost evidence".[2]

1. *R v JGB*, 2001 CanLII 24101 (ON CA), 151 CCC (3d) 363, *per* Weiler JA, at para 9
2. *R v Girou*, 2016 ABQB 607 (CanLII), AJ No 1126, *per* Thomas J, at para 20

Lost Trial Exhibits

A "missing exhibit" that has already been described in evidence may not necessarily cause prejudice to the acccused.[1]

In a jury trial, an exhibit list after the jury had an opportunity to examine it, there may not be an impairment of full answer and defence.[2]

1. *R v Serre*, 2009 ONCA 108 (CanLII), *per curiam*
2. *R v Waszek*, 2003 CanLII 18152 (ON SC), 106 CRR (2d) 127, *per* Cumming J

See Also

- Police Duty to Collect Evidence
- Duty to Preserve Evidence

Disclosure of Third Party Records

This page was last substantively updated or reviewed *July 2021*. (Rev. # 79573)

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Production at Common Law (O'Connor) Application

A party may apply for an order requiring a third party, that is, a party other than the crown or its agents, to produce relevant documents for the purpose of using them in court.

The application, often referred to an as "O'Connor Application"[1], is a two-stage process

1. First the applicant must satisfy the judge that the record is likely relevant to the proceedings against the accused. If so, the judge may order the production solely for the court's inspection.
2. Second, the judge must then determine, after inspection, what portions of the documents are to be produced for the defence.[2]

The O'Connor regime is not limited to situations where the third party has a reasonable expectation of privacy over the records. It applies to *all* third party records.[3]

The Crown has no duty to discover and disclose records on the basis of a "pure fishing expedition".[4]

Third party records have no presumptive relevance. The do not "become relevant by simply suggesting that they relate to credibility 'at large'". It must be established "on a 'specific' and 'material' issue"."[5]

Relevance

Relevance in the context of a third party records application is that there is "a reasonable possibility that the information may assist the accused in the exercise of the right to make full answer and defence, including the ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence".[6]

The term "obviously relevant" does not create a new standard of relevance.[7] Some have used terms such as "admittedly relevant" and "relevant beyond dispute" as meaning the same thing.[8]

Relevance is determined "contextually" by:[9]

- the specific charges against the accused,

- the circumstances surrounding the alleged offence,
- the nature and scope of the investigation,
- the evidence which the Crown relies upon to seek a conviction, and
- any defences the accused intends to put forward

Production of Records for Sexual Offences

Where the records sought to be produced are in relation to a prosecution of a sexual offence, the O'Connor regimes does not apply, instead the hearing is governed by s. 278.1 to 278.91 of the Code.[10]

History

Following the ruling of *R v O'Connor*[11] Parliament passed Bill C-46 (An Act to amend the Criminal Code (production of records in sexual offence proceedings))[12] which came into force on May 12, 1997. These provisions were upheld in 1999 in the decision of *R v Mills*.[13]

1. *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, *per* L'Heureux-Dubé J
2. *O'Connor*, *ibid.*
   R v McNeil, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0), at para 27
3. *McNeil*, *ibid.*
   R v Oleksiuk, 2013 ONSC 5258 (CanLII), 55 MVR (6th) 107, *per* James J, at para 26
4. *R v Levin*, 2014 ABCA 142 (CanLII), 572 AR 382, *per curiam* (3:0), at para 49
   R v Gingras, 1992 CanLII 2826 (AB CA), 71 CCC (3d) 53, *per curiam* leave denied [1992] SCCA No 348
5. *Canada v Worden*, 2014 SKPC 143 (CanLII), 68 MVR (6th) 141, *per* Kalmakoff J
6. *R v Sandhu*, 2020 ABQB 459 (CanLII), *per* Feth J, at para 33
   R v Gubbins, 2018 SCC 44 (CanLII), [2018] 3 SCR 35, *per* Rowe J
7. *Sandhu*, *ibid.*, at para 33
   Gubbin, *ibid.*, at para 23 ("The phrase “obviously relevant” should not be taken as indicating a new standard or degree of relevance: ... Rather, this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under Stinchcombe because it relates to the accused’s ability to meet the Crown’s case, raise a defence, or otherwise consider the conduct of the defence")
8. *Sandhu*, *supra*, at para 36
9. *Sandhu*, *supra*, at para 34
   McNeil, *supra*, at paras 38 to 39
   R v Vautour, 2019 PESC 42 (CanLII), *per* Cann J, at para 13
   R v Fischer, 2020 ABQB 67 (CanLII), *per* Ackerl J, at para 21
10. See Production of Records for Sexual Offences
11. *O'Connor*, *supra*
12. see List of Criminal Code Amendments (1984 to 1999)
13. *R v Mills*, 1999 CanLII 637 (SCC), [1999] 3 SCR 668, *per* McLachlin and Iacobucci JJ

Third Party Records vs Disclosure

A third party includes Crown entities other than the prosecuting authority and so would be subject to an O'Connor application.[1] This does not apply to materials that the police are under a duty to disclose to the crown as the "fruits of the investigation", in which case it would constitute a first party record.[2]

Records of police investigations of third parties and police disciplinary records, usually constitutes third-party records.[3] Unless the misconduct relates to the investigation or could reasonably impact on the case against the accused.[4]

Records will be either in possession of the Crown or a third party depending on several factors:[5]

1. whether the information is the "fruits of the investigation";
2. what the purpose the information was created for;
3. whether the information was created or obtained as a result of, or in connection to, the specific investigation or prosecution of the accused;
4. whether the information is sufficiently related to the specific investigation or prosecution
5. whether there is an intrinsic link, i.e. by a factual and evidential link, to the investigation
6. the nature and content of the information
7. whether any third parties have a privacy interest in the information

1. *R v McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0) at 13
2. *McNeil*, *ibid.*
3. *McNeil*, *supra*, at para 25
4. *McNeil*, *supra*
5. *R v Coopsammy*, 2008 ABQB 266 (CanLII), 445 AR 160, *per* Thomas J

Crown to Duty to Inquire ("McNeil" Obligations)

- See Crown Duty to Disclose#Duty to Inquire ("McNeil" Obligations)

Production Orders

- See Production Orders

First Stage

The first stage determines whether materials should be provided to the court for review.

This stage the burden is upon the applicant but the standard should not be treated as particularly "onerous".[1]

1. *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, *per* L'Heureux-Dubé J, at paras 22, 24 and 138, 140
R v Mills, 1999 CanLII 637 (SCC), [1999] 3 SCR 668, *per* McLachlin and Iacobucci JJ, at paras 45 to 46, 53, 120-138
R v WB (Batte), 2000 CanLII 5751, 45 CCC (3d) 449, *per* Doherty JA, at paras 66, 75

Second Stage

In the second O'Connor stage the court assesses the records on the basis of the likely relevance standard.

Production of Records for Sexual Offences

- Production of Records for Sexual Offences

Procedure

The records keeper must be served with the O'Connor application before it can proceed. [1]

The recommended procedure for obtaining third-party records is:[2]

- The applicant should obtain a subpoena *duces tecum* under section 698(1) and 700(1) of the code and serve it on the third-party record holder, compelling them to attend court with the requested records;
- The applicant must also file an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant on the appeal. Notice of the application must be given to the Crown, the person who is the subject of the records and any other person with a privacy interest in the records. If production is unopposed there is no need for a hearing;
- If the record holder or some other interested person advances a well-founded claim that the records are privileged, this will usually bar the production application in all but the rarest cases where the applicant's innocence is at stake;
- If privilege is not at issue, the court must determine whether production should be compelled in accordance with the two-stage test in O'Connor:
  - First, whether the judge is satisfied that the record is likely relevant to the matter, in which case he can order production of the record for his inspection.
  - Second, after reviewing the records the court determines whether and to what extent the production should be ordered.

1. *R v Elkins*, 2017 BCSC 245 (CanLII), *per* Sewell J, at paras 31 and 32
2. *R v Meer*, 2015 ABCA 163 (CanLII), *per* Veldhuis JA, at para 12 - this process was recommended in the appeal process

Disclosing Specific Materials

School records for crown witnesses will require a third party application.[1]

1. *R v Osborne*, 2011 ONSC 111 (CanLII), *per* Dawson J

Training Materials

In advancing a violation of rights by peace officers, the training manuals applicable to the investigation are of limited relevance since they are not indicative of violations.[1]

1. *R v Ferrari*, 2001 SKQB 340 (CanLII), 210 Sask R 282, *per* Maurice J, at para 7

R v Akinchets, 2011 SKPC 88 (CanLII), 378 Sask R 282, *per* Kalmakoff J - considered training materials on sobriety testing

Police Records ("McNeil Disclosure")

Certain types of police misconduct records have been recommended as being treated as primary disclosure.[1]

McNeil disclosure should include types of evidence such as:[2]

1. Any conviction or finding of guil[t] under the Canadian Criminal Code or under the *Controlled Drugs and Substances Act* [for which a pardon has not been granted].
2. Any outstanding charges under the Canadian Criminal Code or the Controlled Drugs and Substances Act.
3. Any conviction or finding of guilt under any other federal or provincial statute.
4. Any finding of guilt for misconduct after a hearing under the Police Services Act or its predecessor Act.
5. Any current charge of misconduct under the Police Services Act for which a Notice of Hearing has been issued.

The "McNeil" obligation only applies to records of misconduct that is "related to the investigation or the finding of misconduct could reasonably impact on the case against the accused."[3]

The police have an obligation to notify the Crown of any relevant misconduct, as well as seek advice from the Crown on whether the misconduct record is relevant.[4]

The Crown are to exercise a gate-keeper function with respect to the disclosure of these materials to the defence.[5]

Where there are records in possession of the police but the investigators were not aware of them during the course of the investigation, these records will not be subject to McNeil obligations and must be obtained by way of an O'Connor application. [6]

1. *R v McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, *per* Charron J (8:0) ("[W]here the disciplinary information is relevant, it should form part of the first party disclosure package, and its discovery should not be left to happenstance".
2. *McNeil*, *ibid.*, at para 57 - known as the "Ferguson Five" categories
3. *McNeil*, *ibid.*
4. *R v Boyne*, 2012 SKCA 124 (CanLII), 293 CCC (3d) 304, *per* Ottenbreit JA (3:0), at paras 34, 35
5. *Boyne*, *supra*, at para 35
6. *R v Elkin*, 2017 BCSC 245 (CanLII), *per* Sewell J, at para 31

Journalist Materials

The court must recognize that there are special considerations when the record-holder is the media.[1]

There is a four-step process to consider:[2]

1. notice to the press;
2. satisfying the statutory preconditions;
3. balancing the competing interests; and,
4. imposing conditions to reduce the impact on the media

On the third step, considerations should include:[3]

1. the likelihood and extent of any potential chilling effects;
2. the scope of the materials sought and whether the order sought is narrowly tailored;
3. the likely probative value of the materials;
4. whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources;
5. the effect of prior partial publication, now assessed on a case-by-case basis; and
6. more broadly, the vital role that the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party

1. *R v Lim # 4*, 2021 ONSC 45 (CanLII), *per* Molloy J, at para 30
2. *R v Vice Media*, 2018 SCC 54 (CanLII), [2018] 3 SCR 374, *per* Moldaver J, at para 82
   Lim #4, *supra* at para 37
3. *Lim #4*, *supra* at para 37

Calibration Records of Screen Devices and Approved Instruments

It is an unsettled issue in law of whether the calibration records of a screening device (ASD) or an approved breathalyzer instrument are "first party" or "third party" records.[1]

The records for each device are to be treated separately.[2] In Alberta, it has been found that breathalyzer records are first party records, while ASD records are third party records.[3]

One line of Ontario cases suggest that the Crown has the onus to establish that the records are "clearly irrelevant" before they can refuse to provide defence with them.[4]

The other line of Ontario cases suggest that the Defence has the onus of proving the records are "likely relevant".[5]

1. *R v Oleksiuk*, 2013 ONSC 5258 (CanLII), 55 MVR (6th) 107, *per* James J, at paras 29 to 32 summarizing controversy
   R v Sutton, 2013 ABPC 308 (CanLII), 576 AR 14, *per* Henderson J - found them *not* to be first party records
2. *Oleksiuk*, *ibid.*, at para 29
3. see *R v Kilpatrick*, 2013 ABQB 5 (CanLII), [2013] AJ No 41, *per* Graesser J
   R v Black, 2011 ABCA 349 (CanLII), [2011] AJ No 129, 286 CCC (3d) 432, *per* Ritter JA (2:1) - found ASD records irrelevant to RPGs of officer
4. *Olekwiuk*, *supra*, at para 30
   R v Gubins, 2009 ONCJ 80 (CanLII), OJ No 848, *per* Pringle J
   R v Pfaller, 2009 ONCJ 216 (CanLII), *per* Green J
   R v Robertson, 2009 ONCJ 388 (CanLII), *per* Grossman J
   R v Jemmett, 2009 ONCJ 741 (CanLII), *per* Wong J
   R v George, 2009 ONCJ 470 (CanLII), *per* Morneau J
   R v Dionne, 2009 ONCJ 609 (CanLII), *per* Robertson J
5. *Olekwiuk*, *supra*, at para 31
   R v Bensette, 2011 ONCJ 30 (CanLII), [2011] OJ No 403 (C.J.), *per* Campbell J
   R v Ahmed, 2010 ONCJ 130 (CanLII), [2010] OJ No 1500 (C.J.), *per* Tuck-Jackson J
   R v Batenchuk, 2010 ONCJ 192 (CanLII), [2010] OJ No 2302 (C.J.), *per* Maund J
   R v Lenti, 2010 ONCJ 554 (CanLII), [2010] OJ No 5081 (C.J.), *per* LeDressay J
   R v Carriveau, 2011 ONCJ 837 (CanLII), [2011] OJ No 4318 (C.J.), *per* Dorval J

Publication Prohibition

~~Publication prohibited~~

~~276.3 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:~~

> ~~(a) the contents of an application made under section 276.1 [*application to admit complainant's sexual activity*];~~
> ~~(b) any evidence taken, the information given and the representations made at an application under section 276.1 [*application to admit complainant's sexual activity*] or at a hearing under section 276.2 [*application to admit complainant's sexual activity - jury exclusion*];~~
> ~~(c) the decision of a judge or justice under subsection 276.1(4) [*application to admit complainant's sexual activity - judge to decide to hold hearing*], unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and~~
> ~~(d) the determination made and the reasons provided under section 276.2 [*application to admit complainant's sexual activity - jury exclusion*], unless~~
>
> > ~~(i) that determination is that evidence is admissible, or~~
> > ~~(ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.~~

~~**Offence**~~

~~(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.~~
~~1992, c. 38, s. 2; 2005, c. 32, s. 13.~~

Repealed, 2018, c. 29, s. 22

– CCC

Publication prohibited

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

> (a) the contents of an application made under section 278.3 [*application to produce for sexual offences*];
> (b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) [*in camera hearing for application to produce*] or 278.6(2) [*review of hearing to produce — who appears*]; or
> (c) the determination of the judge pursuant to subsection 278.5(1) [*judge may order production of record for review*] or 278.7(1) [*judge may order production of record to accused*] and the reasons provided pursuant to section 278.8 [*reasons for decision to produce*], unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

Offence

(2) Every person who contravenes subsection (1) [*publication prohibited on production hearing*] is guilty of an offence punishable on summary conviction.
1997, c. 30, s. 1; 2005, c. 32, s. 14.

– CCC

Remedy for Breach of Disclosure Obligation

< Procedure and Practice < Disclosure

General Principles

Remedies for lost evidence may include "limits on the Crown's ability to call evidence, to adjournments, to stays of proceedings."[1]

1. *R v La*, 1997 CanLII 309 (SCC), [1997] 2 SCR 680, *per* Sopinka J

Mistrial / Re-Trial

At common law, a mistrial may be granted as a remedy where "there is a 'real danger' of prejudice to the accused or danger of a miscarriage of justice".[1] Late disclosure that causes an unfair trial, even after the trial, can result in a new trial.[2] However, this may not constitute a distinct Charter breach.[3]

Late disclosure does not necessarily result in an unfair trial.[4] A number of factors should be considered.[5]

A new trial can be ordered under s. 24(1) of the Charter due to a failure to disclose where the accused can show a violation of his right to full answer and defence. This requires that there be a "reasonable possibility that the non-disclosure affected the outcome at trial" or that "the overall trial fairness" is affected.[6]

The issue is not whether the evidence "would" have made a difference, it is only a matter of whether it "could" have made a difference and created reasonable doubt.[7] Further, there need only be a "reasonable possibility that the overall fairness...was impaired" such as if it could be used to impeach the witness.[8]

1. *R v Burke*, 2002 SCC 55 (CanLII), [2002] 2 SCR 857, *per* Major J, at para 74
2. *R v C(MH)*, 1991 CanLII 94 (SCC), [1991] 1 SCR 763, *per* McLachlin J
   R v Bjelland, 2009 SCC 38 (CanLII), [2009] 2 SCR 651, *per* Rothstein J
3. *R v Douglas*, 1991 CanLII 7328 (ON CA), , (1991) 5 OR 29, *per curiam*
4. *R v Rejzek*, 2009 ABCA 393 (CanLII), 249 CCC (3d) 202, *per curiam*, at para 26
5. See *R v McQuaid*, 1998 CanLII 805 (SCC), [1998] 1 SCR 244, *per* Cory J, at para 31
6. *R v Dixon*, 1998 CanLII 805 (SCC), [1998] 1 SCR 244, *per* Cory J, at paras 23, 31 to 35
7. *R v Illes*, 2008 SCC 57 (CanLII), [2008] 3 SCR 134{{perSCC|LeBel and Fish JJ}
8. *Illes*, *ibid.*

Exclusion of Evidence

Where late disclosure warrants the exclusion of evidence follow the following principles from *R v Bjelland*[1]:

> (a) Remedies under s. 24(1) of the Charter are flexible and contextual. The exclusion of evidence cannot be ruled out under s. 24(1). However, such a remedy will only be available where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system.
> (b) The Crown's failure to disclose evidence does not, in and of itself, constitute a violation of s. 7. Rather, an accused must generally show "actual prejudice" to his ability to make full to answer and defence.
> (c) An accused must receive a fair trial, however, the trial must be fair from both the perspective of the accused and of society more broadly. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused.
> (d) A trial judge should only exclude evidence for late disclosure in "exceptional" cases:
>
> > (e) where late disclosure renders the trial process unfair, and the unfairness cannot be remedied through an adjournment and disclosure order, or
> > (f) where exclusion in necessary to maintain the integrity of the justice system.

Non-disclosed evidence of a witness that has the effect of impairing the defence's case in a material way resulted in the exclusion of that evidence in circumstances where no other remedy is appropriate.[2]

1. 2009 SCC 38 (CanLII), [2009] 2 SCR 651, *per* Rothstein J
2. *R v D'Onofrio*, [2011] OJ No 1790(*no CanLII links)

Stay of Proceedings

Within the rights under section 7 of the Canadian Charter of Rights and Freedoms include the "right to full answer and defence". This right requires the Crown to provide all relevant evidence. A failure to do so may violate this right, and a breach of that right may entitle the accused to a stay of proceedings under s. 24(1) of the Charter.

Where a section 7 Charter breach is alleged on the basis of violating the right to make full answer and defence due to failure to make disclosure, the issue will usually be left for the conclusion of trial. Not only to first determine whether there is insufficient evidence for guilt but also that the judge can properly assess whether the right to full answer and defence was violated in context of the case in its entirety.[1]

Delayed disclosure can be a factor but not a sole basis of seeking a stay.[2]

A failure to provide disclosure that has the effect of depriving counsel of ability to assess case and making informed decisions on the preparation of case.[3]

1. *R v FCB*, 2000 NSCA 35 (CanLII), , , *per* Roscoe JA
   R v Banford, 2010 SKPC 110 (CanLII), , , *per* Toth J, at para 10 (overturned at 2011 SKQB 418 (CanLII), *per* McLellan J on other grounds).
   R v Salisbury, 2011 SKQB 153 (CanLII), [2011] S.J. No 259 (Sask.Q.B.), *per* Gerein J
   R v Burwell, 2011 SKPC 188 (CanLII), *per* Labach J
2. *R v Dias*, 2010 ABCA 382 (CanLII), 265 CCC (3d) 34, *per curiam*
3. *R v Green*, 2014 BCPC 84 (CanLII), *per* Woods - failure to disclose important evidence that would have affected defence strategy. Stay of proceedings.

Costs

Where failure to disclose is flagrant and unjustified, the court may order costs.[1]

1. *R v 974649 Ontario Inc*, 2001 SCC 81 (CanLII), [2001] 3 SCR 575, *per* McLachlin CJ

Civil Liability

The Crown may be civilly liable for damages where there was a failure to disclose and it can be proven that the Crown had "intentionally withheld" the disclosure. Malice is not required. However, the standard will be more than gross negligence.[1]

The claimant must establish causation by showing that a legally recognizable harm was caused by the failure to disclose.[2]

The standard of "intentionally withholding" disclosure should not be interpreted to affect the Crown's decision-making process.[3]

1. *Henry v British Columbia (Attorney General)*, 2015 SCC 24 (CanLII), [2015] 2 SCR 214, *per* Moldaver J
2. *Henry*, *ibid.*, at paras 95 to 98
3. *Henry*, *ibid.*, at paras 71 to 73

Demand for Particulars

This page was last substantively updated or reviewed *January 2017*. (Rev. # 79573)

< Procedure and Practice < Disclosure

General Principles

An accused can apply for an order requiring the Crown to provide particulars. Section states:

> **What may be ordered**
> **What may be ordered**
>
> 587 (1) A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars
>
> (a) of what is relied on in support of a charge of perjury, the making of a false oath or a false statement, fabricating evidence or counselling the commission of any of those offences;
> (b) of any false pretence or fraud that is alleged;
> (c) of any alleged attempt or conspiracy by fraudulent means;
> (d) setting out the passages in a book, pamphlet, newspaper or other printing or writing that are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;
> (e) further describing any writing or words that are the subject of a charge;
> (f) further describing the means by which an offence is alleged to have been committed; or
> (g) further describing a person, place or thing referred to in an indictment.
>
> **Regard to evidence**
>
> (2) For the purpose of determining whether or not a particular is required, the court may give consideration to any evidence that has been taken.
>
> **Particular**
>
> (3) Where a particular is delivered pursuant to this section,
>
> (a) a copy shall be given without charge to the accused or his counsel;
> (b) the particular shall be entered in the record; and
> (c) the trial shall proceed in all respects as if the indictment had been amended to conform with the particular.
>
> R.S., 1985, c. C-46, s. 587; R.S., 1985, c. 27 (1st Supp.), s. 7.
>
> – CCC

The power to order particulars rests in the discretion of the judge. The judge will only order where it is "necessary".[1]

The dual purpose of particulars is to 1) ensure the defence's "ability to make full answer and defence" and 2) facilitate the administration of justice.[2]

There is no absolute right to particulars.[3] The burden is upon the applicant to establish on the balance of probabilities that the "necessity" to "understand and appreciate that which is alleged against him so as to enable him to adequately prepare and defend against said allegations".[4]

The purpose of orders for particulars is: (1) "to give exact and reasonable information to the accused respecting the charges before the court"; and (2) to "facilitate the administration of justice." [5]

The applicable factors to ordering particulars are set out as follows:[6]

1. The purpose of particulars in a criminal trial is twofold. The first is to give exact and reasonable information to the accused respecting the charge against him as will enable him to establish his defence.[7]

The second purpose is to facilitate the administration of justice.[8]

1. To facilitate the administration of justice, it is essential that the trial judge has sufficient information before him or her by means of particulars as to what the Crown intends to prove against the accused in order that the trial judge may make “proper, adequate and expeditious rulings on the admissibility or otherwise of evidence sought to be deduced”[9]
2. In the event a preliminary inquiry was held, particulars and related information available from the transcript thereof are to be taken into account in applications for particulars[10]
3. The defence carries the burden of satisfying the court that the particulars sought are necessary for a fair trial.

