SPECIAL FEATURE

Appellate Review: Criminal Law

The Honourable Justice Malcolm H Rowe & Michael Collins*

Abstract: Most provinces and territories in Canada have provided for a single flexible right of appeal in civil appeals. By contrast, the *Criminal Code* defines different rights of appeal for different kinds of decisions. This special feature provides an overview of appeals from convictions, acquittals, stays of proceedings, and sentences. It discusses which courts have the power to hear appeals, the approach to leave to appeal, and the applicable standards of review.

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Introduction: Criminal Appeals in Canada

There is no single Canadian criminal appeal jurisdiction. Rather, there are many separate rights of appeal, each of which has its own scope and principles. This special feature aims to provide an overview of the standards of review applicable to appeals from convictions, acquittals, stays of proceedings, and sentences.

Appeals in respect of indictable offences are dealt with by the provincial and territorial appellate courts.[1] Appeals from summary conviction offences are heard by a single judge of the provincial superior courts.[2] A further appeal to the Court of Appeal is available with leave.[3] While the test

1. *Criminal Code*, RSC, 1985, c C-46, Part XXI.
2. *Ibid*, ss 812(1), 829(1). The exception is Nunavut, where a single judge of the Nunavut Court of Appeal hears summary conviction appeals: ss 812(2), 829(2).
3. *Ibid*, s 839. In Nunavut, this appeal lies from a single judge of the Nunavut Court of Appeal to a panel of three: s 839(1.1).

for leave to appeal has been formulated differently in different jurisdictions, the main elements are generally merit and public importance.[4] When summary conviction and indictable matters are tried together, a single appeal to the Court of Appeal can be available, with leave.[5]

A final appeal to the Supreme Court of Canada is available in three situations. First, either the prosecution or the defendant has a right to appeal to the Supreme Court of Canada if there is a dissent in the Court of Appeal on a question of law in an appeal from an indictable conviction, acquittal or verdict of not criminally responsible or unfit to stand trial.[6] Second, the defendant has a right to appeal to the Supreme Court of Canada if the Court of Appeal sets aside an acquittal or of not criminally responsible and enters a verdict of guilty.[7] Third, in the absence of a dissent in the Court of Appeal, either the prosecution or the defendant can seek the Court's leave to appeal.[8] Leave is usually granted only if the case raises an issue of public importance.

4. Ontario, Quebec, Nova Scotia, and the Northwest Territories follow the formulation in *R v R(R)*, 2008 ONCA 497 at para 37, in which leave will be granted if there is a question of law that is significant to the general administra-tion of justice or if there is a clear error of law. Newfoundland and Labrador requires a question of law that either has a reasonable possibility of success or which has significance to the administration of justice: *Newfoundland Recycling Ltd v Newfoundland and Labrador (Attorney General)*, 2009 NLCA 28 at para 9, cited in *R v Kennedy*, 2020 NLCA 11 at para 5. Prince Edward Island applies a threshold similar to Newfoundland and Labrador's: *Dorgan and Gavin v R*, 2009 PECA 23 at para 12, cited in *R v Gavin*, 2018 PECA 6 at para 7. New Brunswick has not formulated a test, but has refused leave when there was no error of law (*Delorey v R*, 2018 NBCA 50 at para 10; *Matchett v R*, 2018 NBCA 32 at para 5) or when the appeal would not have a reasonable chance of success (*Hébert v R*, 2018 NBCA 18 at para 4). Manitoba requires a question of law alone that sets out an arguable case of substance and of sufficient importance to merit the full court's attention: *R v McCorriston (GJ)*, 2010 MBCA 3 at para 16, cited in *R v Jorowski*, 2020 MBCA 43 at para 12. Saskatchewan requires a question of law that is either significant to the administration of law generally or compellingly meritorious: *R v Bray*, 2017 SKCA 17 at para 2, cited in *R v Grover*, 2020 SKCA 40 at para 17. Alberta requires a question of law alone that is of public importance: *R v Caswell*, 2015 ABCA 97 at para 17; for more detail, see *R v Pawlowski*, 2011 ABCA 267 at para 11, cited in *R v Fournier*, 2017 ABCA 424 at para 23. British Columbia and Yukon require a question of law alone, of public importance, and with sufficient merit to have a reasonable possibility of success: *R v Winfield*, 2009 YKCA 9 at para 13, cited in *R v Heltman*, 2019 BCCA 224 at para 24. Nunavut does not appear to have addressed this issue.
5. *Criminal Code, supra* note 1, ss 675(1.1), 676(1.1).
6. *Ibid*, ss 691(1)(a), 691(2)(a), 692(3)(a).
7. *Ibid*, s 691(2)(b).
8. *Ibid*, s 691(1)(b), 691(2)(c), 692(3)(c), 693(1)(b).

