When Can a Canadian Judge Change Her or His Decision?

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It is clear that a Canadian judge can change a ruling or decision. For instance, it is well settled in Canada that a trial judge can reconsider a verdict of guilty in a criminal trial based upon the introduction of "fresh evidence"[1] before sentence is imposed[2] and that an appellate court can subsequently decide an issue it had failed to address in its initial judgment[3] or amend "an order already passed and perfected."[4]

In *R. v. J.A.*, after convicting the accused of a sexual offence, the trial judge received a letter from the victim's grandfather indicating that the victim had told him that there were more sexual incidents involved than he had described in his testimony.[5] The trial judge refused to reopen the trial and vacate his verdict or to declare a mistrial. On appeal, the Ontario Court of Appeal noted that "a trial judge who has made a finding of guilt on disputed facts has the authority to vacate the adjudication of guilt at any time before the imposition of sentence or other final disposition, but such authority should be exercised only in exceptional circumstances and in the clearest of cases."[6] The Court of Appeal concluded that the trial judge's "reasons on the mistrial motion confirm that he appreciated and correctly applied the principles governing mistrial applications and the *Palmer* criteria for the admission of fresh evidence in the context of the whole of the evidence led at trial." It concluded, "His discretionary decision to dismiss the mistrial motion is neither clearly wrong nor based on an erroneous principle. I therefore would reject this ground of appeal."[7]

IMPLIED JURISDICTION

It has been held that the doctrine of "implied jurisdiction" or "jurisdiction by necessary implication" allows a Canadian court 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."[8]

This power has been extended in Canada to the point that it exists even after a court's formal order has been filed and issued. Thus, in *Chandler v. Alberta Association of Architects*, the Supreme Court of Canada stated:

> The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *Re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
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> 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.[9]

Footnotes

1. *See* R. v. Kowall, 108 C.C.C. (3d) 481, 1996 CarswellOnt 3091 (Can. Ont.); R. v. Hayward, 86 C.C.C. (3d) 193, 1993 CarswellOnt 1162 (Can. Ont.).
2. *See* R. v. Griffith, 2013 ONCA 510, 2013 CarswellOnt 10984 (Can. Ont.).
3. *See* R. v. Dhanaswar, 2016 ONCA 229, 2016 CarswellOnt 4357 (Can. Ont.).
4. *See* Director of Public Prosecutions v. GK, [2014] IECCA 35 (Ir.). In *In re L and B (Children)*, [2013] UKSC 8 [¶ 16], [¶ 19] (appeal taken from Eng.), the Supreme Court of the United Kingdom indicated that it "has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected. . . . Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the [*Civil Procedure Rules*] (rule 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind. The question is whether she should have exercised it."
5. 2015 ONCA 754, 2015 CarswellOnt 16819 (Can. Ont.).
6. *Id.* ¶ 24.
7. *Id.* ¶ 32. The reference to the "*Palmer* criteria" is a reference to *R. v. Palmer*, [1980] 1 S.C.R. 759 (Can.). *Palmer* is the leading authority in Canada on the introduction of "fresh evidence" on appeal. The criteria set out in *Palmer* for the introduction of such evidence has been adopted to determining if fresh evidence should be introduced at trial after a guilty verdict has been entered but before sentence has been imposed. The criteria as set out in *Palmer* are: "(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. . . . (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result." [1980] 1 S.C.R. 759, ¶ 22.
8. *See* Cunningham v. Lilles, 2010 SCC 10, [2010] 1 S.C.R. 331, ¶ 19 (Can.); R. v. H. (E.), [1997] O.J. No. 1110, 1997 CarswellOnt 1262, ¶ 11 (Can. Ont.); R. v. Robichaud, 2011 NBCA 112, 2012 CarswellNB 289, ¶ 4 (Can. N.B.).
9. [1989] 2 S.C.R. 848, ¶ 75 (Can.). In a recent decision from the United Kingdom, reference was made to a court becoming *functus* once the order was "sealed"; *see* Samara v. MBI & Partners UK Ltd. (t/a MBI International & Partners Co.), [2016] EWHC 441 (QB) [¶ 60].