4. An order for particulars is a discretionary power of the court and not an absolute right of the accused[11]
5. Section 587 does not require the Crown to give specific details of acts and omissions relevant to the offence charged, save where the same is clearly necessary for the purposes of a fair trial[12]

The request should be granted when the ability to mount a proper defence or the fairness of trial are impacted.[13]

The application should be considered in light of the amount and coverage of the disclosure already provided.[14]

After the rules provided in Stinchcombe requests for particulars has become far less frequent.[15]

The application should not be aimed at discovering the Crown's theory.[16] It should not be used to bind the Crown in preventing them from pursuing one theory or method of proof over another.[17]

Particulars have the effect of forming "part of the indictment and like the other elements of the indictment, must be proven beyond a reasonable doubt".[18]

1. *R v Hynes*, 2001 SCC 82 (CanLII), [2001] 3 SCR 623, *per* McLachlin CJ, at para 33
2. *R v McCarthy's Roofing Limited*, 2016 NSPC 21 (CanLII), *per* Derrick J, at para 7
   R v Canadian General Electric Co., 1974 CanLII 1540 (ONSC), [1974] OJ No 13 (HCJ), *per* Pennell J, at paras 33 and 35
3. *R v Hunter, Goshinman and Anderson*, 1985 ABCA 301 (CanLII), 23 CCC (3d) 331, *per* Lieberman JA, at para 33
4. *R v McLaren*, 1995 CanLII 6031 (SK QB), *per* Grotsky J
5. *Canadian General Electric*, *supra*, at para 35
6. *R v Imperial Tobacco Co. et al.*, 1940 CanLII 238 (AB QB), [1940] 1 DLR 397, 1 WWR 124, 73 CCC 18 (Alta. T.D.), *per* McGillivray J
   Canadian General Electric, *supra*
   R v Cominco Ltd. et al., 1978 CanLII 1997 (AB QB), 91 DLR (3d) 541, 41 CCC (2d) 514, 13 AR 106 (Alta. T.D.), *per* Brennan J
   cf. *R v McGavin Bakeries et al.*, 1950 CanLII 372 (AB QB), 99 CCC 330, 1 WWR (N.S.) 129, 11 CR 227 (Alta. T.D.), *per* McBride J
   see also E.G. Ewaschuk in Criminal Pleadings & Practice in Canada, 2nd ed., (Toronto: Canada Law Book, 2003), at pp. 9-41
7. *Canadian General Electric*, *supra*, at p. 443
8. *R v Adduono*, 1940 CanLII 109 (ON CA), [1940] 1 DLR 597, 73 CCC 152, *per* Masten JA
   See also *R v Côté*, 1977 CanLII 1 (SCC), [1978] 1 SCR 8, at p. 13, (1977), 73 DLR (3d) 752, 2 WWR 174, 33 CCC (2d) 353, *per* de Grandpré J
9. *Cominco*, *supra*, at para 15
   R v General Electric, supra, the secondary purpose of particulars was illustrated as follows at 443 (CCC): ". . .When a conspiracy count involves an alleged widespread complicated conspiracy for the accomplishment of a purpose going beyond the performance of individual acts, the particulars furnished will assist the Judge in ruling on the relevancy of the evidence. To adopt a homely form of words, at trial circumscribed by particulars will not wander all over the shop and will foreclose an unreal controversy."
10. *McGavin Bakeries*, *supra*; *R v Cominco; R v Leverton*, 1917 CanLII 378 (AB CA), [1917] 2 WWR 584, 34 DLR 514, 28 CCC 61, *per* Harvey CJ, at pp. 519-22 (DLR)
11. *R v Griffin*, 1935 CanLII 279 (NB CA), [1935] 2 DLR 503, 63 CCC 286, *per* Grimmer JA
    R v Hunter, 1986 ABCA 81 (CanLII), 23 CCC (3d) 331, *per* Stevenson J, at p. 338
12. *McGavin Bakeries*, *supra*
    Cominco, *supra*
13. *R v Violette*, 2008 BCSC 185 (CanLII), *per* Romilly J, at para 50
14. *Violette*, *ibid.*, at para 50
    R v Cargill Limited-Cargill Limitee, 2000 ABPC 96 (CanLII), 267 AR 5{, *per* Stevenson J, at para 14
15. e.g. see *R v Dalton (R.C.)*, 1999 CanLII 19775 (NLSCTD), 579 APR 20, *per* Halley J, at para 12
    R v Badry, 2000 ABPC 126 (CanLII), 270 AR 167, *per* Norheim J
16. *R v Sharpe*, 2004 BCSC 241 (CanLII), *per* Edwards J, at paras 8 to 11
    R v Thatcher, 1987 CanLII 53 (SCC), [1987] 1 SCR 652, *per* Dickson CJ
17. *Thatcher*, *ibid.*, at paras 60, 61
18. *McCarthy's Roofing*, *supra*, at para 8
    R v Saunders, 1990 CanLII 1131 (SCC), [1990] 1 SCR 1020, *per* McLachlin J, at paras 5 and 6
    R v Dalton (R.C.), 1999 CanLII 19775 (NLSCTD), 579 APR 20, *per* Halley J, at para 11

Qualified Expert

Where a party has given notice under s. 657.3(3) to call expert evidence, the responding party may seek an order for particulars under s. 657.3(5).

See Also

- Production Orders

Production Orders

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Search and Seizure < Warrant Searches < Production Orders

General Principles

A Production Order is a judicial authorization that compels a person, including an organization, to disclose documents and records to an authorized peace officer.[1]

Compared to Search Warrants

A production order cannot be used to circumvent standard search warrant to invade privacy of an accused.[2]

History

On March 9, 2015, Protecting Canadians from Online Crime Act 2014, c. 31 (Bill C-13) came into force re-drafting the production order provisions. General production orders moved from 487.012 to 487.014, 487.013 to 487.018.[3]

Section 487.012 and 487.013 (pre-2015) came into force September 15, 2004.[4]

1. *Canadian Broadcasting Corp. v Manitoba (Attorney General)*, 2009 MBCA 122 (CanLII), 250 CCC (3d) 61, *per* Steel JA, at para 24 (it compels "third parties in possession of information relevant to a criminal investigation to produce and generate documents and data for law enforcement agencies.")
2. *R v Huynh*, 2012 ABCA 37 (CanLII), 519 AR 378, *per curiam*, at para 45
3. see pre-2015 amendment version
4. see pre-2015 amendment version

Procedure

Unlike warrants, there is no need for the filing of a Report to Justice upon seizing records.[1] The only exception is for Trace Specified Communications Production Orders under s. 487.015(6).

1. There is varying case law on this point
cf. *R v Croft*, 2014 ABQB 206 (CanLII), 605 AR 55, *per* Burrows J - albeit under the pre-2014 production provisions

Types of Production Orders

- General Production Orders (487.014)
- Trace Specified Communications Production Orders (487.015)
- Transmission Data Production Orders (487.016)
- Production Orders for Tracking Data (487.017)
- Production Orders for Financial Data (487.018)

Compelling Production

> **Particulars — production orders**
>
> 487.0192 (1) An order made under any of sections 487.014 [*general production orders*] and 487.016 to 487.018 [*production orders for data*] must require a person, financial institution or entity to produce the document to a peace officer or public officer named in the order within the time, at the place and in the form specified in the order.
>
> **Particulars — production order to trace specified communication**
>
> (2) An order made under section 487.015 [*production order to trace specified communication*] must require a person to produce the document to a peace officer or public officer named in the order as soon as feasible after they are served with the order at the place and in the form specified in the order.
>
> **Form of production**
>
> (3) For greater certainty, an order under any of sections 487.014 to 487.018 [*production orders*] may specify that a document may be produced on or through an electro-magnetic medium.
>
> **Non-application**
>
> (4) For greater certainty, sections 489.1 [*restitution of property or report by peace officer*] and 490 [*detention, access and disposal of things seized*] do not apply to a document that is produced under an order under any of sections 487.014 to 487.018 [*production orders*].
> [*omitted (5) and (6)*]
> 2014, c. 31, s. 20.
> [*annotation(s) added*]
>
> – CCC

Production Records as Evidence

> 487.0192
> [*omitted (1), (2), (3) andd (4)*]

Probative force of copies

(5) Every copy of a document produced under section 487.014 [*general production orders*] is admissible in evidence in proceedings under this or any other Act of Parliament on proof by affidavit that it is a true copy and has the same probative force as the document would have if it were proved in the ordinary way.

Canada Evidence Act

(6) A document that is prepared for the purpose of production is considered to be original for the purposes of the *Canada Evidence Act*.
2014, c. 31, s. 20.

– CCC

Application to Revoke or Vary a Production Order

Application for review of production order

487.0193 (1) Before they are required by an order made under any of sections 487.014 to 487.018 [*production orders*] to produce a document, a person, financial institution or entity may apply in writing to the justice or judge who made the order — or to a judge in the judicial district where the order was made — to revoke or vary the order.

Notice required

(2) The person, institution or entity may make the application only if they give notice of their intention to do so to a peace officer or public officer named in the order within 30 days after the day on which the order is made.

No obligation to produce

(3) The person, institution or entity is not required to prepare or produce the document until a final decision is made with respect to the application.

Revocation or variation of order

(4) The justice or judge may revoke or vary the order if satisfied that

(a) it is unreasonable in the circumstances to require the applicant to prepare or produce the document; or
(b) production of the document would disclose information that is privileged or otherwise protected from disclosure by law.

2014, c. 31, s. 20.

– CCC

The terms of all production orders can be varied under s. 487.019(3):

487.019
[*omitted (1) and (2)*]

Power to revoke or vary order

(3) On ex parte application made by a peace officer or public officer, the justice or judge who made the order — or a judge in the judicial district where the order was made — may, on the basis of an information on oath in Form 5.0081 [*forms*], revoke or vary the order. The peace officer or public officer must give notice of the revocation or variation to the person who is subject to the order as soon as feasible.
2014, c. 31, s. 20; 2019, c. 25, s. 193.
[*annotation(s) added*]

– CCC

The decision to vary or revoke under s. 487.0193(4)(b) is a discretionary one on the part of the court.[1]

Revocation or Variance for Reasons of Protected Information

Section 487.0193(4)(b) permits a judge to revoke or vary an order where the order would disclose information that is "privileged or otherwise protected from disclosure by law".[2]

1. *R v Nova Scotia (Ombudsman)*, 2017 NSCA 31 (CanLII), *per* Fichaud JA, at para 32
2. *Nova Scotia (Ombudsman)*, *ibid.*, at para 25

Misc Aspects of Production Orders

Court can add conditions to all types of production orders from s. 487.014 to 487.017.

> **Conditions in preservation and production orders**
>
> 487.019 (1) An order made under any of sections 487.013 to 487.018 [*provisions on production orders*] may contain any conditions that the justice or judge considers appropriate including, in the case of an order made under section 487.014 [*general production orders*], conditions to protect a privileged communication between a person who is qualified to give legal advice and their client.
> [*omitted (2) and (3)*]
> 2014, c. 31, s. 20; 2019, c. 25, s. 193.
>
> – CCC

All types of production order from s. 487.014 to 487.017 have national application.

> 487.019
> [*omitted (1)*]
>
> **Effect of order**
>
> (2) The order has effect throughout Canada.
> [*omitted (3)*]
> 2014, c. 31, s. 20; 2019, c. 25, s. 193.
>
> – CCC

Protection From Liability

> **For greater certainty**
>
> 487.0195 (1) For greater certainty, no preservation demand, preservation order or production order is necessary for a peace officer or public officer to ask a person to voluntarily preserve data that the person is not prohibited by law from preserving or to voluntarily provide a document to the officer that the person is not prohibited by law from disclosing.
>
> **No civil or criminal liability**
>
> (2) A person who preserves data or provides a document in those circumstances does not incur any criminal or civil liability for doing so.
> 2014, c. 31, s. 20.
>
> – CCC

> **Self-incrimination**
>
> 487.0196 No one is excused from complying with an order made under any of sections 487.014 to 487.018 [*production orders*] on the ground that the document that they are required to produce may tend to incriminate them or subject them to a proceeding or penalty. However, no document that an individual is required to prepare may be used or received in evidence against them in a criminal

proceeding that is subsequently instituted against them, other than a prosecution for an offence under section 132 [*perjury – punishment*], 136 [*witness giving contradictory evidence*] or 137 [*fabricating evidence*].
2014, c. 31, s. 20.

– CCC

Breach of Production Orders

Offence — preservation or production order

487.0198 A person, financial institution or entity that contravenes an order made under any of sections 487.013 to 487.018 [*provisions on production orders*] without lawful excuse is guilty of an offence punishable on summary conviction and is liable to a fine of not more than $250,000 or to imprisonment for a term of not more than six months, or to both.
2014, c. 31, s. 20.
[*annotation(s) added*]

– CCC

Production by Consent

Where documents are voluntarily and lawfully provided to a peace officer who is executing his duties, there is no need for a production order.[1]

Section 25 protects those acting in authority from criminal liability.[2]

1. see s. 487.014 found at General Production Orders
2. see Acting in Authority

Sealing Orders

- Sealing and Unsealing Judicial Authorizations

Costs

A company that is subject to a production order will normally have to bear the costs involved with producing the records. [1]

The authorizing justice does not have power to order that the target of the production order be compensated for the cost associated with compliance.[2]

1. *Canada (Attorney General) v Pacific International Securities Inc*, 2006 BCCA 303 (CanLII), 209 CCC (3d) 390, *per* Smith JA
2. *Tele-Mobile Co. v Ontario*, 2008 SCC 12 (CanLII), [2008] 1 SCR 305, *per* Abella J

See Also

- Preservation Demands and Orders
- Foreign Warrants (MLATs)
- Particulars
- Miscellaneous Judicial Authorization Provisions
- Judicial Authorization Chart

	Types of Warrants
Warrants	487 Warrants (487), General Warrants (487.01), CDSA Warrants (CDSA 11), Impaired Driving Blood Samples (320.29), Wiretaps (184), Consent Wiretaps (184.2), Firearms Warrant (117.02, 117.04), Gaming House Warrants (199), DNA Sample (487.05), Law Office Searches (488.1), Hate Propaganda Warrants (320), Seizure of Proceeds of Crime (462.32), Bodily Impressions Warrants (487.092), Warrants to Seize Explosives (492), Production Orders (487.014), Tracking Warrants (492.1), Warrant for Transmission Data Recorder (492.2)

Special Disclosure Issues

This page was last substantively updated or reviewed *January 2021*. (Rev. # 79573)

< Procedure and Practice < Disclosure

Defence Duty to Disclose to Crown

There are limited obligations on defence to disclose evidence to the Crown. The primary obligation to disclose defence evidence is when alibi evidence will be advanced.[1]

Where defence is calling expert evidence supported by a report, the report and any other foundation materials must be disclosed to the Crown no later than the time at which the witness is called.[2]

Normally, the accused is entitled to retain an expert or conduct independent investigations without any obligation to disclose any of the results or any materials the independent third party relied upon.[3] These materials are considered covered by litigation privilege.[4]

When the accused elects to call such a witness to testify, the act of calling the expert constitutes waiver of litigation privilege.[5]

There are several disclosure obligations. An expert witness who is to testify for the defence must provide 30 days notice of the intention to call the expert witness and provide the report or summary of evidence no later than at the close of the Crown's case.[6]

When an expert testifies at trial, the party calling them must disclose any material considered by the expert in coming up with their opinion.[7]

It does not matter whether the particular document was made for the use of counsel or for the assistance of the experts, it is only whether the records relate to information that the expert relied upon.[8] So for example, if defence possessed a recording made in an interview with a person who's evidence the expert relied upon, then it will constitute disclosable records. It is not necessary that the expert put weight on the particular record.[9]

Defence obligation is not satified by merely disclosing a summary of the record.[10]

Although the accused is entitled to withhold the records until the moment the expert is called, the Crown may seek an order for disclosure pre-emptively and may be entitled to an adjournment to review the materials alone or with a Crown expert.[11]

Records disclosed by defence can be used by the Crown for any legimitate purpose and not solely for the purpose of cross-examining the expert witness.[12]

1. See Alibi
2. *R v Stone*, 1999 CanLII 688 (SCC), [1999] 2 SCR 290, *per* Bastarache J
3. *R v Alek Minassian*, 2020 ONSC 7130 (CanLII), *per* Molloy J, at para 7
4. See Litigation Privilege
5. *Stone*, *supra* ("The act of calling of Dr. Janke would certainly constitute waiver of any privilege attached to his report. As noted by McEachern C.J., once a witness takes the stand, he/she can no longer be characterized as offering private advice to a party.")
6. *Minassian*, *supra*, at para 8
7. *Minassian*, *supra*, at para 9 ("it is well accepted in the case law (and not in dispute in this case) that when an expert testifies at trial, disclosure must be made of any material relied upon by the expert in coming to his or her opinion.")
   Stone, *supra* ("...the opposing party must be given access to the foundation of such opinions to test them adequately. Given the fact that the report would have to have been disclosed after Dr. Janke's direct examination, the prior disclosure of the report cannot be said to have had any material impact on the outcome of the trial. Absent the earlier disclosure, the Crown would have been entitled to stand the appellant down before completing its cross-examination of him, and to recall him once they had been given an opportunity to consider the contents of the report")
8. *Minassian*, *supra*, at para 13
9. *Minassian*, *supra*
10. *Minassian*, *supra*, at para 15
11. *Minassian*, *supra*, at para 19
12. *Minassian*, *supra*, at paras 21 to 24

Pre-Charter and Pre-Stinchcombe Disclosure

Under the common law the Crown has a general duty to disclose material evidence to the defence regardless of whether it is favourable to the Crown and whether the witness will be called by the Crown.[1] A breach of the common law duty render the trial unfair and be ground for appeal.[2]

1. *R v Lemay*, 1951 CanLII 27 (SCC), [1952] 1 SCR 232, *per* Kerwin J
2. *R v C(MH)*, 1991 CanLII 94 (SCC), [1991] 1 SCR 763, *per* McLachlin J

Uses of Disclosure Other Than For Defence

When defence take possession of disclosure there is an implied undertaking "not to disclose its contents for any purpose other than making full answer and defence in the proceedings".[1] They have an obligation as officers of the court to not disclose any materials to the public.[2] Disclosure to third-parties is only available where their "examination or possession of the material is in good faith necessary to prepare and conduct the defence".[3]

The Crown can petition the Court to order that defence counsel return any disclosure given to them once the entitlement to the materials have expired.[4]

1. *R v Basi*, 2011 BCSC 314 (CanLII), *per* MacKenzie ACJ, at para 42 ("...I would affirm that an accused who receives disclosure material pursuant to the Crown's Stinchcombe obligations, or to a court order, does so subject to an implied undertaking not to disclose its contents for any purpose other than making full answer and defence in the proceeding.")
   R v Little, 2001 ABPC 13 (CanLII), 82 CRR (2d) 318, *per* Meagher J
   R v Mossaddad, 2017 ONSC 5520 (CanLII), *per* Edwards J, at para 38 ("...the time has come for this court to recognize that whether or not the Crown disclosure provided to defence counsel or a self-represented accused is the subject of a written undertaking, that a deemed undertaking nonetheless would apply such that the only basis upon which the Crown disclosure may be used would be in the context of providing a full answer and defence to the criminal proceedings.")
   Home Office v Harman (H.O.(E.)) , [1983] A.C. 280 (H.L.) (UK), at p. 304 - in civil context, breach of implied undertaking amounts to contempt of court. Adopted in *Canada in Worth Ltd. v Acadia Pipe and Supply Corp., et al* , 1991 CanLII 5837 (AB QB), 113 AR 298 (Q.B.), *per* Lutz J and in *Goodmani v Rossi*, 1995 CanLII 1888 (ON CA), 125 DLR (4th) 613, 24 OR (3d) 395, *per* Morden ACJ
2. *R v Smith*, 1994 CanLII 5076 (SKQB), 146 Sask R 202 (Q.B.), *per* Walker J ("One of those duties [to the court], in my view, is not to give disclosure materials to the public. To do so would fall short of acting responsibly as an officer of the court. ") see also Report of the Attorney

General's Advisory Committee on Charge Screening Disclosure, and Resolution Discussions
3. *Smith*, *ibid.*, at p. 205
4. *Basi*, *supra*

Return of Disclosure

Once proceedings have completed there is no entitlement to the disclosure.[1]

1. *R v Basi*, 2011 BCSC 314 (CanLII), *per* MacKenzie J

Access to Disclosure by Third Parties

Typically disclosure constitutes confidential government records. They are obtainable from parties other than the Crown or Defence counsel by way of a request through the appropriate freedom of information or privacy legislation.[1]

A third party request for the production of materials that are part of a proceeding must be made to the presiding judge.

Where a matter has been concluded, the superior court does not have jurisdiction to order the release or production of any documents or evidence to third party applicants.[2]

1. e.g. Federal (RCMP, etc): Privacy Act, RSC 1985, c P-21 and Access to Information Act, R.S.C., 1985, c. A-1
Ontario: Municipal Freedom of Information and Protection of Privacy Act, RSO 1990, c M.56
Nova Scotia:Freedom of Information and Protection of Privacy Act, SNS 1993, c 5
Alberta: Freedom of Information and Protection of Privacy Act
Personal Information Protection Act
2. *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2009 NSSC 400 (CanLII), 286 NSR (2d) 186, *per* LeBlanc J upheld at 2010 NSCA 99 (CanLII), *per* Bryson JA

Access to Exhibits and Seized Property

This page was last substantively updated or reviewed *January 2014*. (Rev. # 79573)

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

Introduction

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

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

Access to Seized Property

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

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

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

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

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

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

Sharing Seized Evidence Amongst Government Organizations

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

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

See Also

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

Access to Court-Filed Exhibits

This page was last substantively updated or reviewed *January 2018*. (Rev. # 79573)

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

General Principles

Access to Court Record

The Court has a power to supervise and protect its own records.[1]

1. *MacIntyre v Attorney General of Nova Scotia et al*, 1982 CanLII 14 (SCC), [1982] 1 SCR 175, *per* Dickson CJ, at p. 193 ("Undoubtedly every court has a supervisory and protecting power over its own records")

Sealing and Accessing Exhibits

Sealing Orders

The power to seal exhibits comes from the common law.[1]

A sealing order on an exhibit is a form of publication ban and must satisfy the Dagenais/Mentuck test.[2]

Under the Dagenais/Mentuck test, when considering whether to apply a sealing order, the Court must consider whether the protections of a publication ban would be a "reasonable alternative measures".[3]

When dealing with sexual offences, it appears the order can be considered an application under s. 486(4).[4]

Release

The decision to release Court exhibits to the public for publication is at the discretion of the presiding judge.[5]

A judge should only refuse a request from the media to access evidence from a preliminary inquiry after the conclusion of trial where:

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

The judge must rely on actual evidence and not simply judicial common sense and logic alone.[6]

Applications to restrict viewing of exhibits presented in court should have "early notice" so that the court can give direction and the matter can be settled before trial.[7]

Procedure

There is likely an obligation upon the parties to give notice to the media where there is an application to seal an exhibit.[8]

Where notice to the media may slow down the process of sealing and there is a *prima facie* case to seal the exhibit, the Court may seal it first and allow for notice to media on a later date.[9]

Victim's interests

Autopsy photographs were not releasable to protect the right to a fair trial and privacy rights of victim's family.[10]

Accused's Interests

The interests in protecting an acquitted accused by refusing to release an inadmissible cautioned statement of the accused were sufficient to prohibit it's release.[11] By contrast, a statement of an accused found not criminally responsible to a psychiatrist was found releasable to assist the public in understanding the nature of the offence.[12]

1. *R v Moosemay*, 2001 ABPC 156 (CanLII), 297 AR 34, *per* Fradsham J, at para 23
2. *R v Clauer*, 2011 ABQB 98 (CanLII), 511 AR 253, *per* Veit J, at paras 26 to 34
3. *R v Vice Media Canada*, 2017 ONCA 231 (CanLII), 352 CCC (3d) 355, *per* Doherty JA, at para 52
4. e.g. *R v Stratton*, 2009 ONCJ 181 (CanLII), *per* Bellefontaine J
5. *R v Hilderman*, 2006 ABQB 107 (CanLII), 68 WCB (2d) 705, *per* P Martin J, at paras 5 and 6
6. *CTV Television Inc v R. et al.*, 2006 MBCA 132 (CanLII), 214 CCC (3d) 70, *per* MA Monnin JA
7. *Stratton*, *supra* ("I would observe for future cases that I consider it incumbent on the Crown to bring early notice of their intention to bring an Application to restrict public access to the evidence to the Court so that more time will be available to obtain directions from the Court and for the Application to be dealt with thoroughly before trial.")
8. *AB v Bragg Communications Inc*, 2012 SCC 46 (CanLII), [2012] 2 SCR 567, *per* Abella J
9. *Moosemay*, *supra*, at para 38
   R v KSY, 2001 CanLII 8579 (ON CA), [2001] OJ No 3207, *per curiam*
10. *R v W.P. Glowatski*, 1999 CanLII 5632 (BC SC), [1999] BCJ No 1110 (B.C. S.C.), *per* Macaulay J
11. *Vickery v Nova Scotia Supreme Court (Prothonotary)*, 1991 CanLII 90 (SCC), [1991] 1 SCR 671, *per* Stevenson J
12. *R v Arenburg*, [1997] OJ No 2386 (Ont. Gen. Div.)(*no CanLII links) , *per* Chadwick J

Obscene and Pornographic Materials

When sealing child pornography, the Crown must give advance notice to the Court and media.[1]

The authority to seal and restrict access to exhibits of child pornography arises from inherent jurisdiction of the Court.[2]

Obscene Materials

The right to freedom of expression and the press “must stop short of requiring the court to distribute obscene material”.[3]

Application to seal exhibit of a video and photographs of a victim’s vaginal and anal regions taken by the accused while the victim sleeps is not accepted.[4]

Child Pornography

Exhibits such as those showing child pornography and sexual assault, or other materials with "virtually no redeeming social value" are generally sealable.[5]

The dangers of permitting release of child pornographic images include:[6]

1. disclose the identity of the victims;
2. cause significant psychological harm to the victims;
3. discourage the reporting of sexual offences;
4. publicize child pornography; and
5. disadvantage women and girls who are subjected to significant trauma by sexual violence and pornography.

1. *R v JJP*, 2017 YKSC 66 (CanLII), *per* Veale J, at para 4
2. *JJP*, *ibid.*
3. *R v Clauer*, 2011 ABQB 98 (CanLII), 511 AR 253, *per* Veit J, at para 33
4. *Clauer*, *ibid.*
5. *R v Bernardo*, [1995] OJ. No 1472 (Ont. Gen. Div.)(*no CanLII links) - video of child victims in a homicide case being sexually assaulted. Judge was "satisfied that the harm that flows from the public display of this videotape evidence far exceeds any benefit that will flow from the public exposure of sexual assault and child pornography".
6. *JJP*, *supra*, at para 36

Release of Exhibits for Testing

All objects that are put in as exhibits before the court may be released for the purpose of testing on an application of a party.

Section 605 states:

> **Release of exhibits for testing**
>
> 605 (1) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, after three days notice to the accused or prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.
>
> **Disobeying orders**
>
> (2) Every one who fails to comply with the terms of an order made under subsection (1) [*release of exhibits for testing*] is guilty of contempt of court and may be dealt with summarily by the judge or provincial court judge who made the order or before whom the trial of the accused takes place.
> R.S., 1985, c. C-46, s. 605; R.S., 1985, c. 27 (1st Supp.), s. 203.
> [*annotation(s) added*]
>
> – CCC

The application may be made before either a superior court judge or a provincial court judge on three days notice.