1. Sources of Standards of Review

There is no inherent right to appeal at common law.[9] All appeals are statutory. Canadian criminal appeals are governed by the *Criminal Code*, a statute that codified and displaced the older judge-made common law of criminal law and procedure. In this respect, Canada has departed markedly from the English source of its criminal law.

Rather than containing a single flexible right of appeal, as all common law provinces and territories have done for most civil litigation,[10] the *Criminal Code* establishes different rights of appeal from different kinds of decision. These rights have remained fairly consistent for many years, and a large jurisprudence has built up interpreting them. As a result, Canadian criminal standards of review are mostly found in judicial decisions interpreting the *Criminal Code*. This stability incorporates some complexity.

2. Outline

Canadian criminal law includes several possible verdicts. By far the most common are conviction or acquittal. An accused who suffers from a mental disorder can also be found not criminally responsible on account of a mental disorder,[11] or unfit to stand trial on account of a mental disorder.[12] An accused can also receive the special verdicts of autrefois acquit (previously acquitted), autrefois convict (previously convicted), pardon, and expungement.[13]

9. *R v W(G)*, [1999] 3 SCR 597, 1999 CanLII 668 (SCC). However, the common law courts had internal tools for fulfilling the functions of modern appeal courts: see e.g. James Oldham, "Informal Law-Making in England by the Twelve Judges in the Late 18th and Early 19th Centuries" (2011) 27 Law & Hist Rev 181.

10. See *Judicature Act*, RSA 2000, c J-2, s 3; *Court of Appeal Act*, RSBC 1996, c 77, s 6; *The Court of Appeal Act*, CCSM c C240, s 25; *Judicature Act*, RSNB 1973, c J-2, s 8; *Court of Appeal Act*, SNL 2017, c C-37.002, s 6; *Judicature Act*, RSNS 1989, c 240, s 38; *Courts of Justice Act*, RSO 1990, c C.43, s 2; *Judicature Act*, RSPEI 1988, c J-2.1, s 3; *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, s 7; *Court of Appeal Act*, RSY 2002, c 47, s 2.

11. *Criminal Code, supra* note 1, s 672.34.

12. *Ibid*, ss 672.27, 672.31.

13. *Ibid*, s 607. In a defamatory libel case, the special plea of justification is also available: see ss 611-612.

Judges make many decisions before a trial reaches a verdict, including procedural decisions but also substantive decisions on constitutional issues or the admissibility of evidence. The *Criminal Code* does not ordinarily allow an immediate appeal from most of these decisions[14] (though some errors by a provincial court judge can be set aside by an extraordinary remedy such as *certiorari*[15]). Rather, such issues can be raised as part of an appeal from the final disposition.

In some cases, a judge's decision brings the trial to an end before a verdict. Most notably, a judge may quash the charges (for example, where the evidence regarding a necessary element of the offence is deficient[16]), or enter a stay of proceedings.[17] A stay of proceedings can be imposed as a remedy for state misconduct, or if the accused is found guilty of multiple offences for essentially a single wrong.[18] An order that stays proceedings or quashes an indictment is a final disposition and can be immediately appealed.

This special feature describes the main standards of review for convictions, acquittals, stays of proceedings, and sentences, which represent the great majority of criminal appeals. We will focus on the procedures for indictable offences under the *Criminal Code*. These procedures are followed, with slight differences, for summary conviction offences, youth offences, and some regulatory offences, which can be created by provincial legislatures to give effect to their areas of jurisdiction, such as motor vehicle regulation.

In the description that follows, the term "appellate courts" is used to include the Courts of Appeal and the Supreme Court of Canada. With very few exceptions, the standards of review and the role undertaken by the Courts of Appeal and the Supreme Court of Canada are similar, save that the Supreme Court of Canada can overrule the Courts of Appeal.