However, it has also been held that the jurisdiction conferred by implication is a limited one that cannot be turned into "judicial authority to requisition a statutory power withheld by the legislature."[10] As pointed out by the Supreme Court of Canada in *R. v. Adams*, a "court has a limited power to reconsider and vary its judgment disposing of the case as long as the court is not *functus*."[11] In *McKenzie v. McKenzie*, it was held that a court is not *functus* when a variation of an order is required to correct "an error in expressing the manifest intention of the court."[12]

Finally, it has been suggested that vacating a verdict of guilty by a trial judge "is a power which . . . should only be exercised in exceptional circumstances where its exercise is clearly called for."[13]

In this edition's column, I review two recent Canadian Court of Appeal decisions that have considered the issue of when and how a trial judge should reconsider a decision or verdict rendered: *R. v. Arens*[14] and *R. v. O'Shea*.[15]

R. v. ARENS

In *Arens*, the accused was convicted of the offences of impaired driving causing death and dangerous driving causing death.

Before trial, a *voir dire* was held to determine if the arrest of the accused contravened the *Canadian Charter of Rights and Freedoms*, *Constitution Act 1982* (the *Charter*) and whether the evidence obtained as a result of the alleged breaches should be admitted or excluded. The evidence in issue consisted of the observations by officers made after the accused was arrested and video recordings of him taken at the police station (the "impugned evidence").

The Crown conceded that section 8 [unreasonable search and seizure] and section 9 [arbitrary detention] of the *Charter* had been violated. The Alberta Court of Appeal indicated that these "concessions were made on the basis that the arresting officer lacked reasonable and probable grounds to arrest the appellant and to make an evidentiary breath demand."[16] The sole issue in contention was whether the "impugned evidence" should be excluded.

The trial judge accepted the Crown's concession and ruled as follows:

> The arresting officer, when he told Mr. Arens to get out of the truck, did not have evidence of impairment attributable to alcohol that was required to make the arrest. Thus, it was both an arbitrary detention and a violation of Mr. Arens's rights to be secure against unreasonable search or seizure.[17]

However, the trial judge concluded that the "impugned evidence" was admissible.

The evidence called on the *voir dire* was admitted in the trial proper. The accused was subsequently convicted of both charges. In convicting the accused, and without advising counsel in advance, the trial judge reversed his earlier *voir dire* ruling, holding that the *Charter* had not been breached:

> It turns out that I was wrong on my *Grant* analysis of section 24(2) of the *Charter*, in the alternative I find that because there was a lawful arrest based on the evidence of reasonable and probable grounds led during the *voir dire*, there is no *Charter* breach to analyze.[18]

The accused appealed from conviction. The Alberta Court of Appeal described the issue raised by the appeal in the following manner:

> The dispositive issue in this appeal is whether there was a miscarriage of justice as a result of a lack of procedural fairness related to *Charter* rulings in a *voir dire* subsequently reversed in the course of the trial judge's reasons for conviction, and adverse inferences he made about the appellant's failure to provide a breath sample.[19]

A majority of the Alberta Court of Appeal indicated that failing "to provide an opportunity to present full submissions is an error of law reviewable on a standard of correctness. . . . While procedural fairness is usually associated with administrative law, it applies with full force in the criminal law context."[20]

The majority noted that the trial judge had "the authority to reverse his *voir dire* ruling as he was not *functus officio*."[21] However, the majority also held that the trial judge's approach "has the potential of bringing the administration of justice into disrepute. The consequences of these four convictions are significant and scrupulous adherence to procedural fairness is essential in such circumstances."[22]

The majority concluded that the trial judge should have given counsel notice of his reversal decision:

> The trial judge should have given the appellant reasonable notice of his decision to reverse himself on the