Once the proceedings are complete and all avenues of appeal are exhausted this section no longer applies to exhibits.[1]

1. e.g. *R v Horne*, 1999 ABQB 754 (CanLII), 47 WCB (2d) 269, *per* Veit J, at para 34

Media Access to Exhibits

The right to access to exhibits flows from the "open court principle". [1]

It also arises from the s. 2(b) Charter right to freedom of expression.[2]

There is a presumption of access to exhibits.[3]

Where there is no governing legislation, access to exhibits is up to the judge to decide.[4]

Access can be denied "when the ends of justice would be subverted by disclosure or ... used for an improper purpose".[5]

The court is the custodian of exhibits and has supervisory powers of the materials surrendered to it, which includes the regulation of its use. The court must "inquire into the use that is to be made of them and ...[is] fully entitled to regulate that use by securing appropriate undertakings and assurances if those be advisable to protect competing interests."[6]

The public interest in the press having access to all information regarding a court proceeding in rooted in the need to:[7]

1. to maintain an effective evidentiary process;
2. to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society;
3. to promote a shared sense that our courts operate with integrity and dispense justice; and
4. to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them

Dagenais/Mentuck test should apply to requests of third-parties to access exhibits.[8]

The test requires the party opposing access to show that it is "necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties and the public."[9]

When dealing with a young offender, the courts must take into account the privacy requirements under the YCJA when deciding whether to give access to the exhibit.[10]

No court order is required to access an exhibit.[11]

Jurisdiction

It is the trial judge who should be deciding whether access should be allowed. A superior court judge who is not the trial judge should decline jurisdiction to decide whether to grant access.[12]

Pre-trial proceedings

The right to access exhibits includes access at pre-trial proceedings.[13]

Making Copies

The right to access exhibits undoubtedly includes the right to copy them.[14]

Denying Access

The party filing an exhibit who wishes to have access denied should provide "Dagenais notice" to the media and interested parties of their intention.[15] The burden is upon the party seeking to deny access to the exhibit.[16]

1. *R v CBC*, 2010 ONCA 726 (CanLII), 262 CCC (3d) 455, *per* Sharpe JA
   R v Magnotta, 2013 QCCS 4395 (CanLII), *per* Cournoyer J
2. *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 (CanLII), [2005] 2 SCR 188, *per* Fish J, at paras 1 to 9
   Magnotta, *supra*
3. *Muir v Alberta*, 1995 CanLII 9166 (AB QB), [1995] AJ No 1656, *per* Veit J, at and 17 paras 15 and 17{{{3}}} ("Access to exhibits is presumed in an open justice system")
   Magnotta, *supra*, at para 29 ("Access to court exhibits is the constitutional norm and restricting access the exception. In the absence of a specific court order to the contrary, access to exhibits is to be granted without restrictions and copies are to be provided.")
4. *R v CBC*, 2011 SCC 3 (CanLII), [2011] 1 SCR 65, *per* Deschamps J, at para 12 ("In the absence of an applicable statutory provision, it is up to the trial judge to decide how exhibits can be used so as to ensure that the trial is orderly.")
5. *AG (Nova Scotia) v MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 SCR 175, *per* Dickson J, at p. 189 (SCR) ("Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercice of the right.")
   CBC, *supra*, at para 12
6. *Vickery v Nova Scotia Supreme Court (Prothonotary)*, 1991 CanLII 90 (SCC), [1991] 1 SCR 671, *per* Stevenson J, at paras 24 to 25
   MacIntyre, *supra*, at p. 189 (SCR)
7. *Edmonton Journal v Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 SCR 1326Superscript text, at para 61
8. *Canadian Broadcasting Corporation*, *supra*
   Global BC, A Division of Canwest Media Inc v British Columbia, 2010 BCCA 169 (CanLII), [1991] 1 SCR 671, *per* Newbury JA (2:1), at paras 29 to 30
9. *Canadian Broadcasting Corporation*, *supra*
10. e.g. see *R v BJ*, 2009 ABPC 248 (CanLII), 479 AR 248, *per* Miller J
11. *Magnotta*, *supra*, at para 31
12. *Magnotta*, *supra*, at paras 39 to 53
13. *Magnotta*, *supra*, at para 25
    Vancouver Sun (Re), 2004 SCC 43 (CanLII), [2004] 2 SCR 332, *per* Iacobucci and Arbour JJ, at para 27
14. *Magnotta*, *supra*, at paras 20 to 24
    CBC, *supra*, at para 31
15. *Magnotta*, *supra*, at para 30
    Dagenais v Canadian Broadcasting Corp, 1994 CanLII 39 (SCC), [1994] 3 SCR 835, *per* Lamer CJ, at p. 868-9 (SCR)
    Vancouver Sun, *supra*, at para 52
16. *Canadian Broadcasting Corp*, *supra*, at paras 13 to 14

See Also

- Public and Media Restrictions
- Sealing and Unsealing Warrants

Courts and Charges

Criminal Courts and Charges

Criminal Courts

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Procedure and Practice

Introduction

All provinces and territories have three levels of court with the exception of Nunavut.

Trial Court	Provincial / Territorial Court Superior Court
Appellate Court	Summary Conviction Appeals Court (Superior Court) Court of Appeal

Courts by Province

Prov / Terr.	Inferior-level Court	Superior-level Court / Summary Appeal-level Court	Appellate Court
Federal	N / A	N / A	Supreme Court of Canada
Newfoundland and Labrador	Provincial Court of Newfoundland and Labrador	Supreme Court of Newfoundland and Labrador, Trial Division	Supreme Court of Newfoundland and Labrador, Court of Appeal
Prince Edward Island	Provincial Court of Prince Edward Island	Supreme Court of Prince Edward Island	Prince Edward Island Court of Appeal
Nova Scotia	Provincial Court of Nova Scotia	Supreme Court of Nova Scotia	Nova Scotia Court of Appeal
New Brunwick	Provincial Court	Court of Queen's Bench of New Brunswick	Court of Appeal of New Brunswick
Quebec	Court of Quebec	Superior Court	Court of Appeal
Ontario	Ontario Court of Justice	Superior Court of Justice (previously divided into Ontario Court of Justice (General Division) and High Court of Justice)	Court of Appeal for Ontario
Manitoba	Provincial Court of Manitoba	Court of Queen's Bench of Manitoba	Court of Appeal
Saskatchewan	Provincial Court of Saskatchewan	Court of Queen's Bench for Saskatchewan	Court of Appeal for Saskatchewan
Alberta	Provincial Court	Alberta Court of Queen's Bench	Court of Appeal
British Columbia	Provincial Court of British Columbia	Supreme Court of British Columbia	Court of Appeal
Nunvut	N / A	Nunavut Court of Justice	Court of Appeal of Nunavut
Northwest Territories	Territorial Court of the Northwest Territories	Supreme Court of the Northwest Territories	Court of Appeal for the Northwest Territories
Yukon	Territorial Court of Yukon	Supreme Court of Yukon	Court of Appeal

Court of Criminal Jurisdiction

A court of criminal Jurisdiction refers to those courts which are able to hold trial regarding criminal matters. This consists of both provincial courts and superior courts. Section 2 of the Code specifically defines them as:

> 2 In this Act,
> ...
> **"court of criminal jurisdiction"** means
>
> (a) a court of general or quarter sessions of the peace, when presided over by a superior court judge,
> (a.1) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,
> (b) a provincial court judge or judge acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*], and
> (c) in the Province of Ontario, the Ontario Court of Justice;
>
> ...
> R.S., 1985, c. C-46, s. 2; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 2, 203, c. 31 (1st Supp.), s. 61, c. 1 (2nd Supp.), s. 213, c. 27 (2nd Supp.), s. 10, c. 35 (2nd Supp.), s. 34, c. 32 (4th Supp.), s. 55, c. 40 (4th Supp.), s. 2; 1990, c. 17, s. 7; 1991, c. 1, s. 28, c. 40, s. 1, c. 43, ss. 1, 9; 1992, c. 20, s. 216, c. 51, s. 32; 1993, c. 28, s. 78, c. 34, s. 59; 1994, c. 44, s. 2; 1995, c. 29, ss. 39, 40, c. 39, s. 138; 1997, c. 23, s. 1; 1998, c. 30, s. 14; 1999, c. 3, s. 25, c. 5, s. 1, c. 25, s. 1(Preamble), c. 28, s. 155; 2000, c. 12, s. 91, c. 25, s. 1(F); 2001, c. 32, s. 1, c. 41, ss. 2, 131; 2002, c. 7, s. 137, c. 22, s. 324; 2003, c. 21, s. 1; 2004, c. 3, s. 1; 2005, c. 10, s. 34, c. 38, s. 58, c. 40, ss. 1, 7; 2006, c. 14, s. 1; 2007, c. 13, s. 1; 2012, c.1, s. 160, c. 19, s. 371; 2013, c. 13, s. 2; 2014, c. 17, s. 1, c. 23, s. 2, c. 25, s. 2; 2015, c. 3, s. 44, c. 13, s. 3, c. 20, s. 15; 2018, c. 21, s. 12; 2019, c. 13, s. 140; 2019, c. 25, s. 1.
> [*annotation(s) added*]
>
> – CCC

What specific types of criminal matters courts of criminal jurisdiction can hear will be dictated by the Code. Certain types of offences will be designated as within the sole jurisdiction of a select type of court of criminal jurisdiction. This is what is referred to as absolute or exclusive jurisdiction offences.[1]

1. see Defence Election for details

Summary Conviction Court

Part XXVII (s. 785 to 840) defines "summary conviction court" as:

> **Definitions**

785 In this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*],
...
"summary conviction court" means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen and who

(a) is given jurisdiction over the proceedings by the enactment under which the proceedings are taken,
(b) is a justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons, or
(c) is a provincial court judge, where the enactment under which the proceedings are taken gives jurisdiction in respect thereof to two or more justices;

summary conviction court means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen and who ...
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

This definition also applies to Part XXIII (s. 716 to 751.1) and XX.1 (s. 672.1 to 672.95). Further, references under s. 111, 117.011, 117.05, 175, 573, 669.2, and 699.

Superior Courts

2 In this Act,
...
"superior court of criminal jurisdiction" means

(a) in the Province of Ontario, the Court of Appeal or the Superior Court of Justice,
(b) in the Province of Quebec, the Superior Court,
(c) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Court of Appeal or the Supreme Court,
(d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Appeal or the Court of Queen's Bench,
(e) in the Province of Newfoundland and Labrador, Yukon and the Northwest Territories, the Supreme Court, and
(f) in Nunavut, the Nunavut Court of Justice;
(g) and (h) [Repealed, 2015, c. 3, s. 44]

...
R.S., 1985, c. C-46, s. 2; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 2, 203, c. 31 (1st Supp.), s. 61, c. 1 (2nd Supp.), s. 213, c. 27 (2nd Supp.), s. 10, c. 35 (2nd Supp.), s. 34, c. 32 (4th Supp.), s. 55, c. 40 (4th Supp.), s. 2; 1990, c. 17, s. 7; 1991, c. 1, s. 28, c. 40, s. 1, c. 43, ss. 1, 9; 1992, c. 20, s. 216, c. 51, s. 32; 1993, c. 28, s. 78, c. 34, s. 59; 1994, c. 44, s. 2; 1995, c. 29, ss. 39, 40, c. 39, s. 138; 1997, c. 23, s. 1; 1998, c. 30, s. 14; 1999, c. 3, s. 25, c. 5, s. 1, c. 25, s. 1(Preamble), c. 28, s. 155; 2000, c. 12, s. 91, c. 25, s. 1(F); 2001, c. 32, s. 1, c. 41, ss. 2, 131; 2002, c. 7, s. 137, c. 22, s. 324; 2003, c. 21, s. 1; 2004, c. 3, s. 1; 2005, c. 10, s. 34, c. 38, s. 58, c. 40, ss. 1, 7; 2006, c. 14, s. 1; 2007, c. 13, s. 1; 2012, c.1, s. 160, c. 19, s. 371; 2013, c. 13, s. 2; 2014, c. 17, s. 1, c. 23, s. 2, c. 25, s. 2; 2015, c. 3, s. 44, c. 13, s. 3, c. 20, s. 15; 2018, c. 21, s. 12; 2019, c. 13, s. 140; 2019, c. 25, s. 1.

– CCC

Under Part III:

84 (1) In this Part [*Pt. III – Firearms and Other Weapons (s. 84 to 117.15)*],
...
"superior court" means

(a) in Ontario, the Superior Court of Justice, sitting in the region, district or county or group of counties where the relevant adjudication was made,
(b) in Quebec, the Superior Court,
(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,
(d) in Nova Scotia, British Columbia, Prince Edward Island and a territory, the Supreme Court, and
(e) in Newfoundland and Labrador, the Trial Division of the Supreme Court;

...
[*omitted (2), (3), (3.1), (4), (5) and (6)*]
R.S., 1985, c. C-46, s. 84; R.S., 1985, c. 27 (1st Supp.), ss. 185(F), 186; 1991, c. 40, s. 2; 1995, c. 39, s. 139; 1998, c. 30, s. 16; 2003, c. 8, s. 2; 2008, c. 6, s. 2; 2009, c. 22, s. 2; 2015, c. 3, s. 45; 2018, c. 16, s. 216, c. 21, s. 18; 2019, c. 13, s. 152; 2019, c. 25, s. 196.1.
[*annotation(s) added*]

– CCC

Court of Appeal

2 In this Act,
...
"court of appeal" means, in all provinces, the Court of Appeal.
...
R.S., 1985, c. C-46, s. 2; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 2, 203, c. 31 (1st Supp.), s. 61, c. 1 (2nd Supp.), s. 213, c. 27 (2nd Supp.), s. 10, c. 35 (2nd Supp.), s. 34, c. 32 (4th Supp.), s. 55, c. 40 (4th Supp.), s. 2; 1990, c. 17, s. 7; 1991, c. 1, s. 28, c. 40, s. 1, c. 43, ss. 1, 9; 1992, c. 20, s. 216, c. 51, s. 32; 1993, c. 28, s. 78, c. 34, s. 59; 1994, c. 44, s. 2; 1995, c. 29, ss. 39, 40, c. 39, s. 138; 1997, c. 23, s. 1; 1998, c. 30, s. 14; 1999, c. 3, s. 25, c. 5, s. 1, c. 25, s. 1(Preamble), c. 28, s. 155; 2000, c. 12, s. 91, c. 25, s. 1(F); 2001, c. 32, s. 1, c. 41, ss. 2, 131; 2002, c. 7, s. 137, c. 22, s. 324; 2003, c. 21, s. 1; 2004, c. 3, s. 1; 2005, c. 10, s. 34, c. 38, s. 58, c. 40, ss. 1, 7; 2006, c. 14, s. 1; 2007, c. 13, s. 1; 2012, c.1, s. 160, c. 19, s. 371; 2013, c. 13, s. 2; 2014, c. 17, s. 1, c. 23, s. 2, c. 25, s. 2; 2015, c. 3, s. 44, c. 13, s. 3, c. 20, s. 15; 2018, c. 21, s. 12; 2019, c. 13, s. 140; 2019, c. 25, s. 1.

– CCC

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, 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

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 [*general Code definitions*], 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.
[*omitted (2), (3) and (4)*]
2002, c. 13, s. 71.
[*annotation(s) added*]

– CCC

Summary Conviction Appeal Court

Definition of appeal court

812 (1) For the purposes of sections 813 to 828 [*summary trial appeal provisions*], **"appeal court"** means

(a) in the Province of Ontario, the Superior Court of Justice sitting in the region, district or county or group of counties where the adjudication was made;
(b) in the Province of Quebec, the Superior Court;
(c) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court;

(d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench;
(e) [Repealed, 1992, c. 51, s. 43]
(f) [Repealed, 2015, c. 3, s. 56]
(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court;
(h) in Yukon and the Northwest Territories, a judge of the Supreme Court; and
(i) in Nunavut, a judge of the Nunavut Court of Justice.

When appeal court is Court of Appeal of Nunavut

(2) A judge of the Court of Appeal of Nunavut is the appeal court for the purposes of sections 813 to 828 [*summary trial appeal provisions*] if the appeal is from a conviction, order, sentence or verdict of a summary conviction court consisting of a judge of the Nunavut Court of Justice.
R.S., 1985, c. C-46, s. 812; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (2nd Supp.), s. 10; 1990, c. 16, s. 7, c. 17, s. 15; 1992, c. 51, s. 43; 1998, c. 30, s. 14; 1999, c. 3, s. 55; 2002, c. 7, s. 149; 2015, c. 3, s. 56.
[*annotation(s) added*]

– CCC

Definition of appeal court

829 (1) Subject to subsection (2) [*meaning of "appeal court" re nunavut*], for the purposes of sections 830 to 838 [*summary appeal on transcript or agreed statement of facts*], **"appeal court"** means, in any province, the superior court of criminal jurisdiction for the province.

Nunavut

(2) If the appeal is from a conviction, judgment, verdict or other final order or determination of a summary conviction court consisting of a judge of the Nunavut Court of Justice, **"appeal court"** means a judge of the Court of Appeal of Nunavut.
R.S., 1985, c. C-46, s. 829; R.S., 1985, c. 27 (1st Supp.), s. 182; 1999, c. 3, s. 56.
[*annotation(s) added*]

– CCC

Court of Competent Jurisdiction

Generally, a court of competent jurisdiction is one which has jurisdiction over the subject matter, the parties and power to order a remedy.[1]

However, competent jurisdiction is not conveyed by the Charter, but rather exists independently of it.[2]

A "court of competent jurisdiction" is not defined in the Criminal Code.[3] It refers to a court "that possesses jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction to grant the remedy".[4] To have jurisdiction over remedy depends on whether "the court or tribunal suited to grant the remedy sought under s. 24 in light of its function and structure"[5]

1. *United Nurses of Alberta, Local 115 v Foothills Provincial General Hospital Board*, 1987 CanLII 3392 (AB QB), 40 DLR (4th) 163, *per* Chrumka J, at para 13
   Weber v Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 SCR 929, *per* McLachlin J
2. *United Nurses of Alberta*, *supra*, at para 13
3. The only specific reference is s. 290, 462.48
4. *R v Hynes*, 2001 SCC 82 (CanLII), [2001] 3 SCR 623, *per* McLachlin CJ, at para 26
5. *Hynes*, *ibid.*, at para 27

Charter Remedies

In criminal law, the term "court of competent jurisdiction" arises from the words found in s. 24(1) of the Charter which provides that only courts of competent jurisdiction may order remedies for Charter breaches. [1]

A CCJ should include a trial judge.[2] But does not include a preliminary inquiry judge.[3]

A preliminary inquiry judge is not a CCJ and consequently cannot grant remedies under the Charter.[4]

A federal parole board is not a CCJ to grant Charter remedies.[5]

1. Section 24(1) of the Charter reads: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."
2. *R v Rahey*, 1987 CanLII 52 (SCC), [1987] 1 SCR 588

3. *Hynes*, *supra*
4. *R v Mills*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863 (SCC), *per* Lamer CJ (in dissent) (""I agree that a judge presiding at a preliminary inquiry is not a court of competent jurisdiction for the purpose of granting a remedy under s. 24(1). This finding is subject to one exception however. I am of the view that the preliminary inquiry judge is a court of competent jurisdiction for making a finding under s. 24(1) as regards to a violation for the purpose of excluding evidence under s. 24(2).")
5. *Mooring v Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 SCR 75 (SCC), *per* Sopinka J

Courts of Inherent Jurisdiction

Superior courts of the province possess "inherent jurisdiction" provided to them through s. 96 of the Constitution Act, 1982.[1] This jurisdiction cannot be removed by statute.[2]

Inherent jurisdiction has been characterized as a "residual" power that has been applied in a "limited" fashion.[3]

Courts of appeal does not have any inherent jurisdiction.[4]

1. section 96 states under the heading of Appointment of Judges: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."
   Kourtessis v MNR, 1993 CanLII 137 (SCC), [1993] 2 SCR 53, at pp. 65-66 (“Only superior court judges appointed under s. 96 of the Constitution Act, 1867 have inherent jurisdiction.”)
2. *MacMillan Bloedel Ltd. v Simpson*, 1995 CanLII 57 (SCC), [1995] 4 SCR 725, *per* Lamer CJ
   cf. *Shreem Holdings Inc v Barr Picard*, 2014 ABQB 112 (CanLII), 585 AR 356, *per* Wakeling J, at paras 26 to 42
3. *Bass v Mcnally*, 2003 NLCA 15 (CanLII), 35 CPC (5th) 219, *per* Cameron JA
4. *R v GW*, 1999 CanLII 668 (SCC), [1999] 3 SCR 597, *per* Lamer CJ, at para 8
   Kourtessis v MNR, *supra*, at pp. 65-66 ("And courts of appeal have no inherent rights to create appeals. Only superior court judges appointed under s. 96 of the Constitution Act, 1867 have inherent jurisdiction.")

"Court" for Certain Warrants

Section 164

Section 164 defines "judge" for the purpose of s. 164 as:

> 164
> [*omitted (1), (2), (3), (4), (5), (6) and (7)*]
> (8) In this section,
> ...
> **"court"** means
>
> (a) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,
> (a.1) in the Province of Ontario, the Superior Court of Justice,
> (b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen’s Bench,
> (c) in the Provinces of Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court,
> (c.1) [Repealed, 1992, c. 51, s. 34]
> (d) in the Provinces of Nova Scotia and British Columbia, in Yukon and in the Northwest Territories, the Supreme Court, and
> (e) in Nunavut, the Nunavut Court of Justice;
>
> ...
> R.S., 1985, c. C-46, s. 164; R.S., 1985, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 3, c. 17, s. 9; 1992, c. 1, s. 58, c. 51, s. 34; 1993, c. 46, s. 3; 1997, c. 18, s. 5; 1998, c. 30, s. 14; 1999, c. 3, s. 27; 2002, c. 7, s. 139, c. 13, s. 6; 2005, c. 32, s. 8; 2014, c. 25, s. 6.
>
> – CCC

Section 320

Section 320 defines "court" for the purpose of s. 320 as:

> 320
> [*omitted (1), (2), (3), (4), (5), (6) and (7)*]
> (8) In this section, **"court"** means
>
> (a) in the Province of Quebec, the Court of Quebec,
> (a.1) in the Province of Ontario, the Superior Court of Justice,
> (b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen’s Bench,
> (c) in the Provinces of Prince Edward Island and Newfoundland, the Supreme Court, Trial Division,

(c.1) [Repealed, 1992, c. 51, s. 36]
(d) in the Provinces of Nova Scotia and British Columbia, in Yukon and in the Northwest Territories, the Supreme Court, and
(e) in Nunavut, the Nunavut Court of Justice;

...
R.S., 1985, c. C-46, s. 320; R.S., 1985, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 4, c. 17, s. 11; 1992, c. 1, s. 58, c. 51, s. 36; 1998, c. 30, s. 14; 1999, c. 3, s. 29; 2002, c. 7, s. 142.

– CCC

Sentencing Courts

Under Part XXIII of the Code concerning Sentencing (s. 716 to 751.1) defines a "court" as:

716 In this Part [*Pt. XXIII – Sentencing (s. 716 to 751.1)*],
...
"court" means

(a) a superior court of criminal jurisdiction,
(b) a court of criminal jurisdiction,
(c) a justice or provincial court judge acting as a summary conviction court under Part XXVII [*Pt. XXVII – Summary Convictions (s. 785 to 840)*], or
(d) a court that hears an appeal; (tribunal)

...
R.S., 1985, c. C-46, s. 716; R.S., 1985, c. 27 (1st Supp.), s. 154; 1995, c. 22, s. 6; 1999, c. 5, s. 29(E).

– CCC

Part XXIV - Dangerous Offenders and Long-term Offenders

Definitions

752 In this Part [*Pt. XXIV – Dangerous Offenders and Long-Term Offenders (s. 752 to 761)*],
...
"court" means the court by which an offender in relation to whom an application under this Part [*Pt. XXIV – Dangerous Offenders and Long-Term Offenders (s. 752 to 761)*] is made was convicted, or a superior court of criminal jurisdiction; (tribunal)
...
R.S., 1985, c. C-46, s. 752; 2008, c. 6, ss. 40, 61; 2010, c. 3, s. 8; 2012, c. 1, s. 35; 2014, c. 25, s. 29.
[*annotation(s) added*]

– CCC

Courts of Nunavut

The territory of Nunavut is unique in Canada as it has only two rather than three levels of court. Unlike other jurisdictions, the trial level has is unified with only the Nunavut Court of Justice.

In various places in the Code, there is provisions that are redundant except that is conveys power specifically to the Nunavut Court of Justice, including ss. 536.1, 554(2), 555.1, 556(4), 561.1, 562.1, 563.1, 565(1.1), 566.1, 567.1, 569 (2), Part XIX.1 (s. 573 to 573.2), 686 (5.01), (5.1), (5.2), 695(3), 839(1.1). This unification has been in place since April 1, 1999.[1]

1. http://www.nucj.ca/unifiedcourt.htm

See Also

- Definition of Judicial Officers and Offices
- Court Composition

Jurisdiction of the Courts

This page was last substantively updated or reviewed *June 2021*. (Rev. # 79573)

General Principles

"Jurisdiction" generally refers to the legal authority or power of the court to decide an issue. [1]

It has been observed that criminal law, in contrast with civil law, is "highly territorial" and that countries should not "enforce the criminal law of other countries".[2]

Types of Jurisdiction

The three forms of jurisdiction consist of:[3]

- **prescriptive jurisdiction** (also called **legislative** or **substantive jurisdiction**): The authority "to make rules, issue commands or grant authorizations that are binding upon persons and entities"
- **enforcement jurisdiction**: The authority to "use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld" and
- **adjudicative jurisdiction**: The authority to "resolve disputes or interpret the law through decisions that carry binding force".

