

CANADA / JUDGMENT

R. v. Nichols

2025 BCSC 1704

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Supreme Court of British Columbia

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2025 BCSC 1704 R. v. Nichols

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nichols,

2025 BCSC 1704

Date: 20250903

Docket: 31515

Registry: Vancouver

Rex

v.

Kristopher Lawrence Nichols

- and -

Docket: 31516

Registry: Vancouver

Rex

v.

Charles Larry Nichols

Before: The Honourable Justice Bantourakis

On appeal from: An order of the Provincial Court, dated December 2, 2019 (R. v. Nichols, 2019 BCPC 373, 17426-1).

Reasons for Judgment

Counsel for the Crown:

A. Switzer

Counsel for the Appellants:

D.M. Rosenberg, K.C.

D.G. Jones

Place and Dates of Hearing:

Vancouver, B.C.

May 15 and 16, 2025

Place and Date of Judgment:

Vancouver, B.C.

September 3, 2025

Table of Contents

BACKGROUND.. 4

- 1) The Offences. 6
- 2) The Provincial Court Trial Process. 7
- 3) The Summary Conviction Appeal Process. 12

PARTIES' POSITIONS. 12

THE FRESH EVIDENCE APPLICATION.. 13

PREJUDGMENT AND TRIAL FAIRNESS. 16

- 1) Applicable Legal Principles. 16
- 2) Discussion. 19

CONCLUSION.. 25

- [1] The appellants, Charles Nichols and Kristopher Nichols, who are father and son, are Indigenous fishermen who live in the coastal community of Pender Harbour, British Columbia. They are members of what they refer to as the Pender Harbour First Nation.

- [2] On December 2, 2019, after a Provincial Court trial, both appellants were convicted of various offences under the Fisheries Act, R.S.C. 1985, c. F-14. The offences arose from allegations that in May 2017 they fished prawn during a closed time and without a license near Nelson Island, in the area of Pender Harbour. Kristopher Nichols was also convicted of obstruction of a fisheries officer. On sentencing, they each received fines and, among other things, Charles Nichols' boat (the "Breakaway"), was ordered forfeit.
- [3] The Nicholsons have now appealed, asking that their convictions be set aside. They assert that they have an Aboriginal right to fish that would have offered a defence on the fishing offences. They say that they intended to pursue this defence at trial.
- [4] However, in a mid-trial ruling issued before the appellants had the opportunity to present their right to fish defence, the trial judge said that their belief that they had a legal right to fish was "unfounded" and "ill-advised". She also said that their "unfounded belief in their purported legal right to fish [had] likely resulted in ongoing cognitive dissonance and distress" and that they were experiencing "paranoid ideation".
- [5] The appellants submit that a reasonable and informed observer would conclude that the trial judge had prejudged whether they had a legal right to fish before they had a chance to lead evidence or make submissions on the issue. Situating the comments quoted above within the context of the trial as a whole, the appellants also point to a pattern of contentious interactions between the judge and defence counsel that they say reflects a breakdown in the trial process and trial fairness overall. As I will explain, they have brought a fresh evidence application in support of their argument that their trial was not fair and represents a miscarriage of justice.
- [6] Though the Nicholsons have raised other grounds of appeal from conviction as well, and Charles Nichols also appeals from the Breakaway's forfeiture, it is unnecessary to address those issues, given the conclusions I have reached on the fairness of the trial.

BACKGROUND

- [7] The prawn fishery is highly regulated throughout British Columbia to ensure sustainability, conservation and protection. For example, there are licensing requirements, limitations on the number of traps that may be set according to license type, and closures during which prawn fishing is not permitted at all. Prawn traps may not be hauled at night. Licenses are required for both commercial and recreational prawn fishing and communal fishing licenses may also be issued to Aboriginal organizations as defined in the relevant regulations.
- [8] At the time of the offences, the Nicholsons did not hold any recognized form of license authorizing them to fish prawn. The Sechelt Indian Band, which I will refer to as the shíshálh Nation, holds a communal license to fish prawn for food, social and ceremonial purposes in the relevant area. Under that communal license, the band can designate individual fishers to fish, with a four-trap limit per harvester. Kristopher Nichols fished

under that communal license for several years and there is some suggestion that during those years the four-trap limit was not enforced. Kristopher Nichols stopped fishing under the shíshálh communal license some time before the events giving rise to the charges.

[9] Though their status cards indicate that they are Sechelt, the Nicholsons say that they are not. They also say that the shíshálh Nation agrees that they are not Sechelt members. Instead, the appellants claim membership in what they refer to as the Pender Harbour First Nation, which has no official status or recognition under the Indian Act, R.S.C. 1985, c. I-5. The Pender Harbour First Nation is apparently in the process of seeking recognition, but the ultimate outcome remains unknown.

[10] Additionally, as I understand it, the shíshálh Nation does not recognize the Pender Harbour First Nation or any competing Aboriginal rights it may wish to claim in the area. When efforts were previously made to obtain an Aboriginal communal license for the Pender Harbour First Nation, the Department of Fisheries and Oceans Canada ("DFO") refused on the basis, among other things, that access to the fishery was available through the shíshálh communal license.