10. *See* R. v. Crocker, [2012] N.J. No. 266, 2012 CarswellNfld 248, ¶ 14 (Can. Nfld.).
11. [1995] 4 S.C.R. 707, ¶ 29 (Can.).
12. 2016 BCCA 97, 2016 CarswellBC 522, ¶ 22 (Can. B.C.).
13. *See* R. v. Lessard, 30 C.C.C. (2d) 70, 1976 CarswellOnt 8, ¶ 12 (Can. Ont.).
14. 2016 ABCA 20, 2016 CarswellAlta 140 (Can. Alta.).
15. 2016 ONCA 53, 2016 CarswellOnt 574 (Can. Ont.).
16. *Arens*, 2016 ABCA 20, ¶ 8.
17. *Id.* ¶ 10.
18. *Id.* ¶ 13. The reference to "*Grant* analysis" is a reference to *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (Can.), the leading decision in Canada on the test to be applied in determining whether evidence should be excluded if a violation of the *Canadian Charter of Rights and Freedoms* has been established by an accused person. The test involves a three-stage analysis: "(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits." 2009 SCC 32, ¶ 71.
19. *Arens*, 2016 ABCA 20, ¶ 2.
20. *Id.* ¶¶ 18-19.
21. *Id.* ¶ 26.
22. *Id.* ¶ 27.

Charter breaches. Doing so would have provided the appellant the opportunity to fully re-argue whether the police had reasonable and probable grounds to arrest the appellant. Given the Crown's concessions and the *voir dire* ruling, this opportunity was essential.

As noted above, the trial judge, having reversed himself on the *Charter* issues, said even in the absence of the impugned evidence, there was a sufficient basis for conviction. However, the trial judge made extensive reference to the following impugned evidence in the course of his reasons for conviction. First, he referred to Corporal Scarrott and Constable Tremblay's testimony about their post-arrest observations of the appellant at the scene. Second, as regards events at the RCMP detachment, the trial judge made note of Constable Tremblay's testimony, the breathalyzer technician's testimony, Constable Brown's evidence, the video recording and the evidence of the paramedics. In other words, a significant portion of the evidence the trial judge relied on was from the evidence that followed arrest. Although he said that he would have convicted on the other evidence, it is not obvious why he then referred to, and seems to have relied upon, much of the impugned evidence.[23]

In a dissenting opinion, Justice Martin held that the trial judge's "change of mind was of no consequence":

> He initially decided that the evidence was admissible on the understanding that there had been breaches of the appellant's [section] 8 and [section] 9 rights. His ultimate finding that there had not been a breach had no impact on that ruling. In either scenario, the evidence was admissible. This was not a situation where the trial judge reversed himself on the admissibility of evidence.[24]

R. v. O'SHEA

In *O'Shea*, the accused pleaded guilty to the offence of possession of child pornography. At a pretrial conference, the presiding judge indicated "that a proposed 45 day sentence would be 'reasonable.'"[25] At the sentence hearing, the same judge imposed a period of one year imprisonment. The accused appealed from the sentence imposed, seeking to have the Court of Appeal reduce it to a period of 45 days.

The appeal was dismissed. The Ontario Court of Appeal indicated that it could not "be suggested that the trial judge was not entitled to impose a sentence of one year imprisonment":

> Even accepting that the appellant's counsel's notation written at the first pre-trial (a pre-trial conducted by the same judge who ultimately accepted the guilty plea and imposed the sentence) to the effect that a proposed 45 day sentence would be 'reasonable', it was entirely permissible for the trial judge to change her mind once she had seen the evidence of the volume and nature of the child pornography possessed by the appellant.[26]

The Court of Appeal felt that this was reflected in the exchange between the trial judge and defence counsel immediately after she imposed sentence:

> THE COURT: Any questions [counsel]?
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> [Counsel]: Uhm, other than the fact, Your Honour that there had been some judicial pre-trials with respect to resolving the matters, I take it Your Honour was aware of that? Is that correct?
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> THE COURT: I may have been aware of that, but I haven't viewed the videos and I haven't seen the pictures when the position was given. There's a big difference between [Mr. B.'s] case where it's young adults, no, I'm sorry, older teens, and what was seen on those particular pictures, images and videos.[27]

