

CANADA / JUDGMENT

R. v. Holsworth

2022 BCSC 1242

COURT

Supreme Court of British Columbia

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2022 BCSC 1242 R. v. Holsworth

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Holsworth,

2022 BCSC 1242

Date: 20220510

Docket: 26418-1; 26419-1

Registry: Nelson

Regina

v.

Trevor Russell Holsworth

Before: The Honourable Madam Justice Lindsay Lyster

On appeal from: Provincial Court of British Columbia, July 15, 2021

(R. v. Holsworth, Nelson Docket 26418-1 & 26419-1)

Oral Reasons for Judgment

Counsel for the Crown appearing

in-person:

M.A. Erina, and

E.A.V. Madhur

Appearing on his own behalf

in-person:

T. Holsworth

Place and Date of Hearing:

Nelson, B.C.

December 3, 2021

Place and Date of Judgment:

Nelson, B.C.

May 10, 2022

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INTRODUCTION

- [1] THE COURT: I am ready to provide you with my oral reasons for decision in this matter, and I would like to advise you that I intend to request the transcript of my reasons. I will review the transcript to ensure that all citations and quotations are complete and accurate. I will likely add headings for clarity and I will correct any grammatical errors. However, the reasoning and substance of my decision will not change.
- [2] There are two appeals before the court arising out of the convictions of Trevor Holsworth under s. 238(1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [ITA], for failing to comply with notices of requirement to file various personal and corporate income tax returns by July 23, 2019. Mr. Holsworth appeals the seven convictions which were entered against him by the Honourable Trial Judge, on July 15, 2021.

- [3] Mr. Holsworth also appeals the sentence which was imposed by the trial court, which imposed a fine of \$5,002 in total, payable by July 15, 2026.
- [4] The Crown cross-appeals on sentence, on the basis that the sentence imposed by the trial court was illegal as it departed from the legislated minimum fine under s. 238(1)(a) of the ITA.
- [5] Section 231.2(1) of the ITA authorizes the Minister to serve the notices of requirement at issue in this appeal in the following terms:

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice sent or served in accordance with subsection (1.1), require that any person provide, within such reasonable time as is stipulated in the notice,

- (a) any information or additional information, including a return of income or a supplementary return; or
- (b) any document.

- [6] Section 238(1) of the ITA creates a summary conviction offence for failure to comply with various sections of the ITA, including s. 231.2. Section 238(1) provides:

238 (1) Every person who has failed to file or make a return as and when required by or under this Act or a regulation or who has failed to comply with [and it goes on to list a number of subsections I will not read] ...or with an order made under subsection (2) is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

- (a) a fine of not less than \$1,000 and not more than \$25,000; or
- (b) both the fine described in paragraph 238(1)(a) and imprisonment for a term not exceeding 12 months.

- [7] As set out by the Court of Appeal in *R. v. Sedhu*, 2015 BCCA 92 [Sedhu] at para. 26, the offence created by s. 238(1) is a strict liability offence. The Crown must prove beyond a reasonable doubt the identity of the accused, jurisdiction, service of the notice of requirement, and the accused's failure to comply with the notice: *Sedhu* at para. 37.
- [8] As a strict liability offence "it is always open to an accused to establish a defence of due diligence": *Sedhu* at para. 26.
- [9] As stated in *Sedhu* at para. 37, once the Crown has established identity, jurisdiction, service, and failure to comply, "an accused person must have an opportunity to demonstrate due diligence; that the time ... to comply with the requirement was unreasonable; or that the demand was not made for purposes related to the administration or enforcement of the Act."