Issues of jurisdiction will often involve overlapping between the types of jurisdiction.[4]

1. *Reference re Judicature Act*, 1988 CanLII 5677 (NB CA), 46 CCC (3d) 203, *per* Stratton CJ, at p. 218
   R v Gray, 1991 CanLII 7130 (ONSC), 68 CCC 193 (Ont.), *per* Watt J ("By jurisdiction is meant the authority to decide a case, to determine an issue. Its essence is the authority to determine the issue, not the nature or correctness, actual or perceived, of the determination made.")
2. *Police File No 2016-32834 (Re)*, 2016 BCPC 359 (CanLII), *per* Brecknell J, at para 7 citing Rafferty & S. Pitel, Conflicts of Law (Irwin: 2010), p. 56
3. *R v Chowdhury*, 2014 ONSC 2635 (CanLII), *per* Nordheimer J, at para 9
   R v Hape, 2007 SCC 26 (CanLII), [2007] 2 SCR 292, *per* LeBel J, at para 58
4. e.g. see *Chowdhury*, *supra*, at para 10

Basis and Origin of Jurisdiction

Territoriality

Traditionally in criminal matters, jurisdiction has been tied to the state based on a geographic region or territory. This is known as the "principle of territoriality".[1]

From these two principles of jurisdiction arise. There is the "objective territorial principle" of jurisdiction and the "subjective territorial principle" of jurisdiction .[2] The objective principle imposes jurisdiction over acts that either being or end within the state or in which a "constituent element" of the offence takes place within the state. The subjective principle imposes jurisdiction over actions that occur or begin within the state's territory regardless of the location of the consequences.[3]

Qualified Territoriality

The traditional principle of territoriality has been extended to adapt to transnational and international activities, creating concurrent jurisdiction between nations.[4] This will normally apply in cases where the harm caused by the acts of a foreign national outside of the country are felt within Canada on the basis of the “objective territorial principle”.[5] This has also been recognized in cases involving communications between two jurisdictions.[6]

Any extension of jurisdiction should be limited by the principles of "real and substantial" connection and comity between nations.[7]

Nationality

Jurisdiction can also be derived on the basis nationality for persons acting while outside of the country.[8] At common law, it is recognized that Canada has an interest in prosecuting acts of its citizens committed outside of the country.[9]

Plenary or Universal Jurisdiction

Certain circumstances have universal jurisdiction. These are typically specific offences legislated as being prosecutable in Canada irrespective of the territoriality over the matter.[10]

1. *R v Libman*, 1985 CanLII 51 (SCC), *per* La Forest J, at para 11
2. *R v Hape*, 2007 SCC 26 (CanLII), [2007] 2 SCR 292, *per* LeBel J, at para 59
3. *Hape*, *ibid.*, at para 59
4. *R v Chowdhury*, 2014 ONSC 2635 (CanLII), *per* Nordheimer J, at para 11
5. *Chowdhury*, *supra*, at para 23
6. *R v McKenzie Securities Ltd.*, 1966 CanLII 485 (MB CA), [1966] 4 CCC 29, *per* Freedman JA, at para 53 ("The nature of some offences is such that the can properly be described as occurring in the more than one place. This is peculiarly the case where a transaction is carried on by mail from one territorial jurisdiction to another, or indeed by telephone

from one such jurisdiction to another. This has been recognized by the common law for centuries.")
7. *Chowdhury*, *supra*, at paras 11, 23
   Libman, *supra*, at paras 71, 74
8. *Chowdhury*, *supra*, at para 12
   Hape, *supra*, at para 60
9. *Chowdhury*, *supra*, at para 23
10. *Chowdhury*, *supra*, at para 15
    e.g. s. 7(2.01) and (4.1)

Legislative Jurisdiction

Parliament has the constitutional authority to legislate jurisdiction over non-Canadians' conduct outside of the country. However, where international law is violated, such intent must do so clearly and expressly.[1]

Limits on Provincial Legislation

The applicability of provincial offences does not apply to "matters not sufficiently connected to" the province.[2] "Sufficiency" depends on "the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated".[3]

Out-of-province application of provincial offences must be constrained by the principles of "order and fairness". These principles are purposive and are applied flexibly.[4]

1. *R v Chowdhury*, 2014 ONSC 2635 (CanLII), *per* Nordheimer J, at paras 20 to 21
   Hape, *supra*
2. *Unifund Assurance Co. v Insurance Corp. of British Columbia*, 2003 SCC 40 (CanLII), [2003] 2 SCR 63, *per* Binnie J, at para 56
3. *Unifund*, *ibid.*
4. *Unifund*, *ibid.*

Adjudicative Jurisdiction

For a court to have "adjudicative jurisdiction" to decide a matter, the court must have jurisdiction over both the offence and the person.[1] These must be treated as distinct and separate elements.[2]

In criminal matters, the adjudicative jurisdiction is limited by section 6(2) of the Code which prohibits "extraterritorial jurisdiction".[3] It states that:

> 6
> [*omitted (1)*]
>
> **Offences outside Canada**
>
> (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 [*order of discharge*] of an offence committed outside Canada.
> [*omitted (3)*]
> R.S., 1985, c. C-46, s. 6; R.S., 1985, c. 27 (1st Supp.), s. 4, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10.
> [*annotation(s) added*]
>
> – CCC

Similarly, s. 467 states:

> **Offence committed entirely in one province**
>
> 478 (1) Subject to this Act, a court in a province shall not try an offence committed entirely in another province.
> [*omitted (2), (3), (4) and (5)*]
> R.S., 1985, c. C-46, s. 478; R.S., 1985, c. 27 (1st Supp.), ss. 64, 101(E); 1994, c. 44, s. 33(E).
> [*annotation(s) added*]
>
> – CCC

There are several statutory exceptions within the code for certain types of offences including those that occur in space, on planes, and in boats as well as war crimes and crimes against humanity.[4]

Attention should be paid to whether the province has provincial legislation that dictates the jurisdiction of the court over persons and subject matters.[5]

Jurisdiction to Adjudicate Certain Rights

Before a Court can adjudicate matters including Charter rights the Court must be a "court of competent jurisdiction", which requires authority over: 1) the person(s); 2) the subject-matter; and 3) the remedy.[6]

1. *R v Chowdhury*, 2014 ONSC 2635 (CanLII), *per* Nordheimer J, at para 13
2. *Chowdhury*, *supra*, at para 13
3. *Chowdhury*, *supra*, at para 14
4. *Chowdhury*, *supra*, at para 15
   see also s. 7
5. e.g. British Columbia: Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28
   Nova Scotia: Court Jurisdiction and Proceedings Transfer Act, SNS 2003 (2d Sess), c 2
   Saskatchewan: The Court Jurisdiction and Proceedings Transfer Act, SS 1997, c C-41.1
6. *R v Mills*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863, *per* McIntyre J - considering the jurisdiction under s. 24(1) of the Charter to grant remedies

Principles Limiting Jurisdiction Outside of Canada

Jurisdiction of Courts

In the common law, an accused should stand trial in the "locality" of where the offence occurred. This "locality rule" means that an accused will be tried before the most local court available. [1] This rule is based on the convenience of the witnesses, victims and accused persons and also on the historical tradition of the grand jury and petit jury who affirm charges and try a case as being from the same locale as the offence.[2]

The "locality rule" has no application to summary proceeding offences given the application of s. 785 and 798.[3]

Burden of Proof

The Crown does not need to prove that the court has jurisdiction to try a case. Unless statutorily required, the Crown can presume jurisdiction until such point where an application is made. [4]

1. *R v Davis*, 2018 ONSC 4630 (CanLII), *per* Di Luca J, at paras 13, 21
2. *Davis*, *ibid.*, at para 13
3. *R v Feige*, [1992] OJ No 2521 (Ont. Ct. (Gen.Div.)(*no CanLII links) , *per* Ferguson J
   Davis, *supra*, at para 17
   R v Ponnuthurai, [2002] OJ No 4741 (O.C.J.)(*no CanLII links)
4. *R v Minot*, 2011 NLCA 7 (CanLII), 266 CCC (3d) 74, *per* Hoegg JA (3:0), at para 27

Superior Court

A Superior Court has "inherent jurisdiction" that is derived from s. 96 of the *Constitution Act, 1867*. This is also referred to as “original and plenary jurisdiction”. This means that the Superior Court has jurisdiction over all civil and criminal matters unless expressly removed by statute.[1] However, the “core powers” of the superior court cannot be removed by statute without violating s.96 of the Constitution Act 1867.[2]

Inherent jurisdiction has few limitations. It grants courts powers to "among other things, empowers a superior court to regulate its proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice."[3]

This jurisdiction cannot be exercised in contravention to any statutory provision.[4]

Section 468 of the Criminal Code, provides authority over indictable offences unless the Province of the particular Superior Court lacks a real and substantial connection to the offence itself.

> **Superior court of criminal jurisdiction**
>
> 468 Every superior court of criminal jurisdiction has jurisdiction to try any indictable offence.
> R.S., c. C-34, s. 426.
>
> – CCC

This "inherent jurisdiction" also provides power to control the judicial process and to remedy unfairness.[5]

This power includes limited authority to delegate decision-making powers on an issue to another superior court justice "by invitation".[6] It does not allow a judge seized with a trial matter to delegate the trial process.[7]

Jurisdiction Over Persons

Section 470 states:

> **Jurisdiction over person**
>
> 470. Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence
>
> (a) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; or
> (b) if the accused has been ordered to be tried by
>
> (i) that court, or
> (ii) any other court, the jurisdiction of which has by lawful authority been transferred to that court.
>
> R.S., 1985, c. C-46, s. 470; R.S., 1985, c. 27 (1st Supp.), s. 101.
>
> – CCC

The purpose of s. 470, enacted in 1985, was to loosen the long-standing "locality rule" that restricted where a trial court be held.[8]

The term "territorial jurisdiction" as found in s. 470 generally refers to offences committed anywhere in the province.[9]

1. *MacMillan Bloedel v Simpson Ltd*, 1995 CanLII 57 (SCC), [1995] 4 SCR 725, *per* Lamer CJ
   R v Cunningham, 2010 SCC 10 (CanLII), [2010] 1 SCR 331, *per* Rothstein J, at paras 18 to 19
2. See *McMillan Bloedel v Simpson Ltd*, *ibid.*
3. *R v Endean v British Columbia*, 2016 SCC 42 (CanLII), [2016] 2 SCR 162, *per* Cromwell J, at para 60
4. *Parsons v Ontario*, 2015 ONCA 158 (CanLII), 381 DLR (4th) 667, *per* Juriansz JA, at para 73("Thus, a superior court may exercise its inherent jurisdiction on matters regulated by statute but may not contravene any statutory provision")
5. *R v Rose*, 1998 CanLII 768 (SCC), [1998] 3 SCR 262, *per* Cory, Iacobucci and Bastarache JJ
   R v Pilarinos, 2001 BCSC 1332 (CanLII), 158 CCC 1 (BCSC), *per* Bennett J
6. *R v Duong*, 1998 CanLII 14950 (ON SC), 129 CCC (3d) 430, at para 27 ("...a superior court trial judge "by invitation" could confer the decision-making authority (to decide on his disqualification based on apprehension of bias) to another judge of the superior court. He reasoned that a superior court trial judge's inherent jurisdiction to control the process of the court must include the jurisdiction to transfer the authority to hear such a trial application, to another judge of concurrent jurisdiction.")
7. *Duong*, *ibid.*
8. *R v Singh*, 2018 ONSC 1532 (CanLII), *per* Durno J ("Section 470 was enacted in 1985 to loosen the long-standing common law rule that trials be held in the locality in which it occurred. The section abolished the concept that a crime should be tried in the community where it is alleged to have occurred: R.E. Salhany, Canadian Criminal Procedure, 5th ed., Canada Law Book, pp.29-30.") see also para 21
9. *R v Davis*, 2018 ONSC 4630 (CanLII), *per* Di Luca J, at para 16
   R v Feige, [1992] OJ No 2521 (Ont. Ct. (Gen.Div.))(*no CanLII links)
   R v Reyat, 1990 CanLII 1479 (BC SC), [1990] B.C.J. No 1331 (B.C.S.C.), *per* Callaghan J
   R v Jeffries, 2010 ONSC 772 (CanLII), 86 WCB (2d) 859, *per* Gauthier J

Provincial and Territorial Court

A Provincial or Territorial Court has jurisdiction derived by statute alone and depends on the Criminal Code for the source of its authority.[1] That authority must be explicitly provided by statute or by necessary implication.[2]

A provincial court has "authority to control the [its own] process" as well others authorities derived by necessary implication. [3] However, the authority must be exercised "according to the rules of reason and justice"[4]

Section 798 found in part XXVII of the Code [Summary Convictions] states that:

> **Jurisdiction**
>
> 798. Every summary conviction court has jurisdiction to try, determine and adjudge proceedings to which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction.
>
> R.S., c. C-34, s. 733.
> [*annotation(s) added*]
>
> – CCC

Geographic Boundaries

Provincial Court judges are limited to only exercise authority "within their territorial jurisdiction".[5]

Section 2 states that a territorial division "includes any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies". This term is to be read strictly to refer only to divisions within Canada and not international boundaries.[6]

1. *R v Doyle*, 1976 CanLII 11 (SCC), [1977] 1 SCR 597, *per* Ritchie J
   R v SJL, 2002 BCCA 174 (CanLII), 163 CCC (3d) 560, *per* Rowles JA
2. *SJL*, *ibid.*, at para 23
3. *R v Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 SCR 331, *per* Rothstein J (9:0), at para 19 ("Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law")
   Ontario v Criminal Lawyers Association, 2013 SCC 43 (CanLII), [2013] 3 SCR 3, *per* Karakatsanis J, at para 44
4. eg. see *R v Price*, 2010 NBCA 84 (CanLII), 942 APR 324, *per* Richard JA
5. *Re The Queen and Smith*, 1973 CanLII 1502 (NB CA), 12 CCC (2d) 11 (N.B.C.A.), *per* Hughes CJ, at p. 9 ("Inferior Courts can exercise their powers only within their territorial jurisdiction")
   see also Extra-Territorial Jurisdiction of the Courts
6. *R v OB*, 1997 CanLII 949 (ON CA)), 116 CCC (3d) 189, *per* Lacouricere JA
   R v Farler, 2005 NSCA 105 (CanLII), 745 APR 374, *per* Saunders JA, at para 21

Youth Justice Court

A youth justice court refers to either a provincial court or superior court that has jurisdiction over young persons, and adult who commit offences as a young person, by virtue of s. 13 of the YCJA. This jurisdiction over young persons is exclusive.[1] While sitting as a youth justice court, the judge or justice maintains their original powers and jurisdiction.[2]

1. s. 14 of the YCJA
2. See s. 14(7) in reference to a superior court
   see s. 14(6) in reference to a summary conviction provincial court

Jurisdiction Over Persons

Section 470 enables both provincial and superior courts to try an accused for an indictable offence where:

- the accused "is found, is arrested or is in custody within the territorial jurisdiction of the court" or
- the accused "has been ordered to be tried by" the same court or any other court "the jurisdiction of which has ... been transferred to that court".

This power will be subject to limitations including those found in s.478 which prohibits prosecution of an offence occurring entirely in another province unless it is for the purpose of receiving a guilty plea in accordance with its provisions.

Charter does not apply to actions of foreign authorities acting outside of the country. [1]

1. see "Charter Rights Outside of Canada" above

Adults

The Courts have jurisdiction over an accused by virtue of their presence in court.[1] The accused is required to be present for all indictable matters. It is because the accused must be a part of all matters of "vital interest". [2] The accused must be present at trial so as to hear the case against them.

For Summary matters the court may proceed without the presence of the accused except if liable for more than 6 months imprisonment.[3] This would include trial matters by way of an *ex parte* motion.[4]

The law does not recognize "conditional appearances to contest service".[5]

1. s.470(a)
   Gordon v Canada, 1980 CanLII 373 (BC CA), 55 CCC (2d) 197, *per* Anderson JA
2. *R v Vezina; Cote*, 1986 CanLII 93 (SCC), [1986] 1 SCR 2, *per* Lamer J
3. s. 800(2) and 802.1
4. s. 803(2)(a)
5. *R v Sinopec Shanghai Engineering Company Ltd.*, 2011 ABCA 331 (CanLII), 532 WAC 182, *per* Bielby JA (2:1)

Designations of Counsel

As stated, the Courts have jurisdiction over an accused present in court. The accused may appoint counsel to represent them for any proceedings under the Criminal Code by filing a designation of counsel pursuant to s. 650.01(1). [1] Where a designation has been properly filed with the Court the accused does not need to be present for certain court appearances except for when oral evidence is being heard.[2] As such the Court will not lose jurisdiction over the accused due to his or her absence.[3] A valid designation must contain the name and address of the counsel, as well as set out the charge(s) and date(s) of alleged offences or any particulars identifying the matters, and it must be signed by the accused and designated counsel.[4]

> **Designation of counsel of record**
>
> 650.01 (1) An accused may appoint counsel to represent the accused for any proceedings under this Act by filing a designation with the court.
>
> **Contents of designation**
>
> (2) The designation must contain the name and address of the counsel and be signed by the accused and the designated counsel.

Effect of designation

(3) If a designation is filed,

(a) the accused may appear by the designated counsel without being present for any part of the proceedings, other than

(i) a part during which oral evidence of a witness is taken,
(ii) a part during which jurors are being selected, and
(iii) an application for a writ of habeas corpus;

(b) an appearance by the designated counsel is equivalent to the accused's being present, unless the court orders otherwise; and
(c) a plea of guilty may be made, and a sentence may be pronounced, only if the accused is present, unless the court orders otherwise.

When court orders presence of accused

(4) If the court orders the accused to be present otherwise than by appearance by the designated counsel, the court may

(a) issue a summons to compel the presence of the accused and order that it be served by leaving a copy at the address contained in the designation; or
(b) issue a warrant to compel the presence of the accused.

2002, c. 13, s. 61.

– CCC

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1. *R v Golyanik*, 2003 CanLII 64228 (ONSC), 173 CCC 307 (SCJ), *per* Trafford J
   R v C(JJ), 2003 ABPC 31 (CanLII), 12 AtlaLR 191, *per* Cook-Stanhope J
   R v L(GY), 2009 CanLII 38516 (ONSC), 84 WCB 341 (SCJ), *per* McCombs J
2. s. 650.01(3)(a)
3. For indictable offences, the Court will only have jurisdiction over the accused where they are present in court for an appearance. Otherwise, the charge will be a nullity and voidable
4. s. 650.01(2)
   R v Butler, 2010 NSSC 284 (CanLII), 947 APR 11, *per* Coughlan J - rejected designation for no listed charges

Special Classes of Persons

The Crown is generally immune from prosecutions for executive conduct unless statute otherwise directs.[1]

1. see s. 17 of Interpretation Act

Youths

Section 14 of the *Youth Criminal Justice Act* states this about jurisdiction:

Exclusive jurisdiction of youth justice court

14 (1) Despite any other Act of Parliament but subject to the *Contraventions Act* and the *National Defence Act*, a youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he or she was a young person, and that person shall be dealt with as provided in this Act.
[*omitted (2), (3), (4), (5), (6) and (7)*]
2002, c. 1, s. 14; 2015, c. 20, ss. 32, 36, c. 29, s. 14; 2019, c. 13, s. 159.

– YCJA

A court cannot have jurisdiction over any person under the age of 12.[1] This date is set as of the date of the offence. [2] Offences that occur during the accused's 18th birthday will given jurisdiction to the Youth Court.[3]

A justice of the peace may carry out proceedings under the Criminal Code except for pleas, trials and adjudication. (s. 20(1)) This includes determining bail, but is reviewable by a youth court judge.(s. 33(1))

A justice of the peace may place an accused on a consent peace bond. If the accused refuses, the matter can be dealt with by a youth court judge. (s.20(2))

The YCJA creates the Youth Justice Court and the Youth Justice Court Judge under s. 13.

Where an accused who is charged as a "young person" turns 18, the Youth Justice Court still maintains jurisdiction. (s. 14(4)) Likewise, a person who is over 18 at the time of arrest will be subject to the YCJA if the incident occurred while he was a "young person" (s. 14(5)).

Justices of the Peace may perform all the same functions as a Youth Justice Court Judge except for pleas, trials, and adjudication (s. 20(1)).

Section 13 of the Code states:

> **Child under twelve**
>
> 13 No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.
> R.S., c. C-34, s. 12; 1980-81-82-83, c. 110, s. 72.
>
> – CCC

Age at Time of Offence Uncertain

> **Status of offender uncertain**
>
> 16 When a person is alleged to have committed an offence during a period that includes the date on which the person attains the age of eighteen years, the youth justice court has jurisdiction in respect of the offence and shall, after putting the person to their election under section 67 (adult sentence) if applicable, and on finding the person guilty of the offence,
>
> (a) if it has been proven that the offence was committed before the person attained the age of eighteen years, impose a sentence under this Act;
> (b) if it has been proven that the offence was committed after the person attained the age of eighteen years, impose any sentence that could be imposed under the Criminal Code or any other Act of Parliament on an adult who has been convicted of the same offence; and
> (c) if it has not been proven that the offence was committed after the person attained the age of eighteen years, impose a sentence under this Act.
>
> – YCJA

1. see s. 13 of the Criminal Code
2. see s. 16 YCJA and *R v McDonald*, 1985 CanLII 162 (ON CA), 21 CCC (3d) 330, *per* Morden JA
3. see s. 16

Proving Age

The Crown has the onus to prove that the age of the accused is within the jurisdiction of the YCJA beyond a reasonable doubt.[1]

> **Children and Young Persons**
>
> **Testimony as to date of birth**
>
> 658 (1) In any proceedings to which this Act applies, the testimony of a person as to the date of his or her birth is admissible as evidence of that date.
>
> **Testimony of a parent**
>
> (2) In any proceedings to which this Act applies, the testimony of a parent as to the age of a person of whom he or she is a parent is admissible as evidence of the age of that person.
>
> **Proof of age**
>
> (3) In any proceedings to which this Act applies,
>
> (a) a birth or baptismal certificate or a copy of such a certificate purporting to be certified under the hand of the person in whose custody the certificate is held is evidence of the age of that person; and

(b) an entry or record of an incorporated society or its officers who have had the control or care of a child or young person at or about the time the child or young person was brought to Canada is evidence of the age of the child or young person if the entry or record was made before the time when the offence is alleged to have been committed.

Other evidence

(4) In the absence of any certificate, copy, entry or record mentioned in subsection (3) [*proof of age – valid docs*], or in corroboration of any such certificate, copy, entry or record, a jury, judge, justice or provincial court judge, as the case may be, may receive and act on any other information relating to age that they consider reliable.

Inference from appearance

(5) In the absence of other evidence, or by way of corroboration of other evidence, a jury, judge, justice or provincial court judge, as the case may be, may infer the age of a child or young person from his or her appearance.
R.S., 1985, c. C-46, s. 658; 1994, c. 44, s. 64.
[*annotation(s) added*]

– CCC

The age of the accused can be permitted by way of hearsay.[2]

Testimony of a parent

148 (1) In any proceedings under this Act, the testimony of a parent as to the age of a person of whom he or she is a parent is admissible as evidence of the age of that person.

Evidence of age by certificate or record

(2) In any proceedings under this Act,

(a) a birth or baptismal certificate or a copy of it purporting to be certified under the hand of the person in whose custody those records are held is evidence of the age of the person named in the certificate or copy; and
(b) an entry or record of an incorporated society that has had the control or care of the person alleged to have committed the offence in respect of which the proceedings are taken at or about the time the person came to Canada is evidence of the age of that person, if the entry or record was made before the time when the offence is alleged to have been committed.

Other evidence

(3) In the absence of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration of that certificate, copy, entry or record, the youth justice court may receive and act on any other information relating to age that it considers reliable.

When age may be inferred

(4) In any proceedings under this Act, the youth justice court may draw inferences as to the age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination.

– YCJA

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1. See *R v K(PA)*, 1992 CanLII 7313 (NL SC), , 1992 CarswellNfld 125 (Nfld.S.C.), *per* Green J, at paras 37 to 38
2. See s. 658
R v C(I), 2010 ONSC 330 (CanLII), 251 CCC (3d) 272, *per* Dambrot J
R v Male, 2013 MBPC 12 (CanLII), 289 Man R (2d) 146, *per* Heinrichs J

Persons Outside of Country

An offence by a foreign national while outside of the country will not create jurisdiction over the person to prosecute an offence. However, should the person enter into the territorial jurisdiction of the courts, jurisdiction over the person will exist.[1]

Where jurisdiction over the person does not exist. A stay may be entered on the charge until such time as the Crown applies to withdraw the stay.[2]

Breach of Canadian Court Orders

An order that prohibits the possession of a firearm, including probation, recognizance or 109/110 Order, can still apply whether or not the person is within Canada. [3]

Contact prohibitions will apply to accused's who attempt to contact the person who is located outside the country.[4]

1. e.g. *R v Chowdhury*, 2014 ONSC 2635 (CanLII), *per* Nordheimer J, at paras 54 to 57
2. e.g. Chowdhury
3. *R v Rattray*, 2008 ONCA 74 (CanLII), 229 CCC (3d) 496, *per* MacFarland JA - accused bought rifle while in Michigan, no evidence of possession within Canada

see also *R v Greco*, 2001 CanLII 8608 (ON CA), 159 CCC (3d) 146, *per* Moldaver JA

4. e.g. *R v Stanny*, 2008 ABQB 746 (CanLII), 461 AR 46, *per* Bielby J - accused on condition not to contact bank branches. He wrote to branch in England and was convicted of breach

Loss of Jurisdiction Over Person Due to Irregularities

General Powers of Certain Officials
Procedural irregularities

485 (1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands.