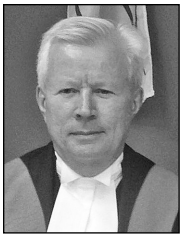
CONCLUSION

It is clear that Canadian trial judges can reverse themselves. However, it is also clear that the "rules of natural justice require courts to provide an opportunity to be heard to those who will be affected by a decision" and that a failure "to provide an opportunity to be heard is fatal to a decision."[28]

In the context of reversing ourselves, great caution is required. Finality plays an important role in the criminal and civil trial process.[29] As pointed out by the Ontario Court of Appeal in *Chitsabesan v. Yuhendran*, although "a judge is not *functus officio* where the order has not been signed and entered and therefore retains jurisdiction over a matter, the instances in which it might be in the interests of justice to withdraw reasons of the court and rehear the case on the merits will be 'rare.'"[30]

We should try to avoid appearing to be making tentative decisions that we subsequently change. A lax approach to finality in decision making has the potential to bring the administration of justice into disrepute. The conflict is always between finality and justice.[31]

23. *Id.* ¶¶ 28-29.
24. *Id.* ¶ 52.
25. 2016 ONCA 53, 2016 CarswellOnt 574, ¶ 5 (Can. Ont.).
26. *Id.*
27. *Id.*
28. *See* Lymer v. Jonsson, 2016 ABCA 32, 2016 CarswellAlta 134, ¶ 3 (Can. Alta.).
29. In *Hafichuk-Walkin v. BCE Inc.*, 2016 MBCA 32, 2016 CarswellMan 75, ¶ 39 (Can. Man.), it was noted that the "integrity of the administration of justice requires finality in litigation. The evils that multiplicity of proceedings give rise to are duplicative litigation, potential inconsistent results, undue costs and inconsistent proceedings."
30. 2016 ONCA 105, 2016 CarswellOnt 1615, ¶ 11 (Can. Ont.).
31. In *In re L and B (Children)*, [2013] UKSC 8 [¶ 46], it was suggested that as "Peter Gibson LJ pointed out in *Robinson v Fernsby* [2004] WTLR 257, para 120, judicial tergiversation is not to be encouraged. On the other hand, it takes courage and intellectual honesty to admit one's mistakes. The best safeguard against having to do so is a fully and properly reasoned judgment in the first place."



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LETTERS

Editors, COURT REVIEW:

The article by Wechsler et al., "The Impact of Forensic vs. Social-Science Evidence on Judicial Decisions to Grant a Writ of Habeas Corpus" (COURT REVIEW, Vol. 51, #4) contains a serious, fundamental problem. Starting with the title, the authors talk throughout of "social science evidence." That would lead a reader quite reasonably to expect a presentation of a contest between, on the one hand, testimony about research on mistaken identity (e.g., by Elizabeth Loftus), and, on the other, perhaps DNA evidence as "forensic" evidence. *But NO social science evidence is ever used in the vignettes presented to the judges.* Although, separately, judges are asked in a survey about such evidence, their survey responses are not linked to their vignette-based decisions about evidence. The authors' error begins with a failure to define "social science evidence" and in their saying (at p. 161) that evidence of false confessions and eyewitness misidentification "fall[s] under the defined domain of social-science evidence in line with social-psychological research . . . ." Yes, social psychologists have been the primary investigators on issues as to false confession and eyewitness misidentification, but that doesn't make *those topics themselves* (eyewitness misidentification and false confessions, as evidentiary matters) "social science evidence," which instead would be the introduction of *social science studies* through citation in briefs, mention in lawyers' argument, and in expert witness testimony. To repeat, none of that social science evidence is presented in the study vignettes. The result is that the article is a study only of judges' reactions to *various kinds of problematic evidence*, which it is certainly worthwhile to study. However, because no social science evidence is present in their vignettes, the authors did *not* test judges' reactions to social science evidence.

Thus the authors' conclusions about judges' reactions to social science evidence cannot stand.

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Answers to Crossword
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