CHARGES AND PROCEEDINGS AT TRIAL

- [10] In January 2020, Mr. Holsworth was charged on two informations with seven counts of failing to file income tax returns as required by notices of requirement served on him pursuant to s. 231(2)(1) of the ITA. As I have stated, this is a strict liability summary conviction offence under s. 238(1) of the ITA.
- [11] There were four counts on Information 26418, which related to corporate income tax returns for Mr. Holsworth's company, Kootenay Experience Ltd., for the years 2014 to 2017. There were three counts on Information 26419, which related to Mr. Holsworth's personal income tax returns for the years 2015 to 2017.
- [12] Mr. Holsworth pleaded not guilty on all counts. A trial on all seven counts on both informations took place before the trial judge, in Nakusp, on July 15, 2021. Mr. Holsworth represented himself at trial, as he did before me on appeal.
- [13] At the outset of the trial, Mr. Holsworth presented a document entitled "Notification, Constitutional Question Act" which I will refer to as the "Notice of Constitutional Question". The Notice of Constitutional Question raised several issues.
- [14] First, it stated that s. 238 of the ITA is unconstitutional because it "provides for a term of imprisonment which is contrary to the Charter of Rights as stated in Reference re Motor Vehicle Act (British Columbia) s. 94(2), [1985] 2 S.C.R. 486".
- [15] Second, it sought an undefined constitutional remedy, the particulars of which were stated as follows:
1. The Canadian Judicial Council claims by their letter to me dated August 28, 2007 that Judges have absolute unfettered discretion to accept or reject all evidence including the official court record, the transcript.
 2. I served the Attorney General of Canada / Minister of Justice David Lametti on March 9th 2020 . . . with a charter notice as per s 24(1) of the Charter of Rights.
 3. The Charter Notice is attached in Appendix A.
 4. No formal response was ever received.
 5. No notification to Parliament was ever made.
 6. I hereby apply for the constitutional remedy outlined in my Charter Notice to be applied, for the constitutionality of the Courts be checked by Parliament and other such remedies be provided as that court determines.
- [16] The attached Charter notice, which was stated to have been delivered to the Deputy Attorney General's office on March 9, 2020, states in part:

Federal Judges through the Canadian Judicial Council (CJC) are claiming the right to dispense arbitrary justice contrary to the principles of fundamental justice of which a lack of arbitrariness is the primary factor. The CJC claim that Federal Judges do not have to accept the official transcript of trial as the highest form of evidence possible, that they have the discretion to accept other evidence such as personal testimony in preference. A large number of problems follow from that position and have [affected] my rights personally and continue to do so. I have requested from the CJC that they explain how they can hold that position with regards to my Charter of Rights or submit my complaint in regards to their position to Parliament to get confirmation of its legality but they have denied both requests.

...

The only Court of competent jurisdiction to judge the judges who judge the judges is Parliament. I have currently lost most of my legal rights except obviously my right to life but I am in fear of losing that. I am hereby applying to Parliament for the protection of my charter of rights. Obviously urgency is of prime importance.

[17] I pause to note that Mr. Holsworth's concerns about the Canadian Judicial Council (CJC), and indeed the Canadian justice system as a whole, all appear to stem from family litigation he was involved in, in or about 2006. Mr. Holsworth made a complaint to the CJC about the judge who presided at his family trial, alleging that the judge wrongly accepted the evidence of his former spouse and her lawyer instead of accepting the transcript.

[18] The CJC responded to Mr. Holsworth's complaint in a letter, dated August 28, 2007, in which the CJC stated that the judge had exercised his judicial discretion in preferring certain evidence over others. The letter went on to state that the exercise of judicial discretion is not a matter of conduct and the CJC therefore concluded Mr. Holsworth's complaint was outside of its mandate and closed its file.

[19] I return to the trial proceedings. The first matter addressed in the trial was Mr. Holsworth's Notice of Constitutional Question. Mr. Holsworth submitted that he had not received a fair trial in the past and that he could not possibly get a fair trial in the ITA proceedings because the CJC had claimed that the judge can disregard all the evidence, which meant that the judge would be dispensing arbitrary justice.

[20] The trial judge dismissed Mr. Holsworth's application as follows, and I will quote from the transcript:

THE COURT: ... So just to clarify then, your concern is, with respect to this trial today, is that you're not going to get a fair trial because you didn't get one in the past. Have I got that right?

THE ACCUSED: Yeah, and -- that is correct and the judicial council has approved of the conduct. They have approved of the conduct.

...

THE COURT: All right. And again, sir, I appreciate you may have concerns, valid or not, from what happened. I wasn't present, I don't know anything about that hearing.

I can tell you today that I do not have any misgivings about you getting a fair trial in this court and I -- so with respect to your notice of constitutional question, I am not prepared to adjourn the proceeding or strike this proceeding based on the concerns that you have raised in your notice of constitutional question. I do not find that there is any validity to those concerns as applying to this trial today. I am not saying there is no validity to your concerns about what happened in the past. But it does not affect what needs to happen today with respect to these charges. All right?

I do not find that there is any realistic prospect of success to your Charter argument with respect to what has been filed before this court in terms of the charges that are before you today.