[11] Though the Nicholsons have asserted an Aboriginal right to fish in the Pender Harbour area as members of the Pender Harbour First Nation, that issue has never been litigated and, as matters currently stand, their assertion has never been tested. In two earlier fisheries prosecutions, Kristopher Nichols indicated his intention to advance an Aboriginal rights defence but was ultimately unable to obtain funding to do so.

[12] In the instant case, the Crown submitted at the beginning of trial that Kristopher Nichols, his father and maybe some other family members had "created" the Pender Harbour First Nation, effectively to bypass the shíshálh Nation's enforcement of the four-trap limit under its communal license, likening their outlook to that of so-called Freeman on the Land. The Crown submitted in opening that, in terms of "motive", the Nicholsons "want to fish as much prawn as they can to make as much money as they can."

[13] On this appeal, the appellants seek to adduce evidence from a professor emeritus in the Department of Anthropology at the University of British Columbia, who advances the opinion that the Pender Harbour First Nation was an Indigenous group with a distinctive cultural identity at the time of contact, that continues to occupy the same territories now as it did at the time of contact, and that fished and has continued to fish in the same waters in which the appellants were arrested. Among other things, the appellants say this is evidence they will adduce in support of an Aboriginal rights defence if a new trial is ordered.

1) The Offences

[14] On May 11, 2017, when the commercial prawn fishery was still closed, officers with the DFO saw buoys marked with Kristopher Nichols' telephone number and status card number off Nelson Island, northwest of Sechelt, B.C., along with strings that had baited traps on them containing prawn.

- [15] The DFO had also received information from sources in the community that the Nicholises had set gear illegally and that the traps might be hauled at night to avoid detection. Kristopher Nichols was known to DFO Officers and, as I alluded to a moment ago, had been prosecuted for Fisheries Act offences before.
- [16] DFO officers established surveillance in the area overnight between May 12 and 13, 2017, and saw the Nicholises pulling prawn traps onto the Breakaway. The officers decided to conduct an inspection and boarded the vessel. Though he was unlicensed, Kristopher Nichols said he was fishing under the authority of the Pender Harbour First Nation. As officers moved to arrest him for fishing without a license, a struggle ensued and the DFO officers used force in arresting him.
- [17] The officers pulled the remaining traps and released the prawn that had been caught back into the ocean. In total, there were more than 98 traps. They were seized, as was the Breakaway.
- [18] The Nicholises were charged with five fishing offences punishable on summary conviction pursuant to s. 78(a) of the Fisheries Act: setting prawn gear during a closed time contrary to s. 25(1) of the Fisheries Act (count 1); fishing for prawn during a closed time contrary to s. 63 of the Pacific Fishery Regulations, 1994 SOR/93-54 (count 2); fishing without a licence contrary to s. 26(1) of the Pacific Fishery Regulations (count 3); possessing prawn caught during a closed time, contrary to s. 33 of the Fisheries Act (count 4); and possessing prawn caught without a license, contrary to s. 33 of the Fisheries Act (count 5).
- [19] In addition, Kristopher Nichols was charged with a sixth count: obstructing a fisheries officer contrary to s. 62 of the Fisheries Act.
- 2) The Provincial Court Trial Process
- [20] The process in Provincial Court extended over several years and can fairly be characterized as protracted, including because of adjournments and other delays attributable to the defence. The interactions between the trial judge and defence counsel (not the Nicholises' counsel on appeal) were difficult at times and became increasingly so as the trial progressed. I will say more about that later.
- [21] Early on, the defence indicated (1) it would be bringing a Charter application seeking, among other things, the exclusion of evidence under s. 24(2) for alleged breaches of ss. 7, 8, 9, 10(a) and (b), as well as 12 of the Charter; and (2) subject to obtaining the necessary funding, it would be advancing an Aboriginal rights defence under s. 35 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, asserting that the Nicholises had an Aboriginal right to fish prawn in that area as members of the Pender Harbour First Nation.

- [22] Importantly, it was agreed that the s. 35 Aboriginal rights defence should, in the ordinary course, only be dealt with if the Court found that the elements of the offences had otherwise been proven to the requisite standard. That is, whether the appellants had an Aboriginal right to fish capable of supporting a defence would only be dealt with at the end of trial. The Charter application, conversely, would be dealt with first.