I. Appeals from Conviction

An accused can be convicted in three ways: after a guilty plea, after trial before a judge alone, or after a trial before a judge and jury.[19] Jury trials are available for more serious offences.[20]

14. See *R v Awashish*, 2018 SCC 45 at paras 10-12 [*Awashish*], explaining the policy against fragmenting trials or deciding issues on an incomplete record.
15. *Criminal Code, supra* note 1, Part XXVI. The Crown or defence can only obtain *certiorari* if the provincial court judge made a jurisdictional error, though a third party can also challenge an error on the face of the record relating to a decision that has a final and conclusive effect on the third party: *Awashish*, *ibid* at para 20. Applications for extraordinary remedies are heard by the superior court, with a further appeal to the court of appeal: *Criminal Code*, *supra* note 1, s 784.
16. *Ibid*, s 601.
17. See e.g. *R v Jewitt*, [1985] 2 SCR 128, 1985 CanLII 47 (SCC).
18. To paraphrase the test from *Kienapple v R*, [1975] 1 SCR 729, 1974 CanLII 14 (SCC); see also *R v Prince*, [1986] 2 SCR 480, 1986 CanLII 40 (SCC).
19. See *Criminal Code, supra* note 1, ss 570, 606, 660-62, 801.
20. See *ibid*, s 560. See also *ibid*, s 785 for a definition of "summary conviction court".

Appeals from a guilty plea are possible, but they raise special considerations. The accused must show that the guilty plea was not voluntary, not unequivocal, or not informed.[21]

A conviction after trial can be appealed for three reasons: unreasonable verdict, a wrong decision on a question of law, or a miscarriage of justice.[22] A ground of appeal on a question of fact or of mixed fact and law requires leave to appeal; however, this is rarely necessary.[23]

1. Unreasonable Verdict

To argue that a conviction was an unreasonable verdict, the accused must show that no properly instructed jury, acting judicially, could reasonably have entered the conviction based on the evidence.[24] This requires the appellate court to consider the evidence in light of judicial experience, reweighing it to a limited extent to ensure that the outcome is reasonable.[25] In so doing, it must consider that the judge or jury under appeal had the advantage of being present throughout the trial as the evidence was presented.[26]

While the verdict is a decision of fact, whether a verdict is unreasonable is a question of law.[27] A jury's verdict of guilt is the main form of unreasonable verdict. However, if a verdict was entered by a judge alone, an appellate court can also find it to be unreasonable if the judge's reasons for conviction rely on inferences or findings of fact that are (1) plainly contradicted by the evidence that the trial judge relied on, or (2) incompatible with evidence that the trial judge did not reject.[28]

2. Error of Law

On appeal, the accused may also place in issue any of the judge's legal decisions. For example, the accused may challenge the judge's decision to admit or exclude evidence. The standard of review for decisions of law is correctness. This means the appellate court can substitute its own view for the trial judge's view. The standard of review for factual findings is palpable and overriding error.[29] This means that appellate courts show considerable deference to the trial judge's findings of fact. Thus, appeals at either the Court of Appeal or the Supreme Court are *not* a re-trial on the record.

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21. See e.g. *R v Wong*, 2018 SCC 25 at para 3.
22. *Criminal Code, supra* note 1, s 686(1)(a).
23. *Ibid*, s 675(1)(a)(ii). A certificate from the trial judge can substitute for leave. Leave to appeal is also required if a ground of appeal does not raise a question of law, fact, or mixed fact and law: s 675(1)(a)(iii). Because unreasonable verdicts and misapprehension of evidence are treated as questions of law alone, resort to these provisions is rarely needed.
24. *R v Yebes*, [1987] 2 SCR 168, 1987 CanLII 17 (SCC) at para 25; see also *R v RP*, 2012 SCC 22 at para 9 [RP].
25. *R v Biniaris*, 2000 SCC 15 at paras 36-41 [*Biniaris*].
26. *R v WH*, 2013 SCC 22 at para 27.
27. *Biniaris, supra* note 25 at para 27.
28. *RP, supra* note 24 at para 9.
29. See e.g. *R v Babos*, 2014 SCC 16.

In an appeal from a jury trial, the accused can challenge the judge's instructions to the jury. In such instances, the applicable standard of review is "whether the charge as a whole enabled the trier of fact to decide the case according to the law and the evidence."[30]

In a trial before a judge alone, the accused can argue that the judge misapprehended the evidence. The standard of review here is whether the judge was mistaken about the substance of material parts of the evidence and whether the errors play an essential part in the reasoning process.[31]

The appellate court can affirm a conviction notwithstanding a wrong decision on a question of law. This is authorized by the "curative proviso" of the *Criminal Code* in two situations: (1) where the error is harmless or trivial, or (2) where the evidence is so overwhelming that the trier of fact would inevitably convict.[32] The curative proviso tends to be used sparingly by appellate courts.