- [21] Following some further discussion, Mr. Holsworth raised the other element of his Notice of Constitutional Question relating to the possibility of imprisonment for a strict liability offence. Crown counsel indicated that they were not in a position to comment on that issue. The trial judge held that the trial would proceed and deferred consideration of that issue.
- [22] The Crown's sole witness was Matthew Hopkins, a collections officer with the Canada Revenue Agency (CRA). His evidence established that he served Mr. Holsworth with the notices of requirement and that Mr. Holsworth had not filed the required tax returns within the 90-day time limit.
- [23] Mr. Hopkins also testified about several phone calls he received from Mr. Holsworth between May and September 2019, in the course of which Mr. Holsworth confirmed receiving the notices of requirement. Mr. Holsworth challenged the voluntariness of these phone calls and a voir dire was called to address the question of the voluntariness of the phone calls. Mr. Holsworth's position was that the term of imprisonment was weighing heavily on him when he was speaking with Mr. Hopkins, such that he felt like he did not have any option not to communicate with Mr. Hopkins. Mr. Holsworth also submitted that his previous experiences with the justice system led to him having an intense fear of going to court, so he attempted to resolve the situation through his communications with Mr. Hopkins.
- [24] The trial judge held that the Crown had proved voluntariness beyond a reasonable doubt.
- [25] After the Crown closed its case, the trial judge explained to Mr. Holsworth that he had a choice about whether to provide evidence, either from himself or any other witness, or to not lead any evidence and simply proceed to argue whether the Crown had proved its case beyond a reasonable doubt. In explaining Mr. Holsworth's options, the trial judge stated as follows:

... These types of cases and when I was a defence lawyer for many years, I dealt with a number of them over time. The Crown has a fairly simple sort of mathematical process to follow here. It's, were you served with these notices. Did you -- and I'm saying you, it could be the corporation or you personally. Were you served with them, did you file within the 90-day timeframe? Is there evidence before the court to prove beyond a reasonable doubt those two things? That's really what you need to focus on. All right?

So if you don't think they've proven it with respect to the evidence they've already called, then there's no point in you taking the witness stand and providing evidence. You can argue on whatever arguments you want and what's been filed or the evidence you've heard, that the Crown hasn't proven it beyond a reasonable doubt.

If you think that there is something that would benefit the court and assist your case by taking the witness stand and providing further evidence with respect to -- because those are really the only two issues. Were you served, did you file, was the company served, did the company file with respect to these things.

[26] Mr. Holsworth asked:

So this would just be about whether I was served or not? ...

[27] The trial judge confirmed that was so, saying:

That's the nuts and bolts issue of this case, is were you properly served? ... Did you properly file within 90 days? ... Those are the nuts and bolts issues.

[28] Mr. Holsworth chose not to take the stand or to lead any other evidence. He did confirm in the course of his closing submissions that he was served and that he communicated with and tried to resolve the issue with Mr. Hopkins. He indicated that he wished to pursue his argument about the constitutionality of the legislation.

[29] The parties proceeded to closing submissions. The Crown's submissions were brief and focused on summarizing its evidence in relation to the elements of the offence. The trial judge then asked Mr. Holsworth to make his submissions.

[30] Mr. Holsworth stated that he took issue with his capacity to comply, that is to pay someone to file the tax returns. The trial judge then invited him to make his constitutional argument relating to the risk of imprisonment. The trial judge explained the holding in *Re Motor Vehicle Act* (British Columbia) and confirmed with Mr. Holsworth that he was saying the same principle applied to the ITA.

[31] Mr. Holsworth then transitioned to submissions regarding freedom of expression, arguing that a regulatory requirement to file information and reports may amount to a restriction of that freedom.

[32] The trial judge then pronounced his judgment. He found Mr. Holsworth guilty on all counts. He held:

- [18] The facts that are in evidence before me are clear, that Mr. Holsworth was served with respect to the documents and that no tax returns were filed within the 90-day timeframe. There is no dispute with respect to that evidence before the court and therefore on both Informations with respect to all the counts, Mr. Holsworth is found guilty.
- [33] The trial judge considered and rejected Mr. Holsworth's constitutional arguments. In this regard, he stated:
- [15] . . . he has a much broader attack against the Informations that are before the court, based on the constitutionality of the Income Tax Act . . . I appreciate that Mr. Holsworth feels very strongly with respect to this and it is clear that that was much of the conversation that he had with Mr. Hopkins from CRA at the time as well.
- [16] Mr. Holsworth also takes issue with his prior dealings with the justice system and that they have significantly undermined his faith in the courts and in the justice system and caused him to have difficulty in terms of dealing with CRA or these courts in terms of having trust in the process that is before him, and I have sympathy for Mr. Holsworth in terms of his prior dealings. They do not affect what I have to decide with respect to this case.
- [17] The challenge to the constitutionality of the Income Tax Act with respect to reference, Re B.C. Motor Vehicle Act is something that has been litigated in prior cases and the Income Tax Act's constitutionality has been upheld many times with respect to these types of challenges and I must follow precedent and reject Mr. Holsworth's arguments with respect to the constitutionality of the Income Tax Act.
- [34] After the ruling on conviction, the parties made submissions on sentence. The Crown's position was that because Mr. Holsworth had belatedly filed the corporate tax returns for 2014 and 2015, which formed the subject matter of Counts 1 and 2 on Information 26418, no punishment should be imposed on those counts.
- [35] In the course of the Crown's submissions, the trial judge asked about the application of the totality principle. The Crown submitted that Mr. Holsworth's "attempt to correct a wrong" obviated the need for any penalty being imposed on the two counts in respect of which he had belatedly filed. The Crown sought the statutory minimum of \$1,000 on each of the five other counts for a total fine of \$5,000.
- [36] Mr. Holsworth's submissions on sentence related essentially to his financial circumstances and a repetition of his concerns with the justice system, including the Law Society of British Columbia, the Family Maintenance Enforcement Program (FMEP), and the Minister of Justice, all arising from his family law case. He said that he had "no capacity to pay anything".
- [37] The trial judge then pronounced sentence in the following terms. Given the appeal and cross-appeal on sentence, it is worthwhile quoting his brief reasons in full:

- [1] THE COURT: Mr. Holsworth is before me on two Informations. The Crown is seeking a total of \$5,000 in fines with respect to this matter. Those are the mandatory fines on each count, with respect to the convictions under the Income Tax Act.
- [2] With respect to dealing with this matter, the Crown has taken the position with the first two counts, Count 1 and 2 on 26418, that zero dollars in fines should be imposed. I do not know that I can actually do that once convictions are entered but I will deal with it in the following fashion.
- [3] With respect to each count on each Information, there will be a fine of \$1,000. However, I will apply the totality principle. I find that that amount is excessive and I will reduce the total amount in fines with respect to Count 1 and Count 2 on Information 26418 to one dollar on each of those two counts. So the total amount of fines will be \$1,000 on each of the other counts, and one dollar on Counts 1 and 2 on 26418. So the total amount of fines will be \$5,002.
- [4] I will give Mr. Holsworth until July the 15th of 2026 to pay those fines. I am not sure I can legally do that, sir, but that is what I have done.

ISSUES ON APPEAL

- [38] In his statement of argument on appeal and in his oral submissions before me, Mr. Holsworth reiterated his many complaints and grievances with the judiciary, the CJC, the Minister of Justice, FMEP, the Law Society, lawyers, and the RCMP, all stemming from the 2006 family law decision. Those complaints and grievances do not relate to the offences with which Mr. Holsworth was charged and of which he was convicted, and they are not relevant to this appeal. I will not be considering them in this decision.
- [39] In his statement of argument, Mr. Holsworth submitted that his Notice of Constitutional Question was ignored at trial and that his constitutional rights and arguments concerning abuse of process were ignored by the trial judge. Mr. Holsworth seeks to have his convictions set aside. He asks this court for a declaration that there was a miscarriage of justice, for a writ of mandamus directing the Minister of Justice to heed his complaint to the CJC, and for Charter damages.
- [40] Mr. Holsworth also submitted in his statement of argument that the trial judge erred in imposing fines on him, despite his stated inability to pay. In oral submissions before me, Mr. Holsworth also submitted that the trial judge erred by failing to advise him of the existence of a due diligence defence under s. 238(1).
- [41] Further, in oral submissions before me, Mr. Holsworth also submitted that the mandatory minimum set out in s. 238(1)(a) of the ITA is unconstitutional, citing *R. v. Boudreault*, [2018] S.C.J. No. 58.

[42] This issue was not raised at trial. No notice of constitutional question with respect to this issue was filed. It was not referred to in Mr. Holsworth's statement of argument and he did not seek leave to raise it on appeal. This raises the question of whether Mr. Holsworth should be permitted to pursue the issue of the mandatory minimum fine on appeal, for the reasons discussed by the Court of Appeal in *R. v. Gill*, 2018 BCCA 144 at para. 9.

[43] In its statement of argument, the Crown restated the issues raised by Mr. Holsworth in his statement of argument as follows:

I. Did the trial judge fail to act judicially by summarily dismissing Mr. Holsworth's 'constitutional' application regarding his grievances with the judiciary and government?