The Vukelich Hearing

- [23] Before a voir dire was declared in respect of the defence's Charter application, the Crown requested a so-called Vukelich hearing, arguing certain aspects of the application should not proceed to a voir dire on the merits. This pre-dated the Supreme Court of Canada's decision in *R. v. Haevischer*, 2023 SCC 11, which has narrowed the scope of such screening procedures.
- [24] The Vukelich hearing began on May 1, 2018. It continued on January 29, 2019, following a defence adjournment request. There were also pre-trial conferences in the intervening period during which the defence's application to exclude evidence was discussed.
- [25] Though it was agreed that the Aboriginal rights defence should only be dealt with in substance at the end of trial if necessary, the Nicholsons' asserted right to fish and issues surrounding the Pender Harbour First Nation's attempts at recognition were mentioned often as they featured in the defence's Charter notice and subsequent written submissions on the Vukelich hearing.
- [26] For example, in addition to raising more conventional arguments regarding the use of force and the right to counsel, the defence made a novel submission that it was a breach of s. 7 of the Charter for the DFO Officers to have carried out surveillance and investigated the offences in issue when they knew that the Nicholsons were involved in an application to the government for recognition of the Pender Harbour First Nation or when they knew or ought to have known that the Nichols were exercising an Aboriginal right to fish. The defence submitted that the DFO could have pursued alternatives to the measures it took, for example by approaching the Nicholsons at home to ask about their fishing activities.
- [27] During the Vukelich hearing, defence counsel faced many questions from the trial judge, including about the apparent conflation of Charter issues with s. 35 Aboriginal rights issues that I have just alluded to, as well as the evidentiary basis for the alleged Charter breaches. The answers given were not always clear. Ultimately, defence counsel submitted that the Pender Harbour First Nation's attempts to obtain recognition or claims to an Aboriginal right to fish were relevant on the Charter application because they provided "context" for the alleged Charter breaches.
- [28] Even though the s. 35 Aboriginal rights defence was not in issue at that point in the proceedings, some of the submissions that were made may have created the impression that not having a license was necessarily fatal to aspects of that intended defence. The Crown briefly submitted that an Aboriginal right to fish, even if it exists, cannot be exercised

without a license and that everyone must fish under the authority of a license. It relied on *R. v. Nikal*, [1996] 1 S.C.R. 1013 for that proposition. *Nikal* is a case in which the Supreme Court of Canada found that the existence of a licensing requirement will not necessarily constitute a *prima facie* infringement of an Aboriginal right to fish.

- [29] The trial judge subsequently asked defence counsel whether the Supreme Court "has ruled that all indigenous, everyone, indigenous or not has to fish with a license." Defence counsel's response was that the Nicholsons were unable to get a license. Counsel did not clarify what could be taken from *Nikal* or explain the defence position that even if a licensing requirement is not *prima facie* infringing, a licensing scheme may still infringe an Aboriginal right to fish depending on the particular circumstances of the case: see e.g. *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 76; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2021 BCCA 155 at paras. 176-182.
- [30] Toward the end of the first day of the Vukelich hearing, defence counsel told the judge she was having difficulty framing her argument "with the back and forth". The trial judge invited submissions in writing, which the parties later provided. On the second day of the Vukelich hearing which, as I have mentioned, occurred some months later, the defence again faced many questions.
- [31] The judge ruled that the Charter application regarding the DFO Officers' use of force, the manner in which they boarded the Breakaway, the search and seizure after the officers came alongside the Breakaway, and the alleged breaches of ss. 10(a) and (b) of the Charter could proceed to a *voir dire*: Vukelich Reasons at para. 15. Conversely, matters such as whether DFO Officers might have pursued other approaches in investigating the Nicholsons and the Charter s. 7 claim invoking the Aboriginal right to fish would not go on to the *voir dire*: Vukelich Reasons at paras. 6-7, 14.

The Charter Voir Dire

- [32] Evidence on the Charter *voir dire* was called over 10 days from January 30, 2019 to August 1, 2019. The Crown called five DFO Officers and the defence cross-examined them extensively. The appellants testified and were cross-examined. Among other things, the use of force proved to be a major focus, with the officers and the Nicholsons offering very different versions of the circumstances of Kristopher Nichols' arrest. The defence also called an expert doctor to provide opinion evidence about Kristopher Nichols' injuries.
- [33] A variety of issues arose during the *voir dire* that resulted in further exchanges between the judge and defence counsel, as had occurred during the Vukelich hearing. These dealt, for example, with the scope of the *voir dire*, witnesses the defence wished to call, a defence application to recall one of the DFO Officers, the defence's proposed use of force expert, and defence adjournment requests.

- [34] As these exchanges became more difficult, the transcript shows that defence counsel said among other things that she was "experienc[ing]" the court's interventions "as yelling" and asked several times to be allowed to complete an answer. At a certain point, defence counsel said the dynamics in the courtroom had prompted her to seek advice from Law Society benchers. The judge directed the parties to provide their final submissions on the Charter voir dire in writing after defence counsel said she was unable to continue the next day, following yet another difficult exchange.
- [35] While the judge had many questions for counsel during submissions, her interventions during witness testimony were relatively limited. However, she did intervene to limit evidence going beyond what she had found was the proper scope of the voir dire. Among other things, when Kristopher Nichols testified, the judge directed him not to give evidence on his views regarding his Aboriginal fishing rights because she had already ruled they were not relevant to the issues on the voir dire. On cross-examination, the Nicholsons agreed they knew that the Pender Harbour First Nation had not been recognized as a band when they claimed to be fishing under the authority of a permit it had issued, and knew that the DFO took the position it was illegal for them to fish without a DFO license.
- [36] On November 19, 2019, the judge gave her reasons dismissing the defence's application to exclude evidence, finding no Charter breaches had been made out (the "Voir Dire Reasons"). The reasons deal extensively with questions the judge had ruled were properly in issue on the voir dire. However, early on, they refer to Nikal and the fact that the Pender Harbour First Nation had not been recognized and did not hold an Aboriginal communal fishing license. Later, in addressing the credibility of the Nicholsons' evidence on the voir dire, the reasons qualify the Nicholsons' beliefs that they had a legal right to fish as "unfounded". I address those and other aspects of the Voir Dire Reasons in greater detail below.