When accused not present

(1.1) Jurisdiction over an accused is not lost by reason of the failure of the accused to appear personally, so long as subsection 515(2.2) [*appearance of accused in person unless otherwise permitted*], paragraph 537(1)(j) [*prisoner appear by video on consent*], (j.1) [*power to permit accused to be absent during inquiry*] or (k) [*power to appear by video when evidence not taken*], subsection 650(1.1) [*video link attendance at trial — not taking evidence*] or (1.2) [*video link attendance at trial — when taking evidence*], paragraph 650(2)(b) [*video-link appearance of accused*] or 650.01(3)(a) [*appearance by designation of counsel*], subsection 683(2.1) [*appear by telepresence*] or 688(2.1) [*right to attend appeal*] or a rule of court made under section 482 [*powers of the superior and appellate court to make rules*] or 482.1 [*powers of the superior and appellate court to make case management rules*] applies.

Summons or warrant

(2) Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

Dismissal for want of prosecution

(3) Where no summons or warrant is issued under subsection (2) [*procedural irregularities in summons or warrant*] within the period provided therein, the proceedings shall be deemed to be dismissed for want of prosecution and shall not be recommenced except in accordance with section 485.1 [*recommencing dismissed charges*].

Adjournment and order

(4) Where, in the opinion of the court, judge, provincial court judge or justice, an accused or a defendant who appears at a proceeding has been misled or prejudiced by reason of any matter referred to in subsection (1) [*procedural irregularities*], the court, judge, provincial court judge or justice may adjourn the proceeding and may make such order as it or he considers appropriate.

Part XVI to apply

(5) 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 where a summons or warrant is issued under subsection (2) [*procedural irregularities in summons or warrant*].
R.S., 1985, c. C-46, s. 485; R.S., 1985, c. 27 (1st Supp.), s. 67; 1992, c. 1, s. 60(F); 1997, c. 18, s. 40; 2002, c. 13, s. 19.
[*annotation(s) added*]

– CCC

Jurisdiction Over Subject Matter

Section 553 is procedural in nature and does not usurp the jurisdiction of superior court on matters that have properly been brought before it.[1]

In Canada Outside of Province

Offence not in a province

481 Where an offence is committed in a part of Canada not in a province, proceedings in respect thereof may be commenced and the accused may be charged, tried and punished within any territorial division in any province in the same manner as if that offence had been committed in that territorial division.
R.S., c. C-34, s. 437.

– CCC

1. *R v Manitopyes*, 2012 SKQB 141 (CanLII), 395 Sask R 191, *per* Chicoine J, at para 69

Real and Substantial Link

An offence is triable in the Canadian courts so long as a "significant portion of the activities constituting the offence took place in Canada" is sufficient that there is a real and substantial connection.[1]

A real and substantial connection is not "limited to the essential elements of the offence".[2]

Where an offence occurs, in whole or in part, outside of the territorial jurisdiction of the court, the principle of comity still permits courts to take jurisdiction over the subject where there is a real and substantial connection between the territory and the offence.[3]

A jurisdiction has a "has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here".[4]

The court should look at acts that are "an integral part of the scheme".[5]

It is necessary that a "significant portion of the activities constituting [the] offence" took place within the jurisdiction.[6]

An order issued from a province is enough connection where the breach occurred entirely out of the province.[7]

1. *R v Libman*, 1985 CanLII 51 (SCC), 21 CCC (3d) 206, 21 DLR (4th) 174, [1985] 2 SCR 178, *per* La Forest J
   see also *R v Rowbotham*, 1988 CanLII 147 (ON CA), 41 CCC (3d), *per curiam*
2. *R v Karigar*, 2017 ONCA 576 (CanLII), *per* Feldman JA, at paras 21 and 30
3. *R v Chowdhury*, 2014 ONSC 2635 (CanLII), *per* Nordheimer J, at para 26
4. *Libman*, *supra*, at para 67 ("This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here")
5. *Libman*, *supra*
6. *Libman*, *supra*
7. *R v Greco*, 2001 CanLII 8608 (ON CA), 159 CCC (3d) 146, *per* Moldaver JA
   cf. *R v B(O)*, 1997 CanLII 949 (ON CA), 116 CCC (3d) 189, *per* Abella JA - sex assault occurring entirely outside the jurisdiction

Offences Between Jurisdictions

Special jurisdictions

476 For the purposes of this Act,

[*omitted (a)*]
(b) where an offence is committed on the boundary of two or more territorial divisions or within five hundred metres of any such boundary, or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any of the territorial divisions;
(c) where an offence is committed in or on a vehicle employed in a journey, or on board a vessel employed on a navigable river, canal or inland water, the offence shall be deemed to have been committed in any territorial division through which the vehicle or vessel passed in the course of the journey or voyage on which the offence was committed, and where the center or other part of the road, or navigable river, canal or inland water on which the vehicle or vessel passed in the course of the journey or voyage is the boundary of two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;
[*omitted (d)*]
(e) where an offence is committed in respect of the mail in the course of its door-to-door delivery, the offence shall be deemed to have been committed in any territorial division through which the mail was carried on that delivery.

R.S., 1985, c. C-46, s. 476; R.S., 1985, c. 27 (1st Supp.), s. 186; 1992, c. 1, s. 58.

– CCC

Section 2 defines "territorial division" as including "any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies".[1] This has been interpreted as encompassing the whole territory of a province.[2]

Between Territorial Divisions Within the Province

Where the offence has occurred outside regular territorial divisions, such as in an "unorganized tract of country", lake or river, then *any* territorial judicial district may have jurisdiction over the matter:

Offence in unorganized territory

480 (1) Where an offence is committed in an unorganized tract of country in any province or on a lake, river or other water therein, not included in a territorial division or in a provisional judicial district, proceedings in respect thereof may be commenced and an accused may be charged, tried and punished in respect thereof within any territorial division or provisional judicial district of the province in the same manner as if the offence had been committed within that territorial division or provisional judicial district.

New territorial division

(2) Where a provisional judicial district or a new territorial division is constituted in an unorganized tract referred to in subsection (1) [*offence in unorganized territory*], the jurisdiction conferred by that subsection continues until appropriate provision is made by law for the administration of criminal justice within the provisional judicial district or new territorial division.
R.S., c. C-34, s. 436.
[*annotation(s) added*]

– CCC

Between Provinces

Where an ongoing offence begins in one province and ends in another province, s. 476(b) convey jurisdiction over both jurisdictions to try the case.[3]

An inter-provincial offence can be captured by s. 476(b) where "any element of the offence has occurred in the province claiming jurisdiction".[4] However, before a court can consider assuming jurisdiction over an inter-provincial offence, the charge must specifically include the local jurisdiction in the wording. Failure to do so will render the court without jurisdiction.[5]

Between International Boundaries

Courts will take jurisdiction over the subject matter of activities of persons outside of the country on the basis of qualified territoriality.[6]

Where the offence constituent elements include phone, email or other types of electronic communication over borders, typically concurrent jurisdiction will exist between the two ends.[7]

1. See Code
2. *R v Ellis*, 2009 ONCA 483 (CanLII), 244 CCC (3d) 438, *per* Gillese JA (3:0)
3. *Bigelow*, *supra* appeal to SCC refused -- offence of child abduction from Ontario to Alberta
   R v DAL, 1996 CanLII 8371 (BC CA), 107 CCC (3d) 178, *per* McEachern CJ - sexual assault between accused and victim occurring in three different provinces
4. *R v Webber*, 2021 NSCA 35 (CanLII), *per* Farrar JA, at para 69
   R v Bigelow, 1982 CanLII 2046 (ON CA), 69 CCC (2d) 204, *per curiam* ("These complex problems do not arise in Canada where courts have used s. 432(b) to establish a broad basis for jurisdiction over inter-provincial offences. The test in reality has become whether any element of the offence has occurred in the province claiming jurisdiction.")
5. *Webber*, *supra* at paras 59 to 86
6. see above re "Territoriality"
7. e.g. *R v Frank*, 2013 ABPC 21 (CanLII), *per* Gaschler J - harassing emails
   R v McKenzie Securities Ltd., 1966 CanLII 485 (MB CA), [1966], 4 CCC 29, *per* Freedman JA, at para 53

Offences Occurring on Water

- Special Jurisdiction for Offences Over Water

Offences Occurring in Air or Space

- Special Jurisdiction for Offences Committed on Aircrafts or Spacecrafts

See Also

- Transfer of Matters to Other Provinces or Territories
- Definition of Judicial Officers and Offices
- Change of Venue

Extra-Territorial Jurisdiction of the Courts

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Procedure and Practice < Jurisdiction of the Courts

General Principles

Generally speaking, "a state is only competent to enforce its laws within its own territorial boundaries".[1] The "primary basis" of jurisdiction flows from territoriality.[2]

Under s. 6, Courts of Canada have jurisdiction over criminal matters committed within the territory of Canada.[3]

The purpose of s. 6 is to recognize that the "primary basis of criminal jurisdiction is territorial".[4] States are hesitant to make "discriminate attempts to control activities that take place wholly within the boundaries" of other countries.[5]

It also reflects the "principle of sovereign integrity" where a state has "exclusive sovereignty over all persons, citizens or aliens, and all property, real or personal, with its own territory".[6]

It is enough that the offence was initiated or realized in Canada to allow for jurisdiction to prosecute an offence.[7]

> 6
> [*omitted (1)*]
>
> **Offences outside Canada**
>
> (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 [*order of discharge*] of an offence committed outside Canada.
>
> **Definition of enactment**
>
> (3) In this section, "enactment" means
>
> (a) an Act of Parliament, or
> (b) an Act of the legislature of a province that creates an offence to which Part XXVII [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] applies,
>
> or any regulation made thereunder.
>
> R.S., 1985, c. C-46, s. 6; R.S., 1985, c. 27 (1st Supp.), s. 4, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10.
> [*annotation(s) added*]
>
> – CCC

Section 6(2) prohibits anyone from being convicted or discharge of "an offence committed outside Canada" subject to any other Acts of Canada.[8] This requires a "real and substantial connection" between the offence and the country. A "significant portion" of the offence should take place in Canada.[9] It could also be characterized as a "meaningful" connection with the jurisdiction.[10]

It is *not* necessary that the particular connection be the "most real and substantial".[11]

Section 481.2 grants jurisdiction over offences occurring outside of Canada except where otherwise prevented by Acts of Parliament. This section does not provide a free-standing authority to assert jurisdiction but rather only applies in conjunction with another Act of Parliament conveying jurisdiction.[12] It states that:

> **Offence outside Canada**
>
> 481.2 Subject to this or any other Act of Parliament, where an act or omission is committed outside Canada and the act or omission is an offence when committed outside Canada under this or any other Act of Parliament, proceedings in respect of the offence may, whether or not the accused is in Canada, be commenced, and an accused may be charged, tried and punished within any territorial division in Canada in the same manner as if the offence had been committed in that territorial division.
> 1996, c. 31, s. 72; 2008, c. 18, s. 10.
>
> – CCC

Probationary term can apply to the accused's conduct outside of the Country.[13]

Obedience to *de facto* Law of Another Country

> **Obedience to de facto law**
>
> 15 No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in de facto possession of the sovereign power in and over the place where the act or omission occurs.
> R.S., c. C-34, s. 15.
>
> – CCC

1. *R v Terry*, 1996 CanLII 199 (SCC), [1996] 2 SCR 207, *per* McLachlin J at para 14
2. *R v Hape*, 2007 SCC 26 (CanLII), [2007] 2 SCR 292, *per* LeBel J
3. see s. 6
   R v Libman, 1985 CanLII 51 (SCC), [1985] 2 SCR 178, *per* La Forest J
   Davidson v British Columbia (Attorney General), 2006 BCCA 447 (CanLII), 214 CCC (3d) 373, *per* Levine JA, at para 5
4. *Libman*, *supra*
5. *Libman*, *supra*
6. *R v Finta*, 1994 CanLII 129 (SCC), [1994] 1 SCR 701, *per* Cory J, at p. 806
7. *Re Chapman*, 1970 CanLII 254 (ON CA), 5 CCC 46, *per curiam* ("If there is an initiation of a fraudulent scheme in Canada (as was the case here in the mailing out of the letters of solicitation) and a realization thereof in Canada through receipt of money or securities intended to be brought in through the scheme, the offence has been committed in Canada although the inducement has extended only to persons outside Canada.")
8. section 6(2) states "Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada."
9. *Libman v The Queen*, 1985 CanLII 51 (SCC), [1985] 2 SCR 178, *per* La Forest J
10. *McCabe v British Columbia (Securities Commission)*, 2016 BCCA 7 (CanLII), 6 WWR 289, *per* Goepel JA, at para 36
    Torudag v British Columbia (Securities Commission), 2011 BCCA 458 (CanLII), 343 DLR (4th) 743, *per* Hall JA, at para 19
11. *McCabe*, *supra*, at para 35
12. *R v United States of America v Patterson*, 2017 BCCA 52 (CanLII), *per* MacKenzie JA, at paras 73 to 75
13. *R v Greco*, 2001 CanLII 8608 (ON CA), 159 CCC (3d) 146, *per* Moldaver JA
    see also Breach of Undertaking, Recognizance, or Probation (Offence)
    cf. *R v B(O)*, 1997 CanLII 949 (ON CA), 116 CCC (3d) 189, *per* Abella JA (accused sexually assaulted his grand-daughter while in the US. Canada had no jurisdiction to try the case)

Principles Limiting Jurisdiction Outside of Canada

Sovereign Equality and The Obligation of Non-Intervention

The international principle of sovereign equality states that "[c]ountries generally respect each other's borders and will not attempt to adjudicate matters that occurred within the borders of another sovereign country" and "countries will exercise jurisdiction over their own nationals but not over another country's nationals except, of course, where that country's nationals commit an offence within another country's borders". [1]

This is a principle of customary international law and has been adopted in Canada.[2] It obliges a state to limit its actions outside of its border.[3]

In order to preserve sovereignty and equality, there is a related duty of "non-intervention" which gives each country the "right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference."[4]

A country should not extend its jurisdiction to enforce "its laws when to do so would infringe on the sovereignty of another state".[5]

Comity

The principle of "comity" refers to the "informal acts performed and rules observed by states in their mutual relations out of, politeness, convenience and goodwill, rather than strict legal obligation".[6] It is an interpretive principle that prefers interpretations of laws that do not infringe on the sovereignty of another state.[7] It is not a binding rule of law, but rather more of a principle of interpretation based on the "deference and respect" that countries have for each other.[8]

In application, comity requires "that a state ought to assume jurisdiction only if it has a real and substantial link to the event".[9]

Comity creates the presumption that "Canada will, in passing legislation, act in compliance with its international obligations including treaty obligations" and that "courts will favour an interpretation of legislation that reflects the value and principles of international law".[10]

Real and Substantial Connection

At common law, the "real and substantial connection" test sets the limits on the assumption of jurisdiction by a court.[11]

Factors to consider in the test include:[12]

1. the connection between the forum and the plaintiff's claim;
2. the connection between the forum and the defendant;
3. unfairness to the defendant in assuming jurisdiction;
4. unfairness to the plaintiff in not assuming jurisdiction.

Where the crown fails to establish a real and substantial connection there is some suggestion that the accused must be acquitted since the Crown failed to prove an essential element.[13]

Presumption of Statutory Interpretation

It is a presumption of statutory interpretation that legislation will conform to international law.[14] However, where presumption is overcome, the Courts must give extraterritorial effect to the law.[15]

1. *R v Chowdhury*, 2014 ONSC 2635 (CanLII), at para 22
   R v Cook, 1998 CanLII 802 (SCC), [1998] 2 SCR 597(*complete citation pending*), at para 26 (sovereign equality "generally prohibits extraterritorial application of domestic law since, in most instances, the exercise of jurisdiction beyond a state's territorial limits would constitute an interference under international law with the exclusive territorial jurisdiction of another state.")
2. *British Columbia (AG) v Brecknell*, 2018 BCCA 5 (CanLII), *per* Harris JA, at para 23
3. *Brecknell*, *ibid.*, at para 23
4. *Hape*, *supra*, at para 45
5. *Chowdhury*, *supra*, at para 34
   Brecknell, *ibid.*, at para 23
6. *Hape*, *supra*, at para 47

7. *Brecknell*, *supra*, at para 24
   Hape, *supra*, at paras 47 to 52
8. *Chowdhury*, *supra*, at paras 31, 32
9. *Hape*, *supra*, at para 62
10. *Chowdhury*, *supra*, at para 32
11. e.g. *Muscutt v Courcelles*, 2002 CanLII 44957 (ON CA), 213 DLR (4th) 577, *per* Sharpe JA
12. *R v Milliea*, 2008 NBPC 11 (CanLII), 858 APR 49, *per* Ferguson J, at para 28
13. *R v Finta*, 1992 CanLII 2783 (ON CA), 73 CCC (3d) 65, *per* Cory J
14. *Brecknell*, *supra*, at para 24
    Hape, *supra*, at paras 53 to 56
15. *Brecknell*, *supra*, at para 24
    Hape, *supra*, at paras 53 to 56

Charter Rights Outside of Canada

The Courts have no jurisdiction to enforce Charter rights on other state's actions.[1] The rights are not enforceable due to the principle of comity.[2]

It is only where foreign state actors operate as agents of the Canadian state that the Charter can be engaged.[3]

1. *R v Harrer*, 1995 CanLII 70 (SCC), [1995] 3 SCR 562, *per* La Forest J
   R v Terry, 1996 CanLII 199 (SCC), [1996] 2 SCR 207, *per* McLachlin J
   R v Hape, 2007 SCC 26 (CanLII), [2007] 2 SCR 292, *per* LeBel J
   R v Tan, 2014 BCCA 9 (CanLII), 299 CRR (2d) 73, *per* Bennett JA
   R v Mehan, 2017 BCCA 21 (CanLII), *per* D Smith JA, at para 28
2. *Hape*, *supra*, at para 52
   Harrer, *supra*, at para 15
3. *Hape*, *supra*, at paras 103 to 105

Power to Issue Orders

The courts have no power ot authorize the enforcement of Canadian laws relating to "matters in the exclusive territorial jurisdiction of another state".[1]

The use of investigative powers relates to enforcement jurisdiction, which cannot be controlled by Canadian law absence consent of the foreign state or rule of international law.[2]

1. *R v Hape*, 2007 SCC 26 (CanLII), [2007] 2 SCR 292, *per* LeBel J, at para 105
2. *Hape*, *supra*, at para 105

Discretionary Limitations

Forum Non Conveniens

The courts have discretion to refuse to accept jurisdiction on the basis of the principle of *forum non-conveniens*.[1] Criteria to consider include:[2]

1. the residence and domicile of the parties,
2. the location of the natural forum,
3. the location of the evidence,
4. the place of residence of the witnesses,
5. the location of the alleged conduct and transaction, including the place of formation and execution of the contract,
6. the existence of an action pending in another jurisdiction between the same parties (in an imperfect lis pendens situation) and the stage of such proceeding,
7. the law applicable to the dispute,
8. the ability to join all parties,
9. the need for enforcement in the alternative court,
10. the juridical advantages for the plaintiff, and
11. the interests of justice.

1. *Boucher v Stelco Inc*, 2005 SCC 64 (CanLII), [2005] 3 SCR 279, *per* LeBel J, at para 37
2. *Boucher v Stelco*, *ibid.*, at paras 37 to 38
   Muscutt v Courcelles, 2002 CanLII 44957 (ON CA), 213 DLR (4th) 577, *per* Sharpe JA, at para 42

Special Cases

Offences by Public Service Employees

Section 7(4) grants jurisdiction over criminal acts of public service employees who commit indictable offences outside of Canada while employed.

> 7.
> [*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.33), (2.34), (3), (3.1), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75)*]
>
> **Offences by Public Service employees**

(4) Every one who, while employed as an employee within the meaning of the Public Service Employment Act in a place outside Canada, commits an act or omission in that place that is an offence under the laws of that place and that, if committed in Canada, would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.
[*omitted (4.1), (4.11), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]

– CCC

Offences Against Cultural Property

Section 7(2.01) imposes jurisdiction over offences under s. 322, 341,344, 380, or 434 committed outside of Canada that is "in relation to cultural property" where the accused is a citizen permanent resident or ordinarily resides in Canada.

7
[*omitted (1) and (2)*]

Offences in relation to cultural property

(2.01) Despite anything in this Act or any other Act, a person who commits an act or omission outside Canada that if committed in Canada would constitute an offence under section 322 [*theft*], 341 [*fraudulent concealment*], 344 [*robbery*], 380 [*fraud*], 430 [*mischief*] or 434 [*arson, damage to property*] in relation to cultural property as defined in Article 1 of the Convention, or a conspiracy or an attempt to commit such an offence, or being an accessory after the fact or counselling in relation to such an offence, is deemed to have committed that act or omission in Canada if the person

(a) is a Canadian citizen;
(b) is not a citizen of any state and ordinarily resides in Canada; or
(c) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* and is, after the commission of the act or omission, present in Canada.

(2.02) For the purpose of subsection (2.01) [*extraterritorial offences in relation to cultural property*], Convention means the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, done at The Hague on May 14, 1954. Article 1 of the Convention is set out in the schedule to the Cultural Property Export and Import Act.
[*omitted (2.1), (2.2), (2.21), (2.3), (2.31), (2.33), (2.34), (3), (3.1), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (4), (4.1), (4.11), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]
R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3.
[*annotation(s) added*]

– CCC

Sexual Offences

Section 7(4.1) which grants jurisdiction over sexual offences[1] However, consent of the Attorney General is required[2] for offence committed outside of Canada by Canadian citizens or permanent residents.

7
[*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33), (2.34), (3), (3.1), (3.2) to (3.6), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77) and (4)*]

Offence in relation to sexual offences against children

(4.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151 [*sexual interference*], 152 [*invitation to sexual touching*], 153 [*sexual exploitation*] or 155 [*incest*], subsection 160(2) [*compelling bestiality*] or (3) [*bestiality in presence of or by child*], section 163.1 [*child pornography*], 170 [*parent or guardian procuring sexual activity*], 171 [*householder permitting prohibited sexual activity*], 171.1 [*making sexually explicit materials available to child*], 172.1 [*child luring*], 172.2 [*agree or arrange sexual offence against child*] or 173 [*Indecent acts*] or subsection 286.1(2) [*comm. to obtain sexual services for consideration – person under 18*] shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.
[*omitted (4.11) and (4.2)*]

Consent of Attorney General

(4.3) Proceedings with respect to an act or omission deemed to have been committed in Canada under subsection (4.1) [*extraterritorial offence re sexual offences against children*] may only be instituted with the consent of the Attorney General.
[*omitted (5), (5.1), (6), (7), (8), (9), (10) and (11)*]
R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.
[*annotation(s) added*]

– CCC

Constitutionality

Section 7(4.10) is *not* ultra vires of the Constitution for violating the principle of sovereign equality or comity.[3]

Any extension of jurisdiction that permits evidence collected by foreign law enforcement will still be subject to trial fairness requirements under s. 7 of the Charter.[4]

1. listed as "section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1 , 170, 171, 171.1, 172.1, 172.2 or 173 or subsection 212(4)"
2. s. 7(4.3)
3. *R v Klassen*, 2008 BCSC 1762 (CanLII), 240 CCC (3d) 328, *per* Cullen J
4. *Klassen*, *ibid.*, at para 113

Terrorism Offences

7
[*omitted (1), (2), (2.01), (2.02), (2.1) and (2.2)*]

Nuclear terrorism offence committed outside Canada

(2.21) Despite anything in this Act or any other Act, everyone who commits an act or omission outside Canada that if committed in Canada would constitute an offence under any of sections 82.3 to 82.6 [*radioactive material or device offences*], or a conspiracy or attempt to commit such an offence, or being an accessory after the fact or counselling in relation to such an offence, is deemed to have committed that act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under any Act of Parliament;
(b) the act or omission is committed on an aircraft that

(i) is registered in Canada under regulations made under the *Aeronautics Act*, or
(ii) is leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations;

(c) the person who commits the act or omission is a Canadian citizen; or
(d) the person who commits the act or omission is, after the commission of the act or omission, present in Canada.

[*omitted (2.3), (2.31), (2.32), (2.33), (2.34), (3), (3.1), (3.2) to (3.6), (3.7), (3.71) and (3.72)*]

Offence relating to financing of terrorism

(3.73) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 83.02 [*providing or collecting property for certain terror-related activities*] is deemed to commit the act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under an Act of Parliament;
(b) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or
(ii) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as the owner of an aircraft in Canada under those regulations;

(c) the person who commits the act or omission

(i) is a Canadian citizen, or
(ii) is not a citizen of any state and ordinarily resides in Canada;

(d) the person who commits the act or omission is, after its commission, present in Canada;
(e) the act or omission is committed for the purpose of committing an act or omission referred to in paragraph 83.02(a) [*providing or collecting property for enumerated terrorist activity*] or (b) [*providing or collecting property with intent to cause harm for political purpose*] in order to compel the Government of Canada or of a province to do or refrain from doing any act;

(f) the act or omission is committed for the purpose of committing an act or omission referred to in paragraph 83.02(a) [*providing or collecting property for enumerated terrorist activity*] or (b) [*providing or collecting property with intent to cause harm for political purpose*] against a Canadian government or public facility located outside Canada; or
(g) the act or omission is committed for the purpose of committing an act or omission referred to in paragraph 83.02(a) [*providing or collecting property for enumerated terrorist activity*] or (b) [*providing or collecting property with intent to cause harm for political purpose*] in Canada or against a Canadian citizen.

Terrorism offence committed outside Canada

(3.74) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada that, if committed in Canada, would be a terrorism offence, other than an offence under section 83.02 [*providing or collecting property for certain terror-related activities*] or an offence referred to in paragraph (a) of the definition terrorist activity in subsection 83.01(1) [*terrorism offences – definitions*], is deemed to have committed that act or omission in Canada if the person

(a) is a Canadian citizen;
(b) is not a citizen of any state and ordinarily resides in Canada; or
(c) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* and is, after the commission of the act or omission, present in Canada.