...

II. Did the trial judge err in law by dismissing Mr. Holsworth's argument that s. 238(1) of the ITA violates the rule in *Re B.C. Motor Vehicle Act*?

...

III. Did the trial judge err in law by failing to reduce the mandatory minimum fines on counts 3 and 4 on Information 26418 and 1-3 on Information 26419 on account of Mr. Holsworth's stated inability to pay?

[44] That last issue identified by the Crown in Mr. Holsworth's appeal is intertwined with the issue raised by the Crown on its cross-appeal, which is whether the trial judge imposed an illegal sentence on Counts 1 and 2 on Information 26418 by imposing lesser fines than the mandatory minimum amount of \$1,000 set out in s. 238(1)(a) of the ITA.

ANALYSIS

[45] In my view, the Crown has fairly restated three of the issues on appeal as they appeared on the face of the parties' statements of argument. To these, I would add the following, which were addressed in oral submissions:

- a) Did the trial judge err in failing to advise Mr. Holsworth of the existence of the due diligence defence, and, if so, did that error give rise to a miscarriage of justice?; and
- b) Should Mr. Holsworth be permitted to challenge the constitutionality of the minimum fine under s. 238(1)(a) of the ITA on appeal?

[46] Mr. Holsworth did not make any submissions on the standard of review applicable to the issues raised on appeal. I accept the Crown's submissions with respect to the applicable standards of review and, as I address each issue, I will identify the applicable standard of review.

Did the trial judge fail to act judicially by summarily dismissing Mr. Holsworth's constitutional application regarding his grievances with the judiciary and the government?

- [47] I turn to my analysis, and the first issue, which is, did the trial judge fail to act judicially by summarily dismissing Mr. Holsworth's constitutional application regarding his grievances with the judiciary and the government?
- [48] The question of whether the trial judge failed to act judicially in summarily dismissing Mr. Holsworth's constitutional application regarding his grievances with the judiciary and the government relates to a discretionary screening decision. As set out in *R. v. Orr*, 2021 BCCA 42 at paras. 53 through 54, such discretionary decisions are subject to a deferential standard of review.
- [49] In my view, it is clear that the trial judge did not fail to act judicially in summarily dismissing Mr. Holsworth's constitutional application related to his grievances flowing from the family law case. Those grievances are completely unrelated to this criminal proceeding and are irrelevant to any matter in issue before the trial court or this court on appeal. A trial judge has a screening functioning in considering whether such applications have a reasonable prospect of success, as described by the Supreme Court of Canada in *R. v. Cody*, 2017 SCC 31 at para. 38.
- [50] The trial judge provided Mr. Holsworth with a full and fair opportunity to explain the nature of his constitutional application. He considered the nature of the application and acted judicially in determining that it had no reasonable prospect of success. There is no basis to interfere with the trial judge's exercise of discretion in summarily dismissing Mr. Holsworth's constitutional application.

Did the trial judge err in law by dismissing Mr. Holsworth's argument that s. 238(1) of the ITA violates the rule in *Re Motor Vehicle Act (British Columbia)*?

- [51] I turn to the second issue. Did the trial judge err in law by dismissing Mr. Holsworth's argument that s. 238(1) of the ITA violates the rule in *Re Motor Vehicle Act (British Columbia)*? The question of whether the trial judge erred in dismissing Mr. Holsworth's argument that s. 238(1) of the ITA is unconstitutional in providing for the possibility of imprisonment for a strict liability offence is a question of law reviewable on a correctness standard.
- [52] In dismissing Mr. Holsworth's argument that s. 238(1) of the ITA is unconstitutional, the trial judge stated at para. 17 that "the Income Tax Act's constitutionality has been upheld many times with respect to these types of challenges and I must follow precedent . . ."
- [53] The Crown submitted before this court on appeal that it is not aware of any precedent ruling on the constitutionality of s. 238(1) of the ITA.
- [54] The Crown suggested that perhaps what the trial judge meant is that the combination of strict liability and the possibility of imprisonment has been upheld as Charter-compliant on many occasions, as was succinctly explained in *R. v. Pontes*, [1995] 3 S.C.R. 44 at pages 52-53, where Justice Cory wrote:

Obviously, if the offence is one of absolute liability, but there is no risk of imprisonment, then the provision will not offend s. 7 of the Canadian Charter of Rights and Freedoms. Similarly, if the statutory provisions are found to create a strict liability offence, then by definition a defence of due diligence must be available to the accused and there will be no infraction of s. 7 of the Charter. The sole difference will be that if the offence is found to be one of strict liability, the possible sanction of a term of imprisonment may be retained.