The Trial Proper

- [37] The trial continued on December 2, 2019. The Crown's admissible evidence on the voir dire was brought into the trial by consent. The defence called no evidence.
- [38] Defence submissions on the trial proper focused on the obstruction count, with defence counsel submitting that the ultimate outcome on the fishing counts would turn on the potential s. 35 Aboriginal rights defence. However, that defence was never pursued. The defence's request for an adjournment to address pending issues relating to funding for the s. 35 Aboriginal rights defence was denied, including because it had not filed a Notice of Constitutional Question regarding that defence. Convictions were entered on all counts.

Sentencing

- [39] On December 29, 2020, following contentious sentencing proceedings, the judge imposed fines totalling \$9,000 on Kristopher Nichols and fines totalling \$3,750 on Charles Nichols. In addition, the Breakaway was ordered forfeit, as was the fishing gear seized at the time of arrest.
- [40] The reasons for sentence excerpt portions of the Voir Dire Reasons that I referred to above regarding the Nicholoses' belief in their legal right to fish. The sentencing reasons go on to find that the Nicholoses made a conscious choice to commit the regulatory offences in issue because they wanted to fish as they saw fit without the limitations of any licence and that they continued to insist they had a right to fish. The judge found their moral culpability was high and the offences were motivated only by greed: Sentencing Reasons at paras. 56-59.
- 3) The Summary Conviction Appeal Process
- [41] On January 22, 2021, the appellants filed Notices of Appeal against conviction and sentence. They were self-represented for much of the appeal process and an initial application they made for the appointment of counsel pursuant to s. 684 of the Criminal Code, R.S.C. 1985, c. C-46 was dismissed: R. v. Nichols, 2022 BCSC 1782.
- [42] The summary conviction appeal initially came on for hearing on September 27, 2023, before Justice Winteringham, then of this Court. The next day, she raised concerns about continuing with the hearing based on what she had heard the previous day. She adjourned the appeal to allow the appellants time to consider (1) whether they wished to obtain legal advice about whether to advance an application to adduce fresh evidence; and (2) whether they would renew their application for the appointment of counsel.
- [43] The matter subsequently came before me and I granted the appellants' renewed application for the appointment of counsel: R. v. Nichols, 2024 BCSC 1128. They have had the assistance of counsel on this appeal since then and have made an application to adduce fresh evidence.

PARTIES' POSITIONS

- [44] The appellants submit that the trial judge predetermined the question of whether they had a s. 35 Aboriginal right to fish at the time and location of the offences. They suggest that the judge appears to have erroneously been of the view both that there could be no lawful exercise of an Aboriginal right to fish without a license and that recognition as a band under the Indian Act was a precondition to the exercise of Aboriginal rights.
- [45] The appellants say these errors may be the reason the judge found that the appellants' belief in their Aboriginal right to fish was unfounded in the Voir Dire Reasons, but that in any event those reasons show that she had prejudged the matter before they were ever able to lead evidence and make submissions on the issue.

- [46] The appellants also say the judge treated the Crown and defence unevenly on procedural and evidentiary matters and point to a broader pattern of interactions between the trial judge and defence counsel that they submit undermined the fairness of the trial. Among other things, they say the judge's interruptions, frustration and alleged hostility impeded defence counsel and, on an objective view of the trial as a whole, overwhelmed the process resulting in a miscarriage of justice.
- [47] The Crown, for its part, maintains that the trial was fair. It emphasizes the strong presumption of judicial impartiality and submits that the appellants have not rebutted it. The Crown says that the impugned passages from the Voir Dire Reasons do not suggest prejudgment of the Aboriginal rights defence when viewed objectively and read in the context of the reasons and the record as a whole. The Crown notes that the appellants were not prepared to advance an Aboriginal rights defence when the time came at trial, says it was incumbent upon them to do so rather than raising it as they have on appeal, and submits that it would be improper to impute bias based on a defence that was never advanced.
- [48] As for the interactions between the judge and defence counsel, the Crown says the judge acted appropriately both substantively and in the exercise of her trial management functions. There were instances in which defence failed to respond meaningfully to the judge's legitimate questions, made legally incorrect and confusing submissions, interrupted the judge and failed to prepare or take steps in a diligent manner. The Crown says the judge's interventions must be understood in that context and that impatience with counsel and even downright rudeness are not sufficient in and of themselves to give rise to a reasonable apprehension of bias.