Terrorist activity committed outside Canada

(3.75) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada that, if committed in Canada, would be an indictable offence and would also constitute a terrorist activity referred to in paragraph (b) of the definition terrorist activity in subsection 83.01(1) [*terrorism offences – definitions*] is deemed to commit that act or omission in Canada if

(a) the act or omission is committed against a Canadian citizen;
(b) the act or omission is committed against a Canadian government or public facility located outside Canada; or
(c) the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act.

(3.76) and (3.77) [Repealed, 2000, c. 24, s. 42]
[*omitted (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]
R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.
[*annotation(s) added*]

– CCC

Hostage Taking

7
[*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33), (2.34) and (3)*]

Offence of hostage taking

(3.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 279.1 [*hostage taking*] shall be deemed to commit that act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
(b) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the Aeronautics Act, or
(ii) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft in Canada under such regulations;

(c) the person who commits the act or omission

(i) is a Canadian citizen, or
(ii) is not a citizen of any state and ordinarily resides in Canada;

(d) the act or omission is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission;
(e) a person taken hostage by the act or omission is a Canadian citizen; or
(f) the person who commits the act or omission is, after the commission thereof, present in Canada.

(3.2) to (3.6) [Repealed, 2013, c. 13, s. 3]

[*omitted (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77), (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]
R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.

– CCC

Human Trafficking

7
[*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33), (2.34), (3), (3.1), (3.2) to (3.6), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77), (4) and (4.1)*]

Offence in relation to trafficking in persons

(4.11) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 279.01 [*trafficking in persons*], 279.011 [*trafficking in persons, under 18*], 279.02 [*material benefit from trafficking*] or 279.03 [*withholding or destroying docs*] shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.
[*omitted (4.2), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]
R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.

– CCC

Misc Circumstances

Internationally Protected Persons

7
[*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33) and (2.34)*]

Offence against internationally protected person

(3) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against the person of an internationally protected person or against any property referred to in section 431 used by that person that, if committed in Canada, would be an offence against any of sections 235 [*punishment for murder – max and min penalties*], 236 [*manslaughter*], 266 [*assault*], 267 [*assault with a weapon or causing bodily harm*], 268 [*aggravated assault*], 269 [*unlawfully causing bodily harm*], 269.1 [*torture*], 271 [*sexual assault*], 272 [*sexual assault with a weapon or causing bodily harm*], 273 [*aggravated sexual assault*], 279 [*kidnapping and forcible confinement*], 279.1 [*hostage taking*], 280 to 283 [*abduction and detention of young persons*], 424 [*threat against an internationally protected person*] and 431 [*attack on premises, residence or transport of internationally protected person*] is deemed to commit that act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
(b) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the Aeronautics Act, or
(ii) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft in Canada under those regulations;

(c) the person who commits the act or omission is a Canadian citizen or is, after the act or omission has been committed, present in Canada; or
(d) the act or omission is against

(i) a person who enjoys the status of an internationally protected person by virtue of the functions that person performs on behalf of Canada, or

(ii) a member of the family of a person described in subparagraph (i) who qualifies under paragraph (b) or (d) of the definition internationally protected person in section 2 [*general Code definitions*].

[*omitted (3.1), (3.2) to (3.6), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77), (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]
R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.

– CCC

United Nations Personnel

Section 7(3.71) relates to offence against United Nations or associated personnel.

7
[*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33) and (2.34), (3), (3.1), (3.2) to (3.6) and (3.7)*]

Offence against United Nations or associated personnel

(3.71) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against a member of United Nations personnel or associated personnel or against property referred to in section 431.1 that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 235 [*punishment for murder – max and min penalties*], 236 [*manslaughter*], 266 [*assault*], 267 [*assault with a weapon or causing bodily harm*], 268 [*aggravated assault*], 269 [*unlawfully causing bodily harm*], 269.1 [*torture*], 271 [*sexual assault*], 272 [*sexual assault with a weapon or causing bodily harm*], 273 [*aggravated sexual assault*], 279 [*kidnapping and forcible confinement*], 279.1 [*hostage taking*], 424.1 [*threat against United Nations or associated personnel*] or 431.1 [*attack on premises, accommodation or transport of United Nations or associated personnel*] is deemed to commit that act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under an Act of Parliament;
(b) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or
(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations;

(c) the person who commits the act or omission

(i) is a Canadian citizen, or
(ii) is not a citizen of any state and ordinarily resides in Canada;

(d) the person who commits the act or omission is, after the commission of the act or omission, present in Canada;
(e) the act or omission is committed against a Canadian citizen; or
(f) the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act.

[*omitted (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77), (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]
R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.
[*annotation(s) added*]

– CCC

Section 7(3.72) relates to offence involving explosive or other lethal device.

7
[*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33) and (2.34), (3), (3.1), (3.2) to (3.6) and (3.7) and (3.71)*]

Offence involving explosive or other lethal device

(3.72) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 431.2 [*accesses or uses explosive or other lethal device to harm persons or destroy property*] is deemed to commit that act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under any Act of Parliament;
(b) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*,
(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations, or
(iii) operated for or on behalf of the Government of Canada;

(c) the person who commits the act or omission

(i) is a Canadian citizen, or
(ii) is not a citizen of any state and ordinarily resides in Canada;

(d) the person who commits the act or omission is, after the commission of the act or omission, present in Canada;
(e) the act or omission is committed against a Canadian citizen;
(f) the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act; or
(g) the act or omission is committed against a Canadian government or public facility located outside Canada.

[*omitted (3.73), (3.74), (3.75), (3.76) and (3.77), (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]
R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.
[*annotation(s) added*]

– CCC

Sections 7(5) to (11) set out the procedural requirements of deemed jurisdiction under this section.

Torture

7
[*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33) and (2.34), (3), (3.1), (3.2) to (3.6)*]

Jurisdiction

(3.7) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against, section 269.1 [*torture*] shall be deemed to commit that act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
(b) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or
(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations;

(c) the person who commits the act or omission is a Canadian citizen;
(d) the complainant is a Canadian citizen; or
(e) the person who commits the act or omission is, after the commission thereof, present in Canada.

(3.76) and (3.77) [Repealed, 2000, c. 24, s. 42]
[*omitted (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]

R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.
[*annotation(s) added*]

– CCC

Non-citizens

Any extra-territorial jurisdiction conveyed by s. 7 in relation to a non-citizen must only be applied with the consent of the Attorney General of Canada.

> 7
> [*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33) and (2.34), (3), (3.1), (3.2) to (3.6), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77), (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1) and (6)*]
>
> **If accused not Canadian citizen**
>
> (7) If the accused is not a Canadian citizen, no proceedings in respect of which courts have jurisdiction by virtue of this section shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced.
> [*omitted (8), (9), (10) and (11)*]
> R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3.
>
> – CCC

The requirement for consent from the Attorney General of Canada only applies to non-citizens who are *not* also permanent residents.[1]

Purpose

The purpose of the requirement for consent at the beginning of the proceedings is to require the government to "consider the international implications of the prosecution of a non-citizen for an extra-territorial offence" "in order to avoid possible international relations issues".[2]

Burden

The crown has no burden to establish the accused was a Canadian citizen to exempt itself from s. 7(7) limiting the jurisdiction of the court. There must be an application by the accused before the Crown has a burden to adduce evidence on citizenship.[3]

1. *R v Patel*, 2016 ONCJ 172 (CanLII), *per* Copeland J, at para 20
2. *Patel*, *ibid.*, at para 27
3. *R v Minot*, 2011 NLCA 7 (CanLII), 266 CCC (3d) 74, *per* Hoegg JA (3:0)

Applicable Forum for Section 7 Jurisdiction Offences

> 7
> [*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33) and (2.34), (3), (3.1), (3.2) to (3.6), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77), (4), (4.1), (4.11), (4.2) and (4.3)*]
>
> **Jurisdiction**
>
> (5) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.
>
> **Appearance of accused at trial**
>
> (5.1) For greater certainty, the provisions of this Act relating to
>
> (a) requirements that an accused appear at and be present during proceedings, and
> (b) the exceptions to those requirements,
>
> apply to proceedings commenced in any territorial division pursuant to subsection (5) [*jurisdiction of extraterritorial offences in Cdn divisions*].
>
> **If previously tried outside Canada**
>
> (6) If a person is alleged to have committed an act or omission that is an offence by virtue of this section and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if that person had been tried and dealt with in Canada, they would be able to plead autrefois acquit, autrefois convict, pardon or an expungement order under the *Expungement of Historically Unjust Convictions Act*, that person shall be deemed to have been so tried and dealt with in Canada.
> [*omitted (7), (8), (9), (10) and (11)*]
> R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3,

126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.
[*annotation(s) added*]

– CCC

Evidence

7
[*omitted (1), (2), (2.01), (2.02), (2.1), (2.2), (2.21), (2.3), (2.31), (2.32), (2.33) and (2.34), (3), (3.1), (3.2) to (3.6), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77), (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1), (6), (7), (8) and (9)*]

Certificate as evidence

(10) In any proceedings under this Act, a certificate purporting to have been issued by or under the authority of the Minister of Foreign Affairs is admissible in evidence without proof of the signature or authority of the person appearing to have signed it and, in the absence of evidence to the contrary, is proof of the facts it states that are relevant to the question of whether any person is a member of United Nations personnel, a member of associated personnel or a person who is entitled under international law to protection from attack or threat of attack against his or her person, freedom or dignity.

Idem

(11) A certificate purporting to have been issued by or under the authority of the Minister of Foreign Affairs stating

(a) that at a certain time any state was engaged in an armed conflict against Canada or was allied with Canada in an armed conflict,
(b) that at a certain time any convention, treaty or other international agreement was or was not in force and that Canada was or was not a party thereto, or
(c) that Canada agreed or did not agree to accept and apply the provisions of any convention, treaty or other international agreement in an armed conflict in which Canada was involved,

is admissible in evidence in any proceedings without proof of the signature or authority of the person appearing to have issued it, and is proof of the facts so stated.

R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; 2001, c. 27, s. 244, c. 41, ss. 3, 126; 2002, c. 13, s. 3; 2004, c. 12, s. 1; 2005, c. 40, s. 2; 2012, c. 1, s. 10, c. 15, s. 1; 2013, c. 9, s. 2, c. 13, s. 3; 2014, c. 25, s. 3; 2018, c. 11, s. 27; 2019, c. 25, s. 4.

– CCC

Attendance at Trial

Appearance of accused at trial

481.3 For greater certainty, the provisions of this Act relating to

(a) the requirement of the appearance of an accused at proceedings, and
(b) the exceptions to that requirement

apply to proceedings commenced in any territorial division pursuant to section 481 [*certain offences in Canada but out of local province*], 481.1 [*offence in Canadian waters*] or 481.2 [*offence outside Canada*].
1996, c. 31, s. 72.

[*annotation(s) added*]

– CCC

Special Jurisdiction for Offences Over Water

General Principles

Inside Canadian Territory

Offences occurring within Canadian waters may be tried within "any territorial division in Canada."[1]

> **Special jurisdictions**
>
> 476 For the purposes of this Act,
>
> (a) where an offence is committed in or on any water or on a bridge between two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;
> [*omitted (b)*]
> (c) where an offence is committed in or on a vehicle employed in a journey, or on board a vessel employed on a navigable river, canal or inland water, the offence shall be deemed to have been committed in any territorial division through which the vehicle or vessel passed in the course of the journey or voyage on which the offence was committed, and where the center or other part of the road, or navigable river, canal or inland water on which the vehicle or vessel passed in the course of the journey or voyage is the boundary of two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;
> [*omitted (d) and (e)*]
>
> R.S., 1985, c. C-46, s. 476; R.S., 1985, c. 27 (1st Supp.), s. 186; 1992, c. 1, s. 58.
>
> – CCC

Any prosecution of offences occurring "in or on the territorial sea of Canada" must be done so under conditions that require the consent of the Attorney General of Canada.[2]

There are also separate arrest, entry and search and seizure powers for offences under 477.1[3]

> **Offence in Canadian waters**
>
> 481.1 Where an offence is committed in or on the territorial sea of Canada or any area of the sea that forms part of the internal waters of Canada, proceedings in respect thereof may, whether or not the accused is in Canada, be commenced and an accused may be charged, tried and punished within any territorial division in Canada in the same manner as if the offence had been committed in that territorial division.
> 1996, c. 31, s. 72.
>
> – CCC

1. see s. 481.1
2. see s. 477.2 for details
3. see s. 477.3

Outside of Territory of Canada

> **Offences outside of Canada**
>
> 477.1 Every person who commits an act or omission that, if it occurred in Canada, would be an offence under a federal law, within the meaning of section 2 of the Oceans Act, is deemed to have committed that act or omission in Canada if it is an act or omission
>
> (a) in the exclusive economic zone of Canada that
>
> (i) is committed by a person who is in the exclusive economic zone of Canada in connection with exploring or exploiting, conserving or managing the natural resources, whether living or non-living, of the exclusive economic zone of Canada, and
> (ii) is committed by or in relation to a person who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act;
>
> (b) that is committed in a place in or above the continental shelf of Canada and that is an offence in that place by virtue of section 20 of the Oceans Act;

(c) that is committed outside Canada on board or by means of a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
(d) that is committed outside Canada in the course of hot pursuit; or
(e) that is committed outside the territory of any state by a Canadian citizen.

1990, c. 44, s. 15; 1996, c. 31, s. 68; 2001, c. 27, s. 247.

– CCC

The term "federal law" is defined in s. 2 of the Oceans Act. It states that "*federal laws* includes Acts of Parliament, regulations as defined in subsection 2(1) of the Interpretation Act and any other rules of law within the jurisdiction of Parliament, but does not include laws of the Legislature of Yukon, of the Northwest Territories or for Nunavut;"

This provision lists certain circumstances where jurisdiction will be imposed on an person who commits a criminal or other federal offence that occurs outside the geographic boundaries of the provinces and territories. This captures mostly offences committed at sea.

The applicable circumstances consist of:

- certain circumstances where an offence is committed in a "exclusive economic zone of Canada";
- offences committed in or above the continental shelf;
- offences committed outside Canada on board or by means of a ship registered or licensed under an Act of Parliament;
- offences committed outside of Canada in the course of hot pursuit; or
- offences committed outside of any state by a Canadian citizen.

Definitions

Definition of ship

477 (1) In sections 477.1 to 477.4 [*offences occurring outside of Canada*], ship includes any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation, without regard to method or lack of propulsion.
[*omitted (2)*]
R.S., 1985, c. C-46, s. 477; 1990, c. 44, s. 15; 1996, c. 31, s. 67.
[*annotation(s) added*]

– CCC

Limitations on s. 477.1 to 477.4

Definition of ship

477
[*omitted (1)*]

Saving

(2) Nothing in sections 477.1 to 477.4 [*offences occurring outside of Canada*] limits the operation of any other Act of Parliament or the jurisdiction that a court may exercise apart from those sections.
R.S., 1985, c. C-46, s. 477; 1990, c. 44, s. 15; 1996, c. 31, s. 67.
[*annotation(s) added*]

– CCC

Fixed Platforms

Section 7(2.1) relates to offences against fixed platforms or international maritime navigation. Section 7(2.2) relates to offences against fixed platforms or navigation in the internal waters or territorial sea of another state.

7
[*omitted (1), (2), (2.01) and (2.02)*]

Offences against fixed platforms or international maritime navigation

(2.1) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada against or on board a fixed platform attached to the continental shelf of any state or against or on board a ship navigating or scheduled to navigate beyond the territorial sea of any state, that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 78.1, shall be deemed to commit that act or omission in Canada if it is committed

(a) against or on board a fixed platform attached to the continental shelf of Canada;
(b) against or on board a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
(c) by a Canadian citizen;
(d) by a person who is not a citizen of any state and who ordinarily resides in Canada;
(e) by a person who is, after the commission of the offence, present in Canada;
(f) in such a way as to seize, injure or kill, or threaten to injure or kill, a Canadian citizen; or
(g) in an attempt to compel the Government of Canada to do or refrain from doing any act.

Offences against fixed platforms or navigation in the internal waters or territorial sea of another state

(2.2) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada against or on board a fixed platform not attached to the continental shelf of any state or against or on board a ship not navigating or scheduled to navigate beyond the territorial sea of any state, that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 78.1, shall be deemed to commit that act or omission in Canada

(a) if it is committed as described in any of paragraphs (2.1)(b) to (g); and
(b) if the offender is found in the territory of a state, other than the state in which the act or omission was committed, that is

(i) a party to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988, in respect of an offence committed against or on board a ship, or
(ii) a party to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988, in respect of an offence committed against or on board a fixed platform.

[*omitted (2.21), (2.3), (2.31), (2.32), (2.33), (2.34), (3), (3.1), (3.2) to (3.6), (3.7), (3.71), (3.72), (3.73), (3.74), (3.75), (3.76) and (3.77), (4), (4.1), (4.11), (4.2), (4.3), (5), (5.1), (6), (7), (8), (9), (10) and (11)*]

– CCC

"Continental Shelf of Canada"

Section 17 of the Oceans Act defines "continental shelf of Canada".

Continental shelf of Canada

17 (1) The continental shelf of Canada is the seabed and subsoil of the submarine areas, including those of the exclusive economic zone of Canada, that extend beyond the territorial sea of Canada throughout the natural prolongation of the land territory of Canada

(a) subject to paragraphs (b) and (c), to the outer edge of the continental margin, determined in the manner under international law that results in the maximum extent of the continental shelf of Canada, the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise, but not including the deep ocean floor with its oceanic ridges or its subsoil;
(b) to a distance of 200 nautical miles from the baselines of the territorial sea of Canada where the outer edge of the continental margin does not extend up to that distance; or
(c) in respect of a portion of the continental shelf of Canada for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(iii), to lines determined from the geographical coordinates of points so prescribed.

Determination of the outer limit of the continental shelf of Canada

(2) For greater certainty, paragraphs (1)(a) and (b) apply regardless of whether regulations are made pursuant to subparagraph 25(a)(iv) prescribing geographical coordinates of points from which the outer edge of the continental margin or other outer limit of the continental shelf of Canada may be determined.
1996, c. 31, s. 17; 2015, c. 3, s. 137(E).

– Oceans Act

Consent of Attorney General

Some form of charges under s. 477.1 required

Consent of Attorney General of Canada

477.2 (1) No proceedings in respect of an offence committed in or on the territorial sea of Canada shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced, if the accused is not a Canadian citizen and the offence is alleged to have been committed on board any ship registered outside Canada.

Exception

(1.1) Subsection (1) [*Consent of Attorney General of Canada to continue prosecution of offence at sea*] does not apply to proceedings by way of summary conviction.

Consent of Attorney General of Canada

(2) No proceedings in respect of which courts have jurisdiction by virtue only of paragraph 477.1(a) [*offences at sea outside of Canada – exclusive economic zone of Canada*] or (b) [*offences at sea outside of Canada – in or above the continental shelf of Canada*] shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced, if the accused is not a Canadian citizen and the offence is alleged to have been committed on board any ship registered outside Canada.

Consent of Attorney General of Canada

(3) No proceedings in respect of which courts have jurisdiction by virtue only of paragraph 477.1(d) [*offences at sea outside of Canada – the course of hot pursuit*] or (e) [*offences at sea outside of Canada – committed by Canadian citizen*] shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced.

Consent to be filed

(4) The consent of the Attorney General required by subsection (1) [*Consent of Attorney General of Canada to continue prosecution of offence at sea*], (2) [*Consent of Attorney General of Canada – offences under s. 477.1(a) or (b)*] or (3) [*Consent of Attorney General of Canada – offences under s. 477.1(d) or (e)*] must be filed with the clerk of the court in which the proceedings have been instituted.
1990, c. 44, s. 15; 1994, c. 44, s. 32; 1996, c. 31, s. 69.
[*annotation(s) added*]

– CCC

Procedural Issues

477.4 (1) and (2) [Repealed, 1996, c. 31, s. 71]

Evidence

(3) In proceedings in respect of an offence,

> (a) a certificate referred to in subsection 23(1) of the *Oceans Act*, or
> (b) a certificate issued by or under the authority of the Minister of Foreign Affairs containing a statement that any geographical location specified in the certificate was, at any time material to the proceedings, in an area of a fishing zone of Canada that is not within the internal waters of Canada or the territorial sea of Canada or outside the territory of any state,

is conclusive proof of the truth of the statement without proof of the signature or official character of the person appearing to have issued the certificate.

Certificate cannot be compelled

(4) A certificate referred to in subsection (3) is admissible in evidence in proceedings referred to in that subsection but its production cannot be compelled.
1990, c. 44, s. 15; 1995, c. 5, s. 25; 1996, c. 31, s. 71.

– CCC

See Also

- Special Jurisdiction for Offences Committed on Aircrafts or Spacecrafts
- Extra-Territorial Jurisdiction of the Courts

Procedure for Young Accused

< Procedure and Practice < Young Persons

General Principles

Jurisdiction of YCJA

The Youth justice court has exclusive jurisdiction over offences allegedly committed by a young person. (s.14(1))

Interpretation of YCJA

Interpretation of the YCJA must be subject to the principles set out in s. 3 of the YCJA. The provisions must be interpreted liberally.[1]

1. s. 3(2)

History

The Juvenile Deliquents Act was the first legislation dealing with offenders under the age of 18. This Act was in effect between 1908 to 1984.

Between 1984 and 2003, the Young Offenders Act was the governing legislation.

- see also List of Legislative Amendments for history of the YCJA and previous Acts.

Application of Criminal Code

Application of Criminal Code

140 Except to the extent that it is inconsistent with or excluded by this Act, the provisions of the Criminal Code apply, with any modifications that the circumstances require, in respect of offences alleged to have been committed by young persons.

– YCJA

Sections of Criminal Code applicable

141 (1) Except to the extent that they are inconsistent with or excluded by this Act, section 16 (defence of mental disorder) and Part XX.1 (mental disorder) of the Criminal Code apply, with any modifications that the circumstances require, in respect of proceedings under this Act in relation to offences alleged to have been committed by young persons.

Notice and copies to counsel and parents

(2) For the purposes of subsection (1),

(a) wherever in Part XX.1 (mental disorder) of the Criminal Code a reference is made to a copy to be sent or otherwise given to an accused or a party to the proceedings, the reference shall be read as including a reference to a copy to be sent or otherwise given to

(i) any counsel representing the young person,
(ii) a parent of the young person who is in attendance at the proceedings against the young person, and
(iii) a parent of the young person not in attendance at the proceedings who is, in the opinion of the youth justice court or Review Board, taking an active interest in the proceedings; and

(b) wherever in Part XX.1 (mental disorder) of the Criminal Code a reference is made to notice to be given to an accused or a party to proceedings, the reference shall be read as including a reference to notice to be given to a parent of the young person and any counsel representing the young person.

Proceedings not invalid

(3) Subject to subsection (4), failure to give a notice referred to in paragraph (2)(b) to a parent of a young person does not affect the validity of proceedings under this Act.

Exception

(4) Failure to give a notice referred to in paragraph (2)(b) to a parent of a young person in any case renders invalid any subsequent proceedings under this Act relating to the case unless

(a) a parent of the young person attends at the court or Review Board with the young person; or
(b) a youth justice court judge or Review Board before whom proceedings are held against the young person

(i) adjourns the proceedings and orders that the notice be given in the manner and to the persons that the judge or Review Board directs, or
(ii) dispenses with the notice if the youth justice court or Review Board is of the opinion that, having regard to the circumstances, the notice may be dispensed with.

(5) [Repealed, 2005, c. 22, s. 63]

Considerations of court or Review Board making a disposition

(6) Before making or reviewing a disposition in respect of a young person under Part XX.1 (mental disorder) of the Criminal Code, a youth justice court or Review Board shall consider the age and special needs of the young person and any representations or submissions made by a parent of the young person.

(7) to (9) [Repealed, 2005, c. 22, s. 63]

Prima facie case to be made every year

(10) For the purpose of applying subsection 672.33(1) (fitness to stand trial) of the Criminal Code to proceedings under this Act in relation to an offence alleged to have been committed by a young person, wherever in that subsection a reference is made to two years, there shall be substituted a reference to one year.

Designation of hospitals for young persons

(11) A reference in Part XX.1 (mental disorder) of the Criminal Code to a hospital in a province shall be construed as a reference to a hospital designated by the Minister of Health for the province for the custody, treatment or assessment of young persons.

Definition of Review Board

(12) In this section, Review Board has the meaning assigned by section 672.1 [*mental disorder definitions*] of the Criminal Code.

2002, c. 1, s. 141; 2005, c. 22, s. 63.

– YCJA

Part XXVII and summary conviction trial provisions of Criminal Code to apply

142 (1) Subject to this section and except to the extent that they are inconsistent with this Act, the provisions of Part XXVII (summary conviction offences) of the Criminal Code, and any other provisions of that Act that apply in respect of summary conviction offences and relate to trial proceedings, apply to proceedings under this Act

(a) in respect of an order under section 83.3 (recognizance — terrorist activity), 810 (recognizance — fear of injury or damage), 810.01 (recognizance — fear of certain offences), 810.011 (recognizance — fear of terrorism offence), 810.02 (recognizance — fear of forced marriage or marriage under age of 16 years) or 810.2 (recognizance — fear of serious personal injury offence) of that Act or an offence under section 811 (breach of recognizance) of that Act;
(b) in respect of a summary conviction offence; and
(c) in respect of an indictable offence as if it were defined in the enactment creating it as a summary conviction offence.

Indictable offences

(2) For greater certainty and despite subsection (1) or any other provision of this Act, an indictable offence committed by a young person is, for the purposes of this Act or any other Act of Parliament, an indictable offence.

Attendance of young person

(3) Section 650 of the Criminal Code applies in respect of proceedings under this Act, whether the proceedings relate to an indictable offence or an offence punishable on summary conviction.

Limitation period

(4) In proceedings under this Act, subsection 786(2) of the Criminal Code does not apply in respect of an indictable offence.

Costs

(5) Section 809 [*costs before summary conviction court*] of the Criminal Code does not apply in respect of proceedings under this Act.