3. Miscarriage of Justice

The third basis for appeal from a conviction is a miscarriage of justice. The jurisprudence has divided miscarriages of justice into two general categories: (1) an unfair trial, and (2) anything that would shake public confidence in the administration of justice.[33] The flexibility inherent in the concept of miscarriage of justice helps ensure that appellate courts can respond to a wide variety of circumstances that warrant appellate intervention.

An error of law that leads to an unfair trial or that would shake public confidence in the administration of justice can lead to a miscarriage of justice.[34] If so, the curative proviso is not available.

One example of a miscarriage of justice that does not involve an error of law involves fresh evidence. A conviction can be overturned based on evidence that was not presented at trial, if the evidence: (1) could not have been found by due diligence, (2) bears on a decisive or potentially decisive issue, (3) is credible, and (4) if believed, could reasonably have affected the result.[35]

Another example of a miscarriage of justice is ineffective representation by counsel. A conviction can be overturned if counsel's acts or omissions were incompetent, resulting in a trial that was fundamentally unfair.[36]

30. *R v Calnen*, 2019 SCC 6 at para 8.
31. *R v Lohrer*, 2004 SCC 80 at para 6.
32. *R v Sekhon*, 2014 SCC 15 at para 53.
33. *R v Davey*, 2012 SCC 75 at para 51.
34. *R v Arradi*, 2003 SCC 23 at paras 38-39.
35. *R v GDB*, 2000 SCC 22 at para 16.
36. *Ibid* at para 26.

4. Remedies for Appeals from Convictions

If an appellate court finds an unreasonable verdict, error of law, or a miscarriage of justice, it can enter an acquittal, order a new trial, or substitute a conviction for a lesser included offence. It can also find the accused unfit to stand trial on account of a medical disorder, or not criminally responsible on account of a medical disorder.[37]

II. Appeals from Acquittals and Stays

The Crown has the right to appeal from an acquittal, a verdict of not criminally responsible by reason of a mental disorder, a stay of proceedings, or a quashed indictment (the document charging the accused and authorizing prosecution).[38]

The Crown's right to appeal an acquittal is narrower than an accused's right to appeal a conviction. The Crown may only appeal an acquittal on "any ground of appeal that involves a question of law alone".[39]

However, what constitutes a "question of law alone" has been interpreted broadly:

- It is an error of law to make a finding of fact for which there is no evidence — however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule.[40]
- The legal effect of findings of fact or of undisputed facts raises a question of law.[41]
- An assessment of the evidence based on a wrong legal principle is an error of law.[42]
- The trial judge's failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence is an error of law.[43]

An error of law may even be found if the trial judge articulates the right test, if the judge's reasoning and application of the test demonstrate an error.[44]

Once a "question of law alone" is identified, the standard of review is correctness. If an error of law is found, the court will only grant a remedy if the error might reasonably be thought to have had a material bearing on the outcome.[45]

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37. *Criminal Code, supra* note 1, ss 686(1)-(3).
38. *Ibid*, ss 676(1)-(2).
39. *Ibid*, s 676(1)(a).
40. *R v JMH*, 2011 SCC 45 at paras 25-27.
41. *Ibid* at para 28.
42. *Ibid* at paras 29-30.
43. *Ibid* at paras 31-32.
44. *R v Chung*, 2020 SCC 8 at para 13.
45. *R v Graveline*, 2006 SCC 16 at para 15.

1. Remedies

If the appellate court finds an error of law, it can order a new trial.[46] This is the only remedy available where a jury has acquitted an accused.[47] However, if the appeal is from a decision by a judge alone, the court can also substitute a conviction[48] if the trial judge made, implicitly or explicitly, all the findings of fact that would be necessary for a conviction.[49]

III. Appeals from Sentences

Sentencing judges are accorded considerable discretion. They are required to exercise this discretion in accordance with principles and objectives of sentencing codified in the *Criminal Code* and developed in case law. Within these guidelines, and constrained by maximum sentences and, in some cases, minimum sentences, the process of sentencing is highly individualized. In recognition of this fact, the decisions of sentencing judges are accorded a high degree of deference by appellate courts.[50]