THE FRESH EVIDENCE APPLICATION

- [49] In support of their arguments on appeal, the appellants have brought a fresh evidence application, seeking to tender two new affidavits. The first, which I have already mentioned, is from Dr. Bruce Miller. He provides opinions, among other things, regarding the Pender Harbour First Nation's distinctive cultural identity at the time of contact, and its members fishing and continuing to fish in the same waters in which the Nicholsons were arrested. The second affidavit is from the appellants' trial counsel. It mostly addresses her concerns about the trial process as it unfolded, and what she says were the appellants' concerns about the fairness of that process.
- [50] The Crown opposes the application on the basis that the proposed evidence does not satisfy the well-established criteria for the admission of fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Taking particular issue with Dr. Miller's affidavit, the Crown notes among other things that his affidavit purports to go to the substance of an Aboriginal rights defence that was not advanced at trial and that cannot be advanced for the first time on appeal.

- [51] Fresh evidence may be admitted on a summary conviction appeal through the combined operation of ss. 683(1) and 822(1) of the Criminal Code. The usual criteria for admitting such evidence are well known. Fresh evidence will typically not be considered on appeal unless it is relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial, it is credible in that it is reasonably capable of belief, and is such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result: *Palmer* at 775. Further, fresh evidence will typically not be accepted on appeal if, by due diligence, it could have been adduced at trial, though this requirement is not applied as strictly in criminal cases: *Palmer* at 775.
- [52] Where the appeal is not based on an issue decided at trial, but rather on the integrity of the trial process itself, these criteria may be relaxed: *R. v. Tallio*, 2021 BCCA 314 at paras. 82-85. The totality of the circumstances must be considered. For example, fresh evidence is commonly admitted where ineffective assistance of trial counsel is alleged on appeal: see e.g. *Ineffective Assistance of Trial Counsel* (Criminal Practice Directive, 12 November 2013) (B.C.C.A.); *Tallio* at para. 85. This makes sense because the evidence in such cases is not so much evidence that might have been adduced at trial, but rather evidence about the trial itself that may not be apparent on the record.
- [53] Whichever standard applies, I have concluded that the proposed fresh evidence should not be admitted. In my view, the evidence of Dr. Miller is not relevant to the issues I must decide: see e.g. *Tallio* at para. 50. Dr. Miller's evidence goes to the substance of a s. 35 Aboriginal rights defence that ultimately was not advanced at the trial level, and that the appellants conceded before me cannot be raised for the first time on appeal: *R. v. Gill*, 2018 BCCA 144 at para. 9; *R. v. Alfred*, 2020 BCCA 384 at paras. 6 - 9.
- [54] The outcome of this appeal does not turn on the probability of success of the potential s. 35 Aboriginal rights defence. Rather, it turns on whether there is a reasonable apprehension that the trial judge prejudged a key issue and failed to remain impartial. If yes, the appeal must be allowed regardless, as a trial before a judge who has not maintained the requisite appearance of impartiality is, by definition, unfair: *R. v. Schmaltz*, 2015 ABCA 4 at para. 17.
- [55] My reasons for finding that the appellants' trial counsel's affidavit should not be admitted on appeal are somewhat different. That affidavit is more like evidence about the trial, than evidence that might have been adduced at trial. In that sense, it has similarities to the kinds of evidence that may more readily be admitted on appeal as going to the integrity of the trial process itself.
- [56] That said, this affidavit speaks for the most part to defence counsel's memory of her subjective experience of the trial and subjective concerns about whether it was conducted fairly. It also addresses what counsel says were the appellants' subjective concerns and views. However, as I will explain shortly, I must apply an objective standard in determining the trial fairness issue in this case and, considering the nature of the unfairness alleged, the outcome turns entirely on an objective assessment of how matters unfolded on the record.

- [57] It bears emphasizing that the appellants have not advanced ineffective assistance of trial counsel as a ground of appeal, nor any other ground that would properly engage evidence of matters occurring outside the courtroom. This is not a case, for example, where a miscarriage of justice is said to arise by virtue of acts or omissions in the conduct of a defence which cannot be properly assessed on the record of proceedings alone. To the contrary, given the specific issues raised on this appeal, which are about how the trial unfolded rather than extrinsic information, I am of the view that if the appellants are to succeed on this issue, they must do so with reference only to the trial court record itself.
- [58] In any event, there is little, if anything, in counsel's affidavit that cannot already be gleaned on the face of the record. The fact that the appellants had concerns about the fairness of the process, that defence counsel likewise had concerns and, for example, sought advice from others about her concerns, were all spoken to in some way or another during the trial. Likewise, the fact that the appellants intended to advance a s. 35 Aboriginal rights defence (subject to funding considerations) is apparent throughout the record.

PREJUDGMENT AND TRIAL FAIRNESS

- [59] The central issue on appeal is whether the trial was conducted in a manner that gives rise to an appearance of unfairness amounting to a miscarriage of justice. The appellants' main submission in this regard is that both the Voir Dire Reasons and the judge's various interventions during the trial give rise to a reasonable apprehension that the judge did not maintain an open mind on a key issue and failed to remain impartial.
- 1) Applicable Legal Principles
- [60] Pursuant to s. 686(1)(a)(iii) of the Criminal Code, which applies here by virtue s. 822(1) of the Criminal Code, a conviction appeal may be allowed where the appellate court is of the view that "on any ground there was a miscarriage of justice", including on the basis that the trial was unfair. "The question to be decided in this regard is whether the irregularity was so severe that it rendered the trial unfair or created the appearance of unfairness": *R. v. Tayo Tompouba*, 2024 SCC 16 at para. 72; *R. v. Legebokoff*, 2016 BCCA 386 at para. 43.
- [61] Judicial impartiality is essential to achieving trial fairness. Judges are expected and required to approach every case impartially, with an open mind, free from inappropriate and undue assumptions: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 36. "The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind": *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 58.