2002, c. 1, s. 142; 2015, c. 20, ss. 33, 36, c. 29, s. 15.
[*annotation(s) added*]

– YCJA

Screening Charges

The Attorney General is authorized to implement a program that pre-screen charges before any charges can be laid.

Consent to Prosecute
Pre-charge screening

23 (1) The Attorney General may establish a program of pre-charge screening that sets out the circumstances in which the consent of the Attorney General must be obtained before a young person is charged with an offence.

Pre-charge screening program

(2) Any program of pre-charge screening of young persons that is established under an Act of the legislature of a province or by a directive of a provincial government, and that is in place before the coming into force of this section, is deemed to be a program of pre-charge screening for the purposes of subsection (1).

– YCJA

Charges

Counts charged in information

143 Indictable offences and offences punishable on summary conviction may under this Act be charged in the same information or indictment and tried jointly.

– YCJA

Election

Multiple Accused

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

Mode of trial where co-accused are young persons

(5) When two or more young persons who are charged with the same offence, who are jointly charged in the same information or indictment or in respect of whom the Attorney General seeks joinder of counts that are set out in separate informations or indictments are put to their election, then, unless all of them elect or re-elect or are deemed to have elected, as the case may be, the same mode of trial, the youth justice court judge

> (a) may decline to record any election, re-election or deemed election for trial by a youth justice court judge without a jury, a judge without a jury or, in Nunavut, a judge of the Nunavut Court Justice without a jury; and
> (b) if the judge declines to do so, shall hold a preliminary inquiry, if requested to do so by one of the parties, unless a preliminary inquiry has been held prior to the election, re-election or deemed election.

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

– YCJA

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

Attorney General may require trial by jury

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

– YCJA

Option of Preliminary Inquiry

67
[*omitted (1), (2), (3), (4), (5) and (6)*]

Preliminary inquiry

(7) When a young person elects to be tried by a judge without a jury, or elects or is deemed to have elected to be tried by a court composed of a judge and jury, the youth justice court referred to in subsection 13(1) shall, on the request of the young person or the prosecutor made at that time or within the period fixed by rules of court made under section 17 or 155 or, if there are no such rules, by the youth justice court judge, conduct a preliminary inquiry and if, on its conclusion, the young person is ordered to stand trial, the proceedings shall be conducted

(a) before a judge without a jury or a court composed of a judge and jury, as the case may be; or
(b) in Nunavut, before a judge of the Nunavut Court of Justice acting as a youth justice court, with or without a jury, as the case may be.

Preliminary inquiry if two or more accused

(7.1) If two or more young persons are jointly charged in an information and one or more of them make a request for a preliminary inquiry under subsection (7), a preliminary inquiry must be held with respect to all of them.

When no request for preliminary inquiry

(7.2) If no request for a preliminary inquiry is made under subsection (7), the youth justice court shall fix the date for the trial or the date on which the young person must appear in the trial court to have the date fixed.

Preliminary inquiry provisions of Criminal Code

(8) The preliminary inquiry shall be conducted in accordance with the provisions of Part XVIII (procedure on preliminary inquiry) of the Criminal Code, except to the extent that they are inconsistent with this Act.

Parts XIX and XX of Criminal Code

(9) Proceedings under this Act before a judge without a jury or a court composed of a judge and jury or, in Nunavut, a judge of the Nunavut Court of Justice acting as a youth justice court, with or without a jury, as the case may be, shall be conducted in accordance with the provisions of Parts XIX (indictable offences — trial without jury) and XX (procedure in jury trials and general provisions) of the Criminal Code, with any modifications that the circumstances require, except that

(a) the provisions of this Act respecting the protection of privacy of young persons prevail over the provisions of the Criminal Code; and
(b) the young person is entitled to be represented in court by counsel if the young person is removed from court in accordance with subsection 650(2) of the Criminal Code.

2002, c. 1, s. 67, c. 13, s. 91; 2012, c. 1, s. 178; 2019, c. 13, s. 166.

– YCJA

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s. 64(1), (2) and 67 (6), (9), s. 13(2),(3)

Order Parents to Attend

Order requiring attendance of parent

27 (1) If a parent does not attend proceedings held before a youth justice court in respect of a young person, the court may, if in its opinion the presence of the parent is necessary or in the best interests of the young person, by order in writing require the parent to attend at any stage of the proceedings.

No order in ticket proceedings

(2) Subsection (1) does not apply in proceedings commenced by filing a ticket under the *Contraventions Act*.

Service of order

(3) A copy of the order shall be served by a peace officer or by a person designated by a youth justice court by delivering it personally to the parent to whom it is directed, unless the youth justice court authorizes service by confirmed delivery service.

Failure to attend

(4) A parent who is ordered to attend a youth justice court under subsection (1) [*order requiring attendance of parent*] and who fails without reasonable excuse, the proof of which lies on the parent, to comply with the order

(a) is guilty of contempt of court;
(b) may be dealt with summarily by the court; and
(c) is liable to the punishment provided for in the Criminal Code for a summary conviction offence.

Warrant to arrest parent

(5) If a parent who is ordered to attend a youth justice court under subsection (1) [*order requiring attendance of parent*] does not attend when required by the order or fails to remain in attendance as required and it is proved that a copy of the order was served on the parent, a youth justice court may issue a warrant to compel the attendance of the parent.

– YCJA

Subpoena

Issue of subpoena

144 (1) If a person is required to attend to give evidence before a youth justice court, the subpoena directed to that person may be issued by a youth justice court judge, whether or not the person whose attendance is required is within the same province as the youth justice court.

Service of subpoena

(2) A subpoena issued by a youth justice court and directed to a person who is not within the same province as the youth justice court shall be served personally on the person to whom it is directed.

– YCJA

Warrants

Warrant

145 A warrant issued by a youth justice court may be executed anywhere in Canada.

– YCJA

Case Conferences

See Case Management#Youth Justice

Evidence

Admissions

149 (1) A party to any proceedings under this Act may admit any relevant fact or matter for the purpose of dispensing with proof of it, including any fact or matter the admissibility of which depends on a ruling of law or of mixed law and fact.

Other party may adduce evidence

(2) Nothing in this section precludes a party to a proceeding from adducing evidence to prove a fact or matter admitted by another party.

– YCJA

Material evidence

150 Any evidence material to proceedings under this Act that would not but for this section be admissible in evidence may, with the consent of the parties to the proceedings and if the young person is represented by counsel, be given in such proceedings.

– YCJA

Evidence of a child or young person

151 The evidence of a child or a young person may be taken in proceedings under this Act only after the youth justice court judge or the justice in the proceedings has (a) if the witness is a child, instructed the child as to the duty to speak the truth and the consequences of failing to do so; and (b) if the witness is a young person and the judge or justice considers it necessary, instructed the young person as to the duty to speak the truth and the consequences of failing to do so.

– YCJA

Proof of service

152 (1) For the purposes of this Act, service of any document may be proved by oral evidence given under oath by, or by the affidavit or statutory declaration of, the person claiming to have personally served it or sent it by confirmed delivery service.

Proof of signature and official character unnecessary

(2) If proof of service of any document is offered by affidavit or statutory declaration, it is not necessary to prove the signature or official character of the person making or taking the affidavit or declaration, if the official character of that person appears on the face of the affidavit or declaration.

– YCJA

Seal not required

153 It is not necessary to the validity of any information, indictment, summons, warrant, minute, sentence, conviction, order or other process or document laid, issued, filed or entered in any proceedings under this Act that any seal be attached or affixed to it.

– YCJA

Proof of Age

Testimony of a parent

148 (1) In any proceedings under this Act, the testimony of a parent as to the age of a person of whom he or she is a parent is admissible as evidence of the age of that person.

Evidence of age by certificate or record

(2) In any proceedings under this Act,

(a) a birth or baptismal certificate or a copy of it purporting to be certified under the hand of the person in whose custody those records are held is evidence of the age of the person named in the certificate or copy; and
(b) an entry or record of an incorporated society that has had the control or care of the person alleged to have committed the offence in respect of which the proceedings are taken at or about the time the person came to Canada is evidence of the age of that person, if the entry or record was made before the time when the offence is alleged to have been committed.

Other evidence

(3) In the absence of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration of that certificate, copy, entry or record, the youth justice court may receive and act on any other information relating to age that it considers reliable.

When age may be inferred

(4) In any proceedings under this Act, the youth justice court may draw inferences as to the age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination.

– YCJA

Guilty Plea

Adjudication
When young person pleads guilty

36 (1) If a young person pleads guilty to an offence charged against the young person and the youth justice court is satisfied that the facts support the charge, the court shall find the young person guilty of the offence.

When young person pleads not guilty

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

– YCJA

Reason for Sentence

Reasons for the sentence

48 When a youth justice court imposes a youth sentence, it shall state its reasons for the sentence in the record of the case and shall, on request, give or cause to be given a copy of the sentence and the reasons for the sentence to

(a) the young person, the young person's counsel, a parent of the young person, the provincial director and the prosecutor; and
(b) in the case of a committal to custody under paragraph 42(2)(n), (o), (q) or (r), the review board.

– YCJA

Order of Committal

Warrant of committal

49 (1) When a young person is committed to custody, the youth justice court shall issue or cause to be issued a warrant of committal.

Custody during transfer

(2) A young person who is committed to custody may, in the course of being transferred from custody to the court or from the court to custody, be held under the supervision and control of a peace officer or in any place of temporary detention referred to in subsection 30(1) that the provincial director may specify.

Subsection 30(3) applies

(3) Subsection 30(3) (detention separate from adults) applies, with any modifications that the circumstances require, in respect of a person held in a place of temporary detention under subsection (2).

– YCJA

See Also

- Bail for Young Accused
- Sentencing Young Offenders
- Confessions by Young Persons

Informations and Indictments

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Procedure and Practice < Informations and Indictments

Informations and Indictments

Criminal charges are set out in written form, either through an Indictment or an Information. An Indictment is the form of a charge typically handled in superior court while an information is the form used in provincial court.

Indictment

Section 2 defines "indictment" stating:

2

...

"indictment" includes

(a) information or a count therein,
(b) a plea, replication or other pleading, and
(c) any record;

...

R.S., 1985, c. C-46, s. 2; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 2, 203, c. 31 (1st Supp.), s. 61, c. 1 (2nd Supp.), s. 213, c. 27 (2nd Supp.), s. 10, c. 35 (2nd Supp.), s. 34, c. 32 (4th Supp.), s. 55, c. 40 (4th Supp.), s. 2; 1990, c. 17, s. 7; 1991, c. 1, s. 28, c. 40, s. 1, c. 43, ss. 1, 9; 1992, c. 20, s. 216, c. 51, s. 32; 1993, c. 28, s. 78, c. 34, s. 59; 1994, c. 44, s. 2; 1995, c. 29, ss. 39, 40, c. 39, s. 138; 1997, c. 23, s. 1; 1998, c. 30, s. 14; 1999, c. 3, s. 25, c. 5, s. 1, c. 25, s. 1(Preamble), c. 28, s. 155; 2000, c. 12, s. 91, c. 25, s. 1(F); 2001, c. 32, s. 1, c. 41, ss. 2, 131; 2002, c. 7, s. 137, c. 22, s. 324; 2003, c. 21, s. 1; 2004, c. 3, s. 1; 2005, c. 10, s. 34, c. 38, s. 58, c. 40, ss. 1, 7; 2006, c. 14, s. 1; 2007, c. 13, s. 1; 2012, c.1, s. 160, c. 19, s. 371; 2013, c. 13, s. 2; 2014, c. 17, s. 1, c. 23, s. 2, c. 25, s. 2; 2015, c. 3, s. 44, c. 13, s. 3, c. 20, s. 15; 2018, c. 21, s. 12; 2019, c. 13, s. 140; 2019, c. 25, s. 1.

– CCC

Under the English common law, there was a system of laying indictments that would permit an indictment against an accused by either a grand jury or coroner's inquest. Section 576 abolished these modes of laying indictments.

Information

Section 785 defines "information":

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

...

"information" includes

(a) a count in an information, and

(b) a complaint in respect of which a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order; (dénonciation)

...

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

An **information** is a accusation sworn by a peace officer. (s. 507, 508, 788, 789 and Form 2) The **indictment** is an unsworn accusation.(s.566,580, 591 and Form 4)

The purpose of an information was described as;[1]

1. to commence the proceedings until the accused is arraigned or the charges dismissed;
2. to inform the accused of the allegations against him or her;
3. to indicate that an allegation has been made under oath before a justice of the peace; and
4. for a summary conviction offence, to indicate to the accused that the information was sworn within six months after the time when the subject-matter of the proceedings arose: s. 786(2) of the Criminal Code.

1. *R v Akey*, 1990 CanLII 6755 (ONSC), [1990] OJ No 2205 (Gen. Div.), *per* Granger J, at para 6

Validity of the Information or Indictment

Sections 580 to 601 sets out the criteria for a valid information.

Form of indictment

580 An indictment is sufficient if it is on paper and is in Form 4 [*forms*].

R.S., 1985, c. C-46, s. 580; R.S., 1985, c. 27 (1st Supp.), s. 117.
[*annotation(s) added*]

– CCC

An indictment should be in conformity with Form 4.[1]

The more modern approach to validity of an information is more focused on substance rather than technical form considered in the older approach.[2]

The date "is relevant and material only when the issue of limitation periods arises"[3] Where the date is in error, it may be that the proper date can be inferred.

Where the date of the information has been amended without any indication of the circumstances creates a nullity. [4]

It is often said that an information that contains on its face contained a contradiction that was an impossibility is a nullity. [5]

Presumptions and Burdens

There is a rebuttable presumption that a justice of the peace will only operate within their authority.[6]

There is a presumption that an information is valid on its face.[7]

The onus is upon the accused to establish on a balance of probabilities that the information is defective.[8]

1. see s. 580 "An indictment is sufficient if it is on paper and is in Form 4."
2. *R v Sault Ste. Marie*, 1978 CanLII 11 (SCC), 40 CCC (2d), *per* Dickson J (9:0), at 353
3. *R v Dean*, 1985 CanLII 1142 (AB QB), 36 Alta LR (2d) 8 (Q.B.), *per* McFadyen J
4. *R v Howell*, 1978 CanLII 692 (AB QB), 14 AR 299, *per* Robotham J
5. *R v George*, 1993 CanLII 4609 (NS SC), 340 APR 30, *per* MacLellan J
6. *R v Justice of the Peace; Ex Parte Robertson*, [1971] 1 OR 12 (CA)(*no CanLII links)
7. *R v Kamperman*, 1981 CanLII 3159 (NS SC), , 48 NSR (2d), *per* Glube J, at para 9 ("There is a presumption that the information is valid on its face and the onus is upon the accused to rebut that presumption ")
8. *R v Awad*, 2013 NSPC 82 (CanLII), *per* Whalen J, at para 51 aff'd at 2015 NSCA 10 (CanLII), *per* Beveridge JA
R v Peavoy, 1974 CanLII 1665 (ONSC), 15 CCC (2d) 97, *per* Henry J
R v Vanstone, 1982 Carswell Alta. 626(*no CanLII links) , at para 30
Kamperman, *supra*, at para 9 ("There is a presumption that the information is valid on its face and the onus is upon the accused to rebut that presumption ")

Motion to Quash the Information

Where the process required by s. 504 to 508 is not complied with and it results in a loss of jurisdiction allows the accused to apply to quash the information.

Types of Errors

Defects to the Jurat

A "jurat" is the part of an information where a judicial officer certifies the document.[1] Where the jurat is missing, or where parts of the information were not seen by the judicial officer who certified the document, the result can be a nullification of the document.[2]

Bilingualism

Under s. 841(3) the boiler-plate or pre-printed portion of the information or indictment must be in both french and english.[3] The failure to have an information comply with s. 841 does not render the information a nullity. Deficiencies can be corrected through amendment under s. 601.[4] There is some suggestion that it will only be a nullity where there is prejudice to the accused.[5]

Section 841 will not apply for summary proceedings.[6]

Lost Information

A trial for a regulatory offence can still proceed despite the information having been lost. [7]

Signatures

While it is acceptable for an affiant to sign by way of a rubber stamp, it is not permitted for an authorizing justice to use a stamp as it is "irreconcilable with the solemnity and importance" of the oath swearing process.[8]

1. http://www.duhaime.org/LegalDictionary/J/Jurat.aspx Duhaime's Law Dictionary: "jurat"
2. e.g. *R v Yerxa*, 1991 CanLII 6234 (NB QB), 285 APR 24, *per* Dickson J
3. cf. *R v Shields*, [1990] OJ No 2534 (Ont.Dist.Ct.)(*no CanLII links) - information a nullity, suggests *all* document must be bilingual
   R v Noiseux (1999) 135 CCC (3d) 225(*no CanLII links) - this also applies to release documents
4. *R v Goodine*, 1992 CanLII 2618 (NS CA), 71 CCC (3d) 146, *per* Hallett JA
5. *R v Sorensen*, 1990 CanLII 6852 (ONSC), 59 CCC (3d) 211), *per* Then J
6. *R v Joudrey* (1992), 309 APR 117 (NSPC)(*no CanLII links)
7. *R v City of Toronto*, 2011 ONCJ 131 (CanLII), OJ No 1293, *per* Green J
8. *R v Welsford*, 1967 CanLII 36 (ON CA), [1967] 2 OR 496, *per* McGillivray JA

Other Errors

> **No reference to previous conviction**
>
> 664 No indictment in respect of an offence for which, by reason of previous convictions, a greater punishment may be imposed shall contain any reference to previous convictions.
> R.S., c. C-34, s. 591.
>
> – CCC

Effect of Defects and Nullities

Where a defect is found, the information cannot stand. It may only be amended within the authority of the Criminal Code.[1]

Absent an information being a nullity, s. 601 gives the judge powers to cure defects.[2]

Corrections

Any amendment to fix a defect must be done before the conclusion of trial.[3]

1. *R v Vanstone*, 1982 Carswell Alta. 626(*no CanLII links) , at para 30
2. *R v Awad*, 2015 NSCA 10 (CanLII), 1126 APR 116, *per* Beverdige JA, at para 15 citing trial judge
3. *Vanstone*, *supra*, at para 30

See Topics

- Laying of an Information and Issuing Process

- Direct Indictments
- Form and Content of Charges
- Joinder and Severance of Charges
- Amendments to Charges

Case Digests

- Case Digests

Laying of an Information

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79573)

< Procedure and Practice < Informations and Indictments
< Procedure and Practice < Compelling the Accused to Attend Court

General Principles

Either before or after arrest a peace officer can create a charge by laying of an information. It typically involves the officer, who has formed reasonable grounds to believe that a criminal offence has occurred, draft an information that will be presented to a justice of the peace along with a sworn summary of the evidence. Under s. 507 or 508 the justice of the peace will determine whether there is sufficient grounds to go forward with laying the sworn information and have the accused attend court. If there is sufficient grounds the justice will either issue a summons or a warrant, or simply confirm the appearance notice already served on the accused. This step is known as "issuing process". Once completed the accused will be required to attend court on the first appearance date. If not satisfied, the justice may cancel the appearance notice, promise to appear or recognizance.

An information must be sworn by an officer who has formed reasonable and probable grounds to believe that the offence described had been committed by the accused.[1] A failure to have the requisite grounds does not render the informations void *ab initio*.[2]

Charges can be laid before any justice within the province.[3]

Consequences of Laying an Information

The swearing of information commences "criminal proceedings" against the accused.[4] The commencement of proceedings does not require the issuance of process.[5]

A person is not an "accused" until such time as the charges have been laid.[6]

Form of Information

According to s. 506, the format for an information is taken from Form 2 of the Code:

> **Form**
>
> 506 An information laid under section 504 [*receiving an information*] or 505 [*time within which information to be laid in certain cases*] may be in Form 2 [*forms*].
> R.S., c. 2(2nd Supp.), s. 5.
> [*annotation(s) added*]
>
> – CCC

1. *R v Awad*, 2014 NSSC 44 (CanLII), *per* Edwards J
2. *R v Whitmore*, 1987 CanLII 6783 (ONSC), 41 CCC (3d) 555, *per* Ewaschuk J aff'd 51 CCC (3d) 294
   Awad, *supra*, at para 14
3. *R v Ellis*, 2009 ONCA 483 (CanLII), 244 CCC (3d) 438, *per* Gillese JA
4. *R v Awad*, 2015 NSCA 10 (CanLII), 1126 APR 116, *per* Beveridge JA, at para 49
   R v Pardo, 1990 CanLII 10957, , 62 CCC (3d) 371, *per* Gendreau JA
   R v McHale, 2010 ONCA 361 (CanLII), 256 CCC (3d) 26, *per* Watt JA, at para 85 ("Laying or receipt of an information commences criminal proceedings"
5. *Davidson v British Columbia (Attorney General)*, 2006 BCCA 447 (CanLII), 214 CCC (3d) 373, *per* Levine JA (3:0)
6. *Pardo*, *supra* ("a person is an accused as of the laying of the information, which constitutes the beginning of the proceedings")
   R v Campbell v Ontario (Attorney General), 1987 CanLII 4333 (ON CA), 60 OR (2d) 617, *per curiam*

Indictable Offences

The two main routes for peace officers to lay an information for an indictable offence (including hybrid offences) start at s. 504 and 505. The main difference between the two options is based on whether the accused was subject to notice of charges. Under s. 504, an information is laid without the accused having any contact with police. Under s. 505 the accused is either arrested or given an appearance notice before an information is laid.

Laying an Information Under s. 504

Under s. 504, where an accused person is charged with an offence, the Information detailing the charge will be sworn by a peace officer. An officer may only swear an information on the basis of personal information or upon reasonable and probable grounds.[1]

> **In what cases justice may receive information**
>
> 504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged
>
> (a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
>
> (i) is or is believed to be, or
> (ii) resides or is believed to reside,
>
> within the territorial jurisdiction of the justice;
>
> (b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;
> (c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
> (d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.
>
> R.S., c. C-34, s. 455; R.S., c. 2(2nd Supp.), s. 5.
>
> – CCC

Section 504 provides a preliminary "screen" of the case to only proceed where there is a *prima facie* case.[2]

The justice's function at this stage is "entirely ministerial or administrative."[3]

The process set out in s. 504 is mandatory without any discretion, even in the case of private prosecutions.[4] No additional steps, such as requiring leave before laying an information are permitted.[5]

If the justice affirms the information by signing it, then the information has been laid and the matter begins the prosecution. The judge then must go to the next stage under s. 507 (public prosecutions) or 507.1 (private prosecutions).[6]

Once an information is sworn and laid, there is no obligation on the part of police to seek a summons or arrest "immediately following" the laying of the information.[7]

1. *R v Kamperman*, 1981 CanLII 3159 (NS SC), 48 NSR (2d) 317, 92 APR 317 (S.C.T.D), *per* Glube J
2. *R v Whitmore*, 1989 CanLII 7229 (ON CA), 35 OAC 373, 51 CCC (3d) 294, *per* Grange JA ("In any event, the duty of the justice of the peace is, first, to determine if the information is valid on its face and secondly, to determine whether it discloses or there is disclosed by the evidence a prima facie case of the offences alleged.")
3. *R v Lupyrypa*, 2008 ABQB 427 (CanLII), 451 AR 245, *per* Burrows J, at paras 48 to 49
4. *R v Thorburn*, 2010 ABQB 390 (CanLII), 500 AR 1, *per* Marceau J, at paras 56, 59
5. *Thorburn*, *ibid.*
6. *Thorburn*, *supra*, at para 59
7. *R v Worme*, 2014 SKQB 383 (CanLII), *per* Zuk J, at para 33

Laying an Information Under s. 505

Section 505 addresses the timing in which the information should be laid before a justice. It states:

> **Time within which information to be laid in certain cases**
>
> 505 If an appearance notice has been issued to an accused under section 497 [*appearance notice by peace officer*], or if an accused has been released from custody under section 498 or 503 [*taking person before justice after arrest*], an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by them shall be laid before a justice as soon as practicable after the issuance or release, and in any event before the time stated in the appearance notice or undertaking for their attendance in court.
>
> R.S., 1985, c. C-46, s. 505; 2019, c. 25, s. 218.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

Where the peace officer fails to comply with 505 by laying an information after the first court appearance does not result in a lack of jurisdiction over the offence or invalidate the information. [1]

1. *R v Markovic*, 2005 CanLII 36251, OJ No 4286 (ON CA), *per* Cronk JA

Issuing Process

Laying An Information by Phone

Under s. 508.1, an information can be laid before a justice of the peace by way of telecommunications including telephone. In this case the information provided by phone is deeded to be under oath (s. 508.1(2)).

Information laid otherwise than in person

508.1 (1) For the purposes of sections 504 to 508 [*provisions relating to laying informations*], a peace officer may lay an information by any means of telecommunication that produces a writing.

Alternative to oath

(2) A peace officer who uses a means of telecommunication referred to in subsection (1) [*meaning of telewarrant*] shall, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to the officer's knowledge and belief, and such a statement is deemed to be a statement made under oath.
1997, c. 18, s. 56.
[*annotation(s) added*]

– CCC

Laying an Information in Private Prosecution (s. 507.1)

Summary Offences

The process of laying charges for summary offences is similar to that of indictable offences. The procedure is set out in s. 788 to 795.

Commencement of proceedings

788 (1) Proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] shall be commenced by laying an information in Form 2 [*forms*].

One justice may act before the trial

(2) Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may

(a) receive the information;
(b) issue a summons or warrant with respect to the information; and
(c) do all other things preliminary to the trial.

R.S., c. C-34, s. 723.
[*annotation(s) added*]

– CCC

Formalities of information

789 (1) In proceedings to which this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] applies, an information

(a) shall be in writing and under oath; and
(b) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

No reference to previous convictions

(2) No information in respect of an offence for which, by reason of previous convictions, a greater punishment may be imposed shall contain any reference to previous convictions.
R.S., c. C-34, s. 724.
[*annotation(s) added*]

– CCC

Under s. 795, the provisions of Parts XVI and XVIII, XVIII.1, XX and XX.1 apply equally to summary offences.