[55] Alternatively, the Crown suggested that the trial judge may have been referring to cases such as *Sedhu*, to which I have already referred, that apply the rule in *Re Motor Vehicle Act* (British Columbia) to hold that because there are potential penal consequences under the ITA, the accused must have the opportunity to demonstrate due diligence.

[56] Whichever line of cases the trial judge may have had in mind, I agree with the Crown that he came to the correct result. The combination of the strict liability offence created by s. 238(1) of the ITA with the possibility of imprisonment does not offend s. 7 of the Charter.

Did the trial judge err in failing to advise Mr. Holsworth of the existence of the due diligence defence, and if so, did that error give rise to a miscarriage of justice?

[57] I turn to the third issue which is, did the trial judge err in failing to advise Mr. Holsworth of the existence of the due diligence defence and, if so, did that error give rise to a miscarriage of justice?

[58] The transcript of the proceedings at trial suggests that Mr. Holsworth may have been confused about the difference between an absolute liability offence and a strict liability offence, and into which category s. 238(1) falls. Early in the trial when he was asked why he said that s. 238(1) was unconstitutional, Mr. Holsworth correctly referred to it as a strict liability offence, and said that it was unconstitutional under *Re Motor Vehicle Act* (British Columbia) because it has a term of imprisonment attached to it.

[59] That latter statement suggests that Mr. Holsworth may have conflated strict and absolute liability offences.

[60] Later, in the course of closing submissions, Mr. Holsworth again referred to *Re Motor Vehicle Act* (British Columbia) and to absolute liability offences. The trial judge interjected to explain:

absolute or strict liability, there's different ladders that we have in law in terms of the types of offences. And so in the B.C. Motor Vehicle Act case, an absolute liability offence that had a risk of jail was held to be unconstitutional.

And are you saying that same principle applies to the Income Tax Act?

[61] In response, Mr. Holsworth confirmed that that was indeed what he was saying.

- [62] The trial judge did not explain to Mr. Holsworth at that time, or indeed at any time in the proceedings, that s. 238(1) creates a strict liability offence or that he could seek to establish a due diligence defence. To the contrary, the trial judge's explanation of the "nuts and bolts" of the offence, being whether Mr. Holsworth was properly served and whether he properly filed within 90 days, would, in my view, have suggested to Mr. Holsworth that this was an absolute liability offence and that no due diligence defence was available.
- [63] When a trial judge is faced with a self-represented accused, they have an obligation to assist that self-represented accused to some extent. This obligation arises from the trial judge's duty to ensure an accused receives a fair trial. The obligation, as set out by the Court of Appeal many years ago in *R. v. Darlyn*, 1946 CanLII 248, is that:
- the Court shall extend its helping hand to guide [them] throughout the trial in such a way that [their] defence, or any defence the proceedings may disclose, is brought out to the jury with its full force and effect.
- [64] The applicable principles were summarized by the Court of Appeal in *R. v. Woolsey*, 2021 BCCA 253, [Woolsey] at paras. 48- 49 as follows:
- [48] A trial judge is obliged to provide a self-represented accused in a criminal case with sufficient assistance to ensure trial fairness. Described in *R. v. Darlyn* . . . as a "helping hand to guide [the accused] throughout the trial", such assistance is required to aid the accused in the proper conduct of the defence so that the defence is "brought out with its full force and effect" . . . Where a self-represented accused contends that a judge failed to provide needed assistance, two questions arise for determination: whether there was such a failure and, if so, whether that failure gave rise to a miscarriage of justice within the meaning of s. 686(1)(a) (iii) of the Criminal Code . . .
- [49] The onus on a trial judge to assist a self-represented accused is a heavy one, rooted in concerns with trial fairness and not with the ultimate verdict. However, the duty owed by the judge is circumscribed. For example, the duty is limited to what is reasonable in the circumstances and the assistance provided need not enable the accused to present the case "as effectively as a competent lawyer". Rather, trial fairness requires that a self-represented accused "be given a fair opportunity to present their case to the best of their ability"
- [65] In the case on appeal, a review of the transcript shows that the trial judge lent a helping hand to Mr. Holsworth in a number of aspects of the trial. He assisted Mr. Holsworth by explaining how to go about cross-examining the Crown's witness, he indicated at what points he could decide to call evidence, and he explained the elements of the offence to Mr. Holsworth. Mr. Holsworth tended to focus on his broader concerns about the justice system, and on a number of occasions the trial judge guided him back to the issue at hand.
- [66] The trial judge is to be commended for his efforts to assist Mr. Holsworth. But, in my view, in the circumstances of this case, he erred in failing to advise Mr. Holsworth of the existence of the due diligence defence. It was apparent that Mr. Holsworth wanted to challenge the