- [62] The requirement to approach each case with an open mind matters deeply, not only because of what it means for individual litigants, but because of the centrality of judicial impartiality in ensuring the continued integrity of and confidence in the administration of justice: see e.g. *Wewaykum* at paras. 57-59; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 94. The objective is therefore to maintain both the reality and the appearance of a fair adjudicative process: *Yukon Francophone School Board* at para. 22.
- [63] This means, among other things, that a judge should not decide a matter in issue, or be seen to have decided a matter in issue, before the parties have had an appropriate opportunity to lead evidence and make submissions. Our Court of Appeal has confirmed that where the issue is alleged prejudgment, "the appropriate test is whether a reasonable observer would come to a conclusion of premature decision making": *R. v. Bennett*, 2016 BCCA 406 at para. 23; see also *R. v. Parmar*, 2005 BCCA 187 at para. 33.
- [64] The Court must consider whether "an informed person, viewing the matter realistically and practically - and having thought the matter through" would "think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly": *Yukon Francophone School Board* at para. 20, citing *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394, per de Grandpré J. (dissenting); *Wewaykum* at para. 60; *S. (R.D.)* at paras. 11, 31 and 111.
- [65] This test contains two objective elements. First, when the court considers what a person viewing the matter would think, it must assume that person is reasonable, informed, and aware of the entire circumstances of the case. Second, any apprehension of unfairness or bias must itself be reasonable in all the circumstances: *S.(R.D.)* at paras. 111, 134.
- [66] This is a high standard: see e.g. *S.(R.D.)* at para. 113, 117. There is a strong presumption of judicial impartiality and that presumption "reflects the historical and current reality. Judges in Canada are, as a rule, strongly independent and impartial": *Kelly v. Palazzo*, 2008 ONCA 82 at para. 20.
- [67] The presumption of judicial impartiality can only be displaced with "cogent evidence" demonstrating what amounts to a real likelihood or probability of bias: *S.(R.D.)* at paras. 112, 117 and 134; see also *Yukon Francophone School Board* at para. 25. Further, the impugned conduct cannot be viewed in isolation, but rather must be assessed on "a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties": *Miglin v. Miglin*, 2003 SCC 24 at para. 26.
- [68] Relatedly, where undue intervention by the trial judge is at issue, the ultimate question is "whether the comments and interventions would create the appearance of an unfair trial to a reasonable person present throughout the proceedings": *R. v. Murray*, 2017 ONCA 393 at para. 97.

- [69] When assessing whether the judge's interventions resulted in or contributed to an unfair trial, it is important to remember that judges are no longer expected to remain passive, as they once were. Indeed "[w]e now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for [them] to do so for justice in fact to be done.": *Brouillard v. The Queen*, [1985] 1 SCR 39 at 44.
- [70] It is not improper for a judge to challenge the assertions of counsel or to express preliminary thoughts on issues in order to give counsel an opportunity to address the court's concerns and little should be taken from these kinds of exchanges during submissions: *R. v. Sanghera*, 2015 BCCA 326 at para. 59.
- [71] Further, the role of a trial judge can be very demanding and, like anyone, a judge may lose patience. "It takes much more than a demonstration of judicial impatience with counsel or even downright rudeness to dispel the strong presumption of impartiality": *Kelly v. Palazzo* at para. 21. "Appellate courts are reluctant to interfere on the ground that a trial judge improperly interfered during the course of trial ": *Murray* at para. 95.
- [72] However, if the high bar for rebutting the presumption of judicial impartiality is met, "it is important that a new trial be ordered, even where the verdict of guilty is not unreasonable having regard to the evidence, and the judge has not erred with respect to the law applicable to the case and has not incorrectly assessed the facts": *Brouillard* at 42-43. A reasonable apprehension of bias, "colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision": *S. (R.D.)* at para. 100; see also *Schmaltz* at para. 17.

2) Discussion

- [73] This case is unusual in that reasons issued by the judge mid-trial are said to offer evidence of prejudgment in relation to an issue that was only meant to be decided later; namely, the s. 35 Aboriginal rights defence. As I will explain, I conclude that the *Voir Dire* Reasons do offer cogent evidence of prejudgment that rebuts the presumption of judicial impartiality. A careful consideration of the entirety of the proceedings reinforces that view. Looking at the case objectively, a reasonable and informed observer would conclude that by the time she issued the *Voir Dire* Reasons the trial judge had likely formed a firm view on a key issue that should only have been decided later, and that she was likely not open to persuasion otherwise thereafter.
- [74] The appellants' intended s. 35 Aboriginal rights defence was only to be considered in substance at the end of trial, and then only if the Crown otherwise succeeded in making out the elements of the offence beyond a reasonable doubt. That defence also depended on the appellants securing funding. Had the defence been advanced at that stage, the onus would have been on the appellants to establish the existence of the Aboriginal right they were asserting, and that it had been infringed. If they succeeded, the onus would then have shifted to the Crown to justify the infringement: see e.g. *R. v. Sparrow*, [1990] 1 SCR 1075.