All summary offences can only be sworn less than 6 months after the date of the allegations. (s. 786(2))

Replacement Informations

523
[*omitted (1)*]

When new information is received

(1.1) If an accused is charged with an offence and a new information, charging the same offence or an included offence, is received while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, section 507 [*process on justice receiving an information*] or 508 [*justice to hear informant and witnesses*], as the case may be, does not apply in respect of the new information and the order for detention, release order, appearance notice, summons or undertaking applies in respect of the new information. [*omitted (1.2), (2) and (3)*]
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
[*annotation(s) added*]

– CCC

Under s. 524(1.1) a court has "jurisdiction to receive and proceed on a relaid information nothwithstanding that the process has not been issued no that information".[1]

New Charges

Section 523(1.1) does not apply for new charges before the court that does not have process.[2]

Where the accused and a new information without process are both before the court, the court has jurisdiction to deal with the information.[3]

1. *R v Brar*, 2007 ONCJ 359 (CanLII), *per* Cowan J, at para 8
   Re McCarthy and The Queen, 1998 CanLII 5749 (BC SC), 131 CCC (3d) 102, *per* Melnick J
2. *R v Dougan*, 2012 YKSC 88 (CanLII), *per* McIntyre J, at para 19
3. *Dougan*, *supra*, at para 19
   McCarthy, *supra*

Direct Indictment Laid

523
[*omitted (1) and (1.1)*]

When direct indictment preferred

(1.2) If an accused is charged with an offence, and an indictment is preferred under section 577 charging the same offence or an included offence while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, the order for detention, release order, appearance notice, summons or undertaking applies in respect of the indictment. [*omitted (2) and (3)*]
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
[*annotation(s) added*]

– CCC

Replacement Release Order

Section 523(2) and (3) relate to the vacating of a previous detention/bail order.

523
[*omitted (1), (1.1) and (1.2)*]

Order vacating previous order for release or detention

(2) Despite subsections (1) [*duration that release conditions apply on replacement information*] to (1.2) [*previous release mechanism transfers to direct indictment*],

(a) the court, judge or justice before which or whom an accused is being tried, at any time,
(b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469 [*exclusive jurisdiction offences*], or
(c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1) [*consequences on new information is received*], without such consent, at any time

(i) where the accused is charged with an offence other than an offence listed in section 469 [*exclusive jurisdiction offences*], the justice by whom an order was made under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] or any other justice,
(ii) where the accused is charged with an offence listed in section 469 [*exclusive jurisdiction offences*], a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or
(iii) the court, judge or justice before which or whom an accused is to be tried,

may, on cause being shown, vacate any order previously made under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the interim release or detention of the accused and make any other order provided for in this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

Provisions applicable to proceedings under subsection (2)

(3) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] and 519 [*release of accused after show cause hearing*] apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2) [*power to vacate previous orders*], except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence listed in section 469 [*exclusive jurisdiction offences*].
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
[*annotation(s) added*]

– CCC

The judge must be satisfied that that "cause" has been shown before they may vacate the old order and make any new one.[1]

The ability to seek an order under 523(2) will depend on the stage of proceedings. An application can be made when:

1. during trial (523(2)(a))
2. upon "completion of the preliminary inquiry", except when it is a 469 offence (523(2)(b))
3. with consent of Crown and defence (523(2)(c)); *or*
4. if no consent, then "any time" so long as it is an order under (1.1) [ie. Replacement information] and the application is before any judge or justice (for a non 469 offence) *or*, if it *is* a 469 offence, it must be before a superior court of criminal jurisdiction;

A judge should only interfere where there has been a "material change in circumstances".[2]

Merely being committed to trial after a preliminary inquiry does not amount to "cause".[3]

Exclusive jurisdictions Offences under s. 469 do *not* apply to these orders under 523(2) and (3).[4]

1. See s. 523(2) "on cause being shown"
2. *R v McDonell*, 2012 ONSC 2567 (CanLII), *per* Hourigan J, at para 17
3. *McDonell*, *ibid.*, at para 19
4. See 523(3)

Transferring the Accused's Matter to the Proper Jurisdiction

Remand Where Offence Committed in Another Jurisdiction
Order that accused appear or be taken before justice where offence alleged to have been committed

543 (1) If an accused is charged with an offence alleged to have been committed out of the limits of the jurisdiction in which they have been charged, the justice before whom they appear or are brought may, at any stage of the inquiry after hearing both parties, order the accused to appear or, if the accused is in custody, issue a warrant in Form 15 [*forms*] to convey the accused before a justice who, having jurisdiction in the place where the offence is alleged to have been committed, shall continue and complete the inquiry.

Transmission of transcript and documents and effect of order or warrant

(2) Where a justice makes an order or issues a warrant pursuant to subsection (1) [*order that accused appear or be taken before justice where offence alleged to have been committed*], he shall cause the transcript of any evidence given before him in the inquiry and all documents that were then before him and that are relevant to the inquiry to be transmitted to a justice having jurisdiction in the place where the offence is alleged to have been committed and

> (a) any evidence the transcript of which is so transmitted shall be deemed to have been taken by the justice to whom it is transmitted; and
> (b) any appearance notice, undertaking or release order issued to or given or entered into by the accused shall be deemed to have been issued, given or entered into in the jurisdiction where the offence is alleged to have been committed and to require the accused to appear before the justice to whom the transcript and documents are transmitted at the time provided in the order made in respect of the accused under paragraph (1)(a) [*x*].

R.S., 1985, c. C-46, s. 543; 2019, c. 25, s. 245.
[*annotation(s) added*]

– CCC

Confirming Attendance

Once the accused attends for the first time in court, the authority of the justice of the peace or peace officer is complete and only the judge may compel future attendance. The purpose of a promise to appear, summons, or any other tool to ensure attendance is to secure attendance for the first time. After the initial appearance the promise to appear is irrelevant.[1]

Whenever a judge had an information before him, he must comply with section 508. Section 508(b)(i) would appear to require that judges confirm that the notice, promise to appear or recognizance remains in effect and then endorse the information.[2]

However, case law has been divergent on the issue of whether the failure to confirm the order to return to court creates a nullity, invalidating the information. While there are a number of cases supporting the nullity effect on the lack of confirmation,[3] there is a growing line of cases that see it as having no effect on the validity of the charge.[4]

1. *R v Oliveira*, 2009 ONCA 219 (CanLII), 243 CCC (3d) 217, *per* Doherty JA at 30
2. *R v Key*, 2011 ONCJ 780 (CanLII), *per* Robertson J - detailed review of cases
3. eg. *R v Koshino*, [1991] OJ No 173 (Gen. Div.)(*no CanLII links)
   R v Sandoval, [2000] OJ No 5591 (SCJ)(*no CanLII links)
   R v Smith, 2008 CanLII 3410 (ONSC), [2008] OJ No 381 (SCJ), *per* Belobaba J
   R v Pilieci, 2010 ONSC 3606 (CanLII), 257 CCC (3d) 541, *per* Lauwers J
4. *R v Rennie*, [2004] OJ No 4990 (SCJ)(*no CanLII links)
   R v Pavlick, [2008] OJ No 2114 (SCJ)(*no CanLII links)
   R v Sullivan, [2009] OJ No 5075 (SCJ)(*no CanLII links)
   R v Duran, 2011 ONSC 7346 (CanLII), 285 CCC (3d) 46, *per* Trotter J
   R v Morton, 1992 CanLII 7818 (ONSC), 70 CCC (3d) 625, *per* Then J, affirmed, 83 CCC (3d) 95, 1993 CanLII 8575 (ON CA), *per curiam*
   R v Matykubov, 2010 ONCJ 233 (CanLII), *per* Armstrong J
   See also *R v Wetmore*, 1976 CanLII 1358 (NSCA), (1976), 18 NSR (2d) 292 (NSCA), *per* MacKeigan CJ

Confirming Attendance After Conviction and Before Sentencing

732.2
[*omitted (1), (2), (3), (4) and (5)*]

Compelling appearance of person bound

(6) The provisions of Parts XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] and XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under subsections (3) [*probation order – changes to order*] and (5) [*vary or cancel probation order on breach conviction*].

1995, c. 22, s. 6; 2004, c. 12, s. 12(E).
[*annotation(s) added*]

– CCC

See Also

- Release by Police
- Private Prosecutions
- Informations and Indictments

Direct Indictments

< Procedure and Practice < Informations and Indictments

Preferring Indictments

Section 566, 574 and 576 refers to the "preferring" of an indictment.

Indictment

566 (1) The trial of an accused for an indictable offence, other than a trial before a provincial court judge, shall be on an indictment in writing setting forth the offence with which he is charged.

Preferring indictment

(2) Where an accused elects under section 536 [*trial of absolute jurisdiction offences*] or re-elects under section 561 [*right of re-election*] to be tried by a judge without a jury, an indictment in Form 4 may be preferred.

What counts may be included and who may prefer indictment

(3) Section 574 and subsection 576(1) [*no indictment can be preferred except within Code*] apply, with such modifications as the circumstances require, to the preferring of an indictment pursuant to subsection (2) [*preferring indictment on judge-alone election*].

R.S., 1985, c. C-46, s. 566; R.S., 1985, c. 27 (1st Supp.), s. 111; 1997, c. 18, s. 67.
[*annotation(s) added*]

– CCC

Prosecutor may prefer indictment

574 (1) Subject to subsection (3) [*judicial consent required for private prosecution*], the prosecutor may, whether the charges were included in one information or not, prefer an indictment against any person who has been ordered to stand trial in respect of

(a) any charge on which that person was ordered to stand trial; or
(b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial.

Preferring indictment when no preliminary inquiry

(1.1) If a person has not requested a preliminary inquiry under subsection 536(4) [*request for preliminary inquiry*] or 536.1(3) [*request for preliminary inquiry – Nunavut*] into the charge or was not entitled to make such a request, the prosecutor may, subject to subsection (3) [*judicial consent required for private prosecution*], prefer an indictment against a person in respect of a charge set out in an information or informations, or any included charge, at any time after the person has made an election, re-election or deemed election on the information or informations.

Preferring single indictment

(1.2) If indictments may be preferred under both subsections (1) [*power of prosecutor to prefer indictment*] and (1.1) [*preferring indictment when no preliminary inquiry*], the prosecutor may prefer a single indictment in respect of one or more charges referred to in subsection (1) [*power of prosecutor to prefer indictment*] combined with one or more charges or included charges referred to in subsection (1.1) [*preferring indictment when no preliminary inquiry*].

Consent to inclusion of other charges

(2) An indictment preferred under any of subsections (1) to (1.2) [*means of preferring an indictment*] may, if the accused consents, include a charge that is not referred to in those subsections, and the offence charged may be dealt with, tried and determined and punished in all respects as if it were an offence in respect of which the accused had been ordered to stand trial. However, if the offence was committed wholly in a province other than that in which the accused is before the court, subsection 478(3) [*offence committed entirely in one province – ordered into custody*] applies.

[*omitted (3)*]
R.S., 1985, c. C-46, s. 574; R.S., 1985, c. 27 (1st Supp.), s. 113; 2002, c. 13, s. 45; 2019, c. 25, s. 263.
[*annotation(s) added*]

– CCC

Indictment

576 (1) Except as provided in this Act, no indictment shall be preferred.

Criminal information and bill of indictment

(2) No criminal information shall be laid or granted and no bill of indictment shall be preferred before a grand jury.

Coroner's inquisition

(3) No person shall be tried on a coroner's inquisition.

R.S., 1985, c. C-46, s. 576; R.S., 1985, c. 27 (1st Supp.), s. 114.

– CCC

The preferring of an indictment occurs when it is "lodged" with the superior court at the opening of trial.[1]

Once an indictment has been preferred, any defect arising from the arrest, summoning, or preliminary inquiry will not invalidate the indictment.[2]

An indictment has been preferred once an accused has been arraigned and plead not guilty. At this point the indictment cannot be quashed.[3]

1. *R v Chabot*, 1980 CanLII 54 (SCC), [1980] 2 SCR 985, *per* Dickson J
   R v Tippett, 2010 NLCA 49 (CanLII), 259 CCC (3d) 396, *per* Green CJ
2. *Chabot*, *ibid.*
   R v Dowson, 1983 CanLII 59 (SCC), [1983] 2 SCR 144, *per* Lamer J
   Tippett, *supra*, at para 16
3. *R v Tippett*, 2010 NLCA 49 (CanLII), 259 CCC (3d) 396, *per* Green CJ
   R v Pike, 1992 CanLII 7129 (NL CA), 77 CCC (3d) 155, *per* Steele JA

Direct Indictment

A "direct indictment" is an indictment that has been put before a Superior Court Justice without there having been an information from which the accused would have had an option of a preliminary inquiry.

Direct indictments

577. Despite section 574 [*authority to prefer an indictment*], an indictment may be preferred even if the accused has not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has been commenced but not concluded or a preliminary inquiry has been held and the accused has been discharged, if

> (a) in the case of a prosecution conducted by the Attorney General or one in which the Attorney General intervenes, the personal consent in writing of the Attorney General or Deputy Attorney General is filed in court; or
> (b) in any other case, a judge of the court so orders.

R.S., 1985, c. C-46, s. 577; R.S., 1985, c. 27 (1st Supp.), s. 115, c. 1 (4th Supp.), s. 18(F); 2002, c. 13, s. 46.
[*annotation(s) added*]

– CCC

A direct indictment may be commenced by the Attorney General of Canada as well as the provincial Attorney General.[1]

Where a direct indictment has been preferred the accused is deemed to have waived the preliminary inquiry and has made an election of trial by judge and jury (565).

Direct indictments can be used even where there was already an election to provincial court.[2] It can also be used where the offence is one of absolute jurisdiction under s. 553[3]

Direct Indictments are most frequently used where:[4]

1. delays in the trial could deprive the accused of the right to be tried within a reasonable time;
2. the physical or psychological health of witnesses, their age, their safety or that of their relatives, and the difficulties involved in having witnesses testify more than once;
3. preservation of the integrity of the Crown's evidence by, for example, protecting informants and ongoing police investigations;
4. a risk that evidence could be destroyed;
5. public safety reasons;
6. the need to avoid multiple proceedings caused, for example, by delays in making arrests;
7. the accused was wrongly discharged following the preliminary inquiry because of errors, or new evidence has been discovered;
8. a preliminary inquiry would be unreasonably costly, complex or long, or would be inappropriate because of the nature of the issues or the evidence;
9. the alleged offence is so controversial that it is in the public interest to try the case as quickly as possible; and
10. certain guidelines set out additional, broader criteria, such as the need to maintain public confidence in the administration of justice, the public interest, or the fact that the case is notorious or of particular importance to the public, that the direct indictment is the most appropriate procedure in the circumstances, or that there is a special need to expedite proceedings.

The Attorney General does not need to give reasons for deciding to prefer a direct indictment.[5]

The power under s. 577 is a discretionary power of the Crown.[6] However, it is reviewable for violations of the Charter. [7]

The consent of the Attorney General should generally be found on the direct indictment with a signature. However, may still be valid by attaching a letter from the Attorney-General consenting to the indictment.[8]

The "recommendation package" addressed to the Attorney General setting out a recommendation for laying a direct indictment is privileged and not disclosable.[9]

No New Bail Hearing

The filing of a direct indictment does not create a new right to a second bail hearing for an accused held in custody.[10]

1. *R v Trang*, 2001 ABQB 106 (CanLII), 153 CCC (3d) 201, *per* Binder J
2. *Sher v The Queen*, 2012 ONSC 4783 (CanLII), OJ No 3916, *per* Rutherford J, at para 14
   R v Poloni, 2009 BCSC 629 (CanLII), 190 CRR (2d) 162, *per* Leask J ("[the case law] all unequivocally state that the Attorney General has jurisdiction to directly indict an accused person who previously elected trial in provincial court.")
3. *R v Beaudry*, 1966 CanLII 537 (BC CA), [1967] 1 CCC 272 (BCCA), *per* Bull JA
4. *R v SJL*, 2009 SCC 14 (CanLII), [2009] 1 SCR 426, *per* Deschamps J, at para 38
5. *Sher*, *supra*, at paras 27, 29
6. *Ertel*, *supra*
7. *R v Dallas, Hinchcliffe & Terezakis*, 2001 BCSC 77 (CanLII), [2001] BCTC 77, *per* Curtis J, at para 21
8. See *R v L'Henaff*, 1999 SKQB 259 (CanLII), 192 Sask R 103, *per* Gerein J for form of indictment
9. *R v Ahmad*, 2008 CanLII 27470 (ON SC), 77 WCB (2d) 804, *per* Dawson J
   see also Solicitor Client Privilege
10. *R v Codina #7*, 2018 ONSC 1096 (CanLII), [2018] OJ No 964, *per* Molloy J, at para 58

Constitutionality of s. 577

Section 577 was found to be constitutional despite its effect of removing the right to a preliminary inquiry.[1]

It is not necessary to rely on unwritten constitutional principles to determine whether the use of s. 577 complies with the Charter.[2]

1. *R v Ertel*, 1987 CanLII 183 (ON CA), 35 CCC (3d) 398, *per* Lacouricere JA
   Re Regina and Arviv, 1985 CanLII 161 (ON CA), 19 CCC (3d) 395, *per* Martin JA, appeal ref'd [1985] 1 SCR v,
   see also *R v Charlie*, 1998 CanLII 4145 , *per* Southin JA
2. *R v Ahmad*, 2008 CanLII 54312 (ON SC), *per* Dawson J

Failure to Complete Disclosure

Preferring a direct indictment where disclosure obligations have not been met may breach the right to full answer and defence under s. 7 of the Charter as it removes the ability to cross-examine witnesses prior to trial.[1] This proposition may not still apply given later developments in case law.[2]

1. *R v Rosamond*, 1983 CanLII 2576 (SK QB), 5 CCC (3d) 523, *per* Vancise J
   Re Regina and Arviv, 1985 CanLII 161 (ON CA), 19 CCC (3d) 395, *per* Martin J, at para 26
   R v Sterling, 1993 CanLII 9146 (SK CA), 84 CCC (3d) 65, *per* Bayda CJ
   see also: *R v Chan*, 2003 ABQB 169 (CanLII), 172 CCC (3d) 349, *per* Sulyma J
   cf. *R v Bjelland*, 2009 SCC 38 (CanLII), [2009] 2 SCR 651, *per* Rothstein J
2. The case law on this point re-dates the conclusions drawn from *Bjelland*, *supra*, at paras 32 to 36 and *R v SJL*, 2009 SCC 14 (CanLII), [2009] 1 SCR 426, *per* Deschamps J, at para 21 which stated that the discovery function of the preliminary inquiry has a reduced importance.

History of Section 577

Prior to the 2002 amendments to s. 577, the provision read:

> **Direct indictments**
>
> 577. In any prosecution,
>
> (a) where a preliminary inquiry has not been held, an indictment shall not be preferred, or
> (b) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid
>
> before any court without,
>
> (c) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General, or
> (d) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court.
>
> R.S., 1985, c. C-46, s. 577; R.S., 1985, c. 27 (1st Supp.), s. 115, c. 1 (4th Supp.), s. 18(F).
>
> – CCC

Prior to the 1985, s. 577 was found at s. 504.[1]

1. See Table_of_Concordance_(Criminal_Code)

Proper Use of Discretion and Abuse of Process

The exercise of power under s. 577 can be reviewed as an abuse of process.[1]

To warrant a remedy, it must be shown "that a discretion was exercise for improper or arbitrary motives".[2] There must be "clear and convincing evidence supporting the allegations before the Court."[3]

The defence may be able to have the court order evidence be taken from the justice system participants involved in the decision and the documents related to the decision to direct the indictment.[4] There is a high standard to warrant such disclosure requiring evidence of *mala fides* or "flagrant impropriety".[5] Further, the applicant must show that the documents fall under an exception to solicitor-client privilege.[6]

Filing a direct indictment mid-trial may be the basis of finding an abuse of process.[7]

Procedural Impasses

The use of a direct indictment as a means to "break the procedural impasse" is considered acceptable.[8]

Protecting the Well-being of Witnesses

The laying of a direct indictment for the purpose of protecting the mental and physical well-being of witnesses, especially sexual assault complainants, is a valid exercise of Crown discretion.[9]

Timely Adjudication of Case

The Crown should give "very serious consideration" to direct indictments in order to ensure that cases are tried on their merits.[10]

1. e.g. *R v Trang*, 2002 ABQB 744 (CanLII), 323 AR 297, *per* Binder J, at para 369
2. *R v Beare*, 1988 CanLII 126 (SCC), [1988] 2 SCR 387, *per* L Forest J
3. *R v Dallas, Hinchcliffe & Terezakis*, 2001 BCSC 77 (CanLII), [2001] BCTC 77, *per* Curtis J, at para 21
4. *R v Durette*, 1992 CanLII 2779 (ON CA), 72 CCC (3d) 42, *per* Finlayson JA (2:1) - judge declined to order statements from prosecutors but ordered sealed copies of relevant documents
5. *R v Chan*, 2003 ABQB 169 (CanLII), 172 CCC (3d) 349, *per* Sulyma J - application for disclosure denied
6. *R v Trang*, 2002 ABQB 744 (CanLII), 11 Alta LR (4th) 52, *per* Binder J, at para 419
7. *R v JSG*, 2020 SKQB 164 (CanLII), 391 CCC (3d) 404, *per* Danyliuk J
8. *R v Thomas*, 2017 BCSC 841 (CanLII), *per* Baird J, at para 18
9. *R v CMM*, 2017 MBCA 105 (CanLII), 2 WWR 213, *per* Mainella JA, at para 13 ("It is entirely appropriate for the proper administration of justice for the Crown to exercise its direct indictment power under section 577 to protect the physical or psychological health of a witness, such as a sexual assault complainant, from the difficulties involved in testifying more than once or to prevent or remedy a wrongful discharge arising from a legal error made by a preliminary inquiry judge")
   R v SJL, 2009 SCC 14 (CanLII), [2009] 1 SCR 426, *per* Deschamps J, at para 38
10. *CCM*, *supra*, at para 14
    R v Manasseri, 2016 ONCA 703 (CanLII), 344 CCC (3d) 281, *per* Watt JA, at para 376

Procedure

Where an indictment is preferred, the accused may be compelled to attend by way or summons or warrant for arrest, as the case may be, under s. 578, which states:

Summons or warrant

578 (1) Where notice of the recommencement of proceedings has been given pursuant to subsection 579(2) [*crown directed stay of proceedings – recommencement*] or an indictment has been filed with the court before which the proceedings are to commence or recommence, the court, if it considers it necessary, may issue

(a) a summons addressed to, or
(b) a warrant for the arrest of,

the accused or defendant, as the case may be, to compel him to attend before the court to answer the charge described in the indictment.

Part XVI to apply

(2) 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 where a summons or warrant is issued under subsection (1) [*procuring attendance on re-commencement of charges*].
R.S., 1985, c. C-46, s. 578; R.S., 1985, c. 27 (1st Supp.), s. 116.
[*annotation(s) added*]

– CCC

No Right for Accused to Participate

The accused has no right to participate in the process of exercising Crown discretion in laying a direct indictment despite Crown policy recommending notice to defence.[1]

1. *R v Papasotiriou-Lanteigne*, 2016 ONSC 6145 (CanLII), OJ No 5056, *per* Nordheimer J, at paras 57 to 61

Timing of Preferring an Indictment

The fact that a direct indictment was laid during a preliminary inquiry does not constitute interference with judicial independence.[1]

1. *R v Codina #7*, 2018 ONSC 1096 (CanLII), [2018] OJ No 964, *per* Molloy J, at para 88

Deemed Election

565
[*omitted (1)*]

When direct indictment preferred

(2) If an accused is to be tried after an indictment has been preferred against the accused on the basis of a consent or order given under section 577 [*direct indictments*], the accused is, for the purposes of the provisions of this Part [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] relating to election and re-election, deemed to have elected to be tried by a court composed of a judge and jury and not to have requested a preliminary inquiry under subsection 536(4) [*request for preliminary inquiry*] or 536.1(3) [*request for preliminary inquiry – Nunavut*], if they were entitled to make such a request, and may re-elect to be tried by a judge without a jury without a preliminary inquiry.

Notice of re-election

(3) If an accused intends to re-elect under subsection (2) [*deemed election on direct indictment*], the accused shall give notice in writing to a judge or clerk of the court where the indictment has been filed or preferred. The judge or clerk shall, on receipt of the notice, notify a judge having jurisdiction or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or clerk any indictment, appearance notice, undertaking or release order given by or issued to the accused, any summons or warrant issued under section 578 [*procuring attendance on re-commencement of charges*] and any evidence taken before a coroner that is in the possession of the first-mentioned judge or clerk.

[*omitted (4)*]
R.S., 1985, c. C-46, s. 565; R.S., 1985, c. 27 (1st Supp.), s. 111; 1999, c. 3, s. 46; 2002, c. 13, s. 41; 2008, c. 18, s. 23; 2019, c. 25, s. 260.

– CCC

Right to Re-Elect

Where a direct indictment has been preferred, he accused has a right to re-elect without the consent of the Crown.[1] However, the right of election does not extend into the jury trial tiself. It may be necessary that there be at least 60 days notice before the commencement of jury selection.[2]

1. *R v Conway-McDowall*, 2019 ABQB 11 (CanLII), *per* Henderson J
   R v Perdomo, 2019 ABQB 415 (CanLII), *per* Neufeld J
2. *Perdomo*, *ibid.*, at para 49

Form and Content of Charges

Form and Content of Charges

Joinder and Severance of Charges

Joinder and Severance of Charges

Amendments to Charges

Amendments to Charges

Private Prosecutions

Private Prosecutions

Types of Offences

Types of Offences