constitutionality of s. 238(1) of the ITA on the basis of *Re Motor Vehicle Act* (British Columbia). He was confused about the difference between strict and absolute liability offences and which kind of offence s. 238(1) created. The distinction, of course, turns on whether a due diligence defence is available. Such a defence is available under s. 238(1), but in explaining what the Crown had to prove in the context of giving Mr. Holsworth information to help him to decide whether to give evidence, it is probable, in my view, that the trial judge left Mr. Holsworth with the impression that there was no due diligence defence available.

- [67] Having determined that the trial judge erred in this respect, I must determine if his error gave rise to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code.
- [68] The Court of Appeal in *Woolsey* summarized how an appellate court ought to go about reviewing the sufficiency of the assistance provided by a trial judge at paras. 59-60:
- [59] A trial judge's decision on how to assist a self-represented accused is entitled to appellate deference because it involves the exercise of discretion. This Court will only intervene on appeal if the judge "proceeded on a wrong principle or if a miscarriage of justice resulted" Further, as stated in *Neidig*, a failure on the part of the judge to provide sufficient assistance is not a free-standing ground of appeal. As previously noted, where a failure is demonstrated the question is whether that failure gave rise to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code
- [60] As also noted, when an appellate court assesses trial fairness, the question is whether the judge provided sufficient assistance to enable the accused "to bring out [their] defence 'with full force and effect'" In making this determination, this Court considers the entire trial, examines the record in detail and evaluates the advice provided in light of the circumstances of the case, bearing in mind the accused is entitled to a fair trial, not a perfect trial. In order to meet the requirements of trial fairness, "[t]he judge's advice must be interactive, [and] tailored to the circumstances of the offence and the offender, with appropriate instruction at each stage of a trial"
- [69] The Crown submits that the trial judge's error did not result in a miscarriage of justice because, based on the evidence before the trial court, and in particular Mr. Holsworth's cross-examination of Mr. Hopkins, there was no prospect that Mr. Holsworth might have mounted a successful due diligence defence. The Crown submits in this regard that Mr. Holsworth did not attempt to seek from Mr. Hopkins any evidence suggesting that Mr. Holsworth had taken any steps, let alone reasonable steps, to comply with the notices.
- [70] Mr. Holsworth's cross-examination of Mr. Hopkins had a number of themes. These included whether Mr. Hopkins had dropped off documents at Mr. Holsworth's property, the contents of their discussions including a conversation about a shareholder loan, and how his company would file a return. It is true that there was little, if anything, explored in the cross-examination of Mr. Hopkins that could have helped to establish a due diligence defence, but

I do not think that fact bears the weight the Crown submits. As I have already discussed, Mr. Holsworth was clearly confused about the nature of the offence created by s. 238(1).

- [71] There is nothing in the transcript that suggests to me that Mr. Holsworth understood when he was cross-examining Mr. Hopkins, or indeed at any point in the proceedings, that a due diligence defence was available to him. As a result, he likely would not have understood that he should attempt to elicit evidence from Mr. Hopkins that might help him to establish a due diligence defence.
- [72] In *R. v. Steeves*, 2019 BCSC 1471 [Steeves], a case relied upon by the Crown, a judge of this court was sitting on appeal from a conviction for failing to file notices of requirement under s. 238(1) of the ITA. The court considered whether the appellant in Steeves had established a miscarriage of justice. In doing so, the court referred, at para. 82, to the decision of the Court of Appeal in *R. v. Ball*, 2019 BCCA 32 [Ball] at paras. 119-120 for the relevant principles, as follows:
- [119] Pursuant to s. 686(1)(a)(iii) of the Criminal Code, an appeal from conviction may be allowed where there was a miscarriage of justice. In *R. v. Davey*, 2012 SCC 75, Justice Karakatsanis described a "miscarriage of justice" for the purposes of s. 686(1)(a)(iii) by quoting from *R. v. Khan*, 2001 SCC 86 and *R. v. Wolkins*, 2005 NSCA 2:
- [50] In his concurring opinion in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823 (S.C.C.), LeBel J. considered the scope of the miscarriages of justice contemplated by s. 686(1)(a)(iii). He concluded, at para. 69, that when considering whether an irregularity that occurred during a trial rises to the level of a miscarriage of justice, "[t]he essential question in that regard is whether the irregularity was severe enough to render the trial unfair or to create the appearance of unfairness."
- [51] In *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222 (N.S. C.A.), at para. 89, Cromwell J.A. provided a helpful summary of the two types of unfairness contemplated within the meaning of miscarriage of justice under s. 686(1)(a)(iii):

the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice. [Citations omitted.]