- [75] The Voir Dire Reasons, as I have mentioned, were delivered mid-trial and before there was any chance to lead evidence or make submissions on the s. 35 Aboriginal rights defence. Early on in those reasons, the judge refers to the fact that the Pender Harbour First Nation did not hold an Aboriginal communal license and thus could not issue permits. She then references Nikal, which the Crown had submitted stood for the proposition that an Aboriginal right to fish cannot be exercised without a permit or license:
- [7] [] It is not in issue that the "Pender Harbour First Nation" is not recognized by any authority as an independent Band or Nation, does not have a Communal License and thus cannot issue permits. In *R. v. Nikal*, [1996] 1 S.C.R. 1013 The Supreme Court of Canada found that everyone in Canada who engages in fishing (as defined in the FA) must possess a valid DFO issued license or permit.
- [76] The reasons return to these issues under the heading "Credibility and Findings of Fact", where the judge finds that neither of the appellants was a credible witness. Among the reasons offered for that conclusion are findings the judge appears to make about the Nicholsons' "purported legal right to fish":
- [39] In cross-examination the two accused were questioned on the history of the Nichols family's failed efforts to be recognized as an independent Nation and their view that as indigenous persons they are entitled to fish without constraints, including for commercial purposes. It is clear that the accused engage in motivated reasoning and interpret many of the actions of authorities as persecution. Kristopher Nichols had repeatedly been warned that if he continued to fish without a license or permit his equipment would be seized. The reality constraints which have previously impacted Kristopher Nichols, being three previous prosecutions (now convictions), the refusal of the Sechelt Band to issue him permits under their communal license as a result of his ongoing abuse of that privilege, and now the loss of his father's boat, have not served to change his ill-advised beliefs.
- [40] I find the persistence of their unfounded belief in their purported legal right to fish has likely resulted in ongoing cognitive dissonance and distress. Their evidence supports that both accused, but especially Kristopher Nichols, are now experiencing paranoid ideation. After being taken into custody aboard the Breakaway, Kristopher Nichols began making irrational statements which caused the officers to be concerned about his mental health.
- [Emphasis added.]
- [77] Judges may undoubtedly express preliminary views on the issues before them without giving rise to a reasonable apprehension of predetermination, and great caution must be exercised in ascribing weight to individual comments situated within a broader record. However, these passages from the Voir Dire Reasons, considered objectively, suggest the judge had formed the view that the Nicholsons belief in their "purported legal right to fish" was "unfounded". Indeed, that is what the reasons say.

- [78] The Voir Dire Reasons were taken under reserve and the paragraphs I have excerpted above contain findings of fact. These are not spontaneous comments or queries made during an exchange with counsel. Moreover, they form part of the judge's essential reasoning for concluding that neither appellant was a credible witness on the voir dire. They do so with reference to mental health issues the judge found the appellants were experiencing because of their "ill-advised" and "unfounded" beliefs, namely "cognitive dissonance and distress" and "paranoid ideation". The judge thought these findings were significant enough that she reproduced and relied on paragraphs 39 and 40 of the Voir Dire Reasons in her reasons for sentence: Sentencing Reasons at para. 56.
- [79] Reasons must be read as a whole, functionally, and in light of the record and the live issues at trial: *R. v. G.F.*, 2021 SCC 20 at para. 69. The Crown points out that Kristopher Nichols gave evidence that he felt he was being targeted in several ways and suggests that the reference to "paranoid ideation" can be understood in that context. It is true that Kristopher Nichols gave that evidence. But it remains that the Voir Dire Reasons link the alleged "paranoid ideation" and "cognitive dissonance and distress" to an apparent finding that the appellants' "belief in their purported legal right to fish" is "unfounded", an issue that was not to be decided until later in the proceedings and upon which the very outcome could have turned.
- [80] The Crown also notes that the opening sentence of paragraph 39 of the Voir Dire Reasons refers to the Nicholsons taking the view that they are entitled to fish without constraints, even for commercial purposes. The Crown submits that belief in a right to fish without constraints would be ill-advised on the current state of the law. Leaving aside whether the appellants actually testified to espousing that particular perspective, they had not had the opportunity to fully address the scope of the asserted right or the basis for their beliefs at that point, because those matters were supposed to be dealt with at a later stage of the trial.
- [81] As I mentioned earlier, Kristopher Nichols was directed not to testify about his views regarding his asserted Aboriginal fishing rights, because they were not relevant on the voir dire; his evidence on that point was necessarily curtailed. I see no issue with the judge's direction curtailing his evidence in that regard, considering her findings on the scope of the voir dire. However, in those circumstances, conclusions should not have been reached, and should not be seen to have been reached, about the asserted right, or the degree to which belief in it may or may not have been ill-advised or unfounded.
- [82] Looking at the record as a whole, the judge clearly understood that the Aboriginal rights defence was to be dealt with at the end of trial and she took steps to ensure that the s. 24(2) Charter issues and s. 35 Aboriginal rights defence were not conflated during the voir dire. Despite this, and regrettably, the Voir Dire Reasons engage to a degree with the Aboriginal rights question. This may be because the right to fish was mentioned repeatedly on the Charter application notwithstanding the judge's significant trial management efforts, or because the submissions that were made (and not made) about Nikal created the impression that the failure to hold a license was necessarily fatal to aspects of the Aboriginal rights defence.