Both the Crown and the offender can, with leave, appeal from a sentence.[51] The standard of review is similar for the Crown and the offender. The appellate court can intervene in circumstances where the sentence is demonstrably unfit, or if the sentencing judge made an error in principle that had an impact on the sentence.[52]

1. Demonstrably Unfit Sentence

A sentence will be demonstrably unfit if it is "clearly unreasonable": clearly too high or clearly too low.[53] The sentencing judge does not need to have made any specific error; the focus is on the outcome, not the reasons.[54]

In considering whether a sentence is demonstrably unfit, an appellate court will often consider the principle of *parity*: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".[55] To assess whether parity has been achieved, an appellate court may consider the sentences imposed in other similar cases.

46. *Criminal Code, supra* note 1, s 686(4)(b)(i).
47. *Ibid*, s 686(4)(b).
48. *Ibid*, s 686(4)(b)(ii).
49. *R v Cassidy*, [1989] 2 SCR 345, 1989 CanLII 25 (SCC); *R v Lutoslawski*, 2010 SCC 49.
50. *R v Friesen*, 2020 SCC 9 at para 38 [*Friesen*].
51. *Criminal Code, supra* note 1, ss 675(1)(b), 676(1)(d).
52. *R v Lacasse*, 2015 SCC 64 at paras 41, 44 [*Lacasse*]; *Friesen, supra* note 50 at para 26.
53. *Lacasse, supra* note 52 at para 52.
54. *Ibid*.
55. *Criminal Code, supra* note 1, s 718.2(b); *Friesen, supra* note 50 at para 31.

A sentence can also be demonstrably unfit even if the accused cannot show it is a marked departure from previous sentences. The fundamental principle of sentencing in Canadian law is proportionality: sentences must be "proportionate to the gravity of the offence and the degree of responsibility of the offender".[56] A sentence that unreasonably departs from this principle is demonstrably unfit.[57]

2. Material Error in Principle

An appellate court can also vary a sentence if the sentence was affected by a material error in principle. An error in principle is any error in applying the principles of sentencing. An error in principle arises, for example, if the sentencing judge errs in law, fails to consider a relevant factor in sentencing, or considers an irrelevant factor. Weighing or balancing factors can also form an error in principle, if by emphasizing one factor or not giving enough weight to another, the trial judge exercises discretion unreasonably.[58]

An error in principle will only allow an appellate court to vary the sentence if the error in principle had an impact on the sentence.[59]

3. Remedy

If a sentence is demonstrably unfit or affected by an error in principle, the appellate court will apply the principles of sentencing afresh to the facts, without deference to the existing sentence. It can then vary the original sentence, replacing it with a fit one.[61] The appellate court has no power to order a new trial or hearing.[62]

In some cases, the court's new sentence may require reincarcerating an offender who has served a full sentence and been released, though the appellate court may consider this factor when imposing a fit sentence.[63] On occasion, an offender whose sentence was found to have been too low, but who has completed the sentence and been released, will not be re-incarcerated.[64] This decision is highly contextual.[65]

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56. *Criminal Code, supra* note 1, s 718.1; *Friesen*, *supra* note 50 at para 30.
57. *Lacasse, supra* note 52 at para 54.
58. *Friesen, supra* note 50 at para 26.
59. *Lacasse, supra* note 52 at para 44.
60. *Friesen, supra* note 50 at para 27.
61. *Ibid* at para 29.
62. *Criminal Code, supra* note 1, s 687(1).
63. *R v Suter*, 2018 SCC 34 [*Suter*].
64. See e.g. *Suter, ibid* at para 103; *R v Proulx*, 2000 SCC 5 at para 132.
65. See e.g. *R v Taylor*, 2013 NLCA 42 at paras 65 (*per* White JA) and 133 (*per* Green CJNL, concurring); *R v Veysey*, 2006 NBCA 55 at paras 31-33; *R v JED*, 2018 MBCA 123 at paras 113-115.

Conclusion

Knowing only the broad and flexible standards of review that have been developed for civil appeals in Canada, it would be easy to assume that these same standards apply in criminal appeals. But Canadian criminal law has taken a different path, with limited rights of appeal for specific contexts, each with its own principles and jurisprudence. This special feature provides a practical overview of the main features of this surprisingly intricate field: the rights of appeal and standards of review for appeals from convictions, acquittals, stays of proceedings, and sentences.