- [120] In *Khan*, Justice LeBel explained that, in most cases, the whole of the circumstances must be weighed in determining whether a trial was unfair, in reality or in appearance. Emphasizing that an accused is not entitled to a perfect trial, he acknowledged that minor irregularities will inevitably occur in legal proceedings. The critical question, however, is whether the irregularity in issue rendered the trial unfair or created an appearance of unfairness, the latter of which is assessed by asking if the irregularity would taint the

administration of justice in the eyes of a reasonable and objective observer. He went on to state that, while there is no strict formula for determining a miscarriage of justice, there are several elements that provide helpful reference points:

- [75] First, one should ask whether the irregularity pertained to a question which was, in law or in fact, central to the case against the accused. Thus, an irregularity which is related to a central point of the case is more likely to be fatal than one concerning a mere peripheral point
- [76] Second, the court of appeal should consider the relative gravity of the irregularity. How much influence could it have had on the verdict? ...
- [77] When the court considers the gravity of the error, it should also consider the possible cumulative effect of several irregularities during the trial
- [78] Third, one should be mindful of the type of trial during which the error has occurred. Was it a trial by jury or by a judge sitting alone? Sometimes, irregularities can have a more severe impact on the fairness of the trial when they occur during a trial before a judge and a jury
- [79] Fourth, and related, is the possibility that the irregularity may have been remedied, in full or in part, at the trial
- [84] Fifth, one must keep in mind that what matters most is the effect of the irregularity on the fairness of the trial and the appearance of fairness. Therefore, it will not be a mitigating factor that the irregularity did not result from a deliberate act by the Crown, the judge, or one of the court officials
- [85] Sixth, the attitude of defence counsel if and when he was confronted with the irregularity may have an impact. Therefore, if defence counsel had an opportunity to object to the irregularity and failed to do so, this militates for a finding that the trial was not unfair. Of course, this is not absolutely determinative, as a trial can be declared unfair even if defence counsel failed to object. [Citations omitted, emphasis in original].
- [73] From this passage, it is apparent that a miscarriage of justice can arise from either an irregularity that was sufficient to render the trial unfair or one that creates the appearance of unfairness. Where an appearance of unfairness is in issue, the question is whether the irregularity would taint the administration of justice in the eyes of a reasonable and objective observer.
- [74] In my view, the trial judge's error in failing to ensure that Mr. Holsworth was aware of the availability of a due diligence defence was, in all of the circumstances of this case, sufficient to taint the administration of justice in the eyes of a reasonable and objective observer. The availability of a due diligence defence is central to a strict liability offence such as this, and it was important, especially in light of Mr. Holsworth's evident confusion about the nature of the offence, that he know that that defence was available. That knowledge might have affected both his cross-examination of Mr. Hopkins and his decision whether to call

evidence in his own defence. In the circumstances, I find that Mr. Holsworth's ability to bring out his defence with full force and effect was impaired.

[75] I therefore conclude that a miscarriage of justice occurred due to the trial judge's error.

CONCLUSION

[76] As a result of the miscarriage of justice resulting from the trial judge's failure to ensure that Mr. Holsworth was aware of the due diligence defence, I set aside the convictions and I order a new trial. In light of this conclusion, it is unnecessary for me to consider the appeal and cross-appeal on sentence or the question of whether Mr. Holsworth should be granted leave to raise the fresh issue of whether the mandatory minimum fine established by s. 238(1)(a) is unconstitutional and I decline to do so.

[77] For the assistance of Mr. Holsworth on this point, I will say, however, that should he wish to challenge the constitutionality of the mandatory minimum fine at a new trial, he must file a notice of constitutional question in order to ensure that the Crown is put on notice, that a full evidentiary record on that issue is created, and considered reasons are provided by the trial court.

[78] That concludes my reasons for decision in this matter.

"Lyster J."

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