- [83] Regardless, I am satisfied that a reasonable and informed observer would find cogent evidence in the Voir Dire Reasons that the judge was likely no longer impartial on a central issue at trial, because she had reached firm views about the intended s. 35 Aboriginal rights defence or aspects of it prematurely, namely that the Nicholises' belief in their right to fish was unfounded.
- [84] The Crown rightly points out that judges are presumed to be open to persuasion and able to disabuse themselves of evidence they have heard, or points they may have expressed views on, depending on the circumstances. After the Voir Dire Reasons were issued, the judge asked whether there would be a s. 35 hearing. The Crown says it was incumbent upon the appellants to pursue their Aboriginal rights defence at that point and that limited portions of the Voir Dire Reasons are insufficient to raise a reasonable apprehension of prejudgment or bias or to justify the decision not to pursue any aspect of the appellants' defence they wished to pursue.
- [85] The Voir Dire Reasons must of course be situated within the entire record, and a reasonable apprehension that the judge did not remain impartial can only be made out on an objective consideration of the proceedings as a whole. I have already alluded to the fact that defence counsel faced much questioning from the trial judge. To say those interactions became increasingly contentious would be an understatement. For example, defence counsel's indications that she was experiencing the judge's interventions as "yelling" are borne out by the DARS recordings and those instances became more pronounced as the matter progressed.
- [86] The portions of the trial transcript that set out defence submissions are in many respects dominated by judicial interjections. While this did not occur during witness testimony, the judge's questions and comments for counsel became so relentless that it appears at a certain point to have become impossible to answer. Counsel repeatedly commented that she was not being allowed to answer the Court's questions. Defence efforts were met with frustration and, eventually, seeming antagonism. The courtroom dynamic degenerated to the point that counsel advised the Court she was consulting with Law Society benchers, had ethical concerns, and that her clients were losing faith in the process. Among other things, it is apparent that there was a profound and mutual loss of trust between the judge and defence that ended up affecting the entire course of proceedings.
- [87] Without commenting on specifics, I agree with the Crown generally that the very experienced trial judge appears to have been faced with a challenging set of circumstances here. The Charter application that occupied the major portion of the trial initially included potentially novel claims that risked conflating issues and derailing the trial process. When the judge made legitimate inquiries on that and other points, the answers were not always responsive. There were interruptions, adjournments, last-minute applications, and the legal basis for the positions taken was not always clear.

- [88] A reasonable and informed observer would situate the judge's interventions within that broader context. However, having reviewed the trial record in its entirety, I am satisfied that observer would also conclude that at a certain point the judge's expressed frustration and impatience went beyond an acceptable (if sometimes impatient and intemperate) response to challenging circumstances and instead contributed to the appearance of an unfair process.
- [89] In that context, the notion that the judge would likely have been open to revisiting the premature findings on the right to fish set out in the Voir Dire Reasons is not persuasive. More than one type of intervention can compromise trial fairness and "the appearance of a fair trial may be destroyed by a combination of different types of intervention": *R. v. Valley* 1986, 26 CCC (3d) 207 at 232 (ONCA). Here the combined effect of the Voir Dire Reasons and the interactions I have described resulted in an unfair trial.

CONCLUSION

- [90] The outcome here does not turn on a finding of actual bias or actual loss of impartiality. Further, there is no suggestion that the trial judge was biased in the sense that she began the process with a firm view, was driven by personal animus or had any particular interest in the outcome.
- [91] However, the process must be seen to be fair. Considering the record as a whole, I am of the view that a reasonable and informed observer, looking at the matter realistically and practically, and having thought the matter through, would conclude it is likely that the judge had reached a firm view regarding the appellants' intended s. 35 Aboriginal rights defence, or aspects of it, by the end of the Charter voir dire, and was likely no longer open to persuasion. This, despite the fact that the appellants had not yet had the opportunity to advance, lead evidence or make submissions on that key issue.
- [92] I appreciate that the defence's ability to advance the s. 35 Aboriginal rights defence was subject to other variables, including funding. Additionally, it would not have offered a defence on Kristopher Nichols' obstruction charge. However, the failure to maintain the appearance of judicial impartiality in this case undermines the fairness of the trial as a whole and mandates a fresh process: *Brouillard* at 42-43; *S. (R.D.)* at para. 100; *Schmaltz* at para. 17; *Valley* at 232.
- [93] Accordingly, the appellants' conviction appeals are allowed, their convictions set aside and their matters remitted for a new trial.

"Bantourakis J."

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