**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *R. v Wolkins*, 2005 NSCA 2

**Date:** 20050105
**Docket:** CAC 216712
**Registry:** Halifax

**Between:**

Ronald D. Wolkins

Appellant

v.

Her Majesty the Queen

Respondent

| | |
|---|---|
| **Judges:** | Glube, C.J.N.S.; Cromwell and Fichaud, JJ.A. |
| **Appeal Heard:** | November 10, 2004, in Halifax, Nova Scotia |
| **Held:** | Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Fichaud, J.A. concurring. |
| **Counsel:** | Elaine Cumming, for the appellant<br>Paul Adams and Shaun O'Leary, for the respondent |

Reasons for judgment:

## I. Introduction:

[1] Mr. Wolkins was charged with lobster fishing outside his licence area. He chose to be represented at trial by an agent rather than a lawyer. After his conviction, he appealed to the Summary Conviction Appeal Court ("SCAC") on the basis that his agent had represented him with such incompetence that the conviction was a miscarriage of justice. The SCAC dismissed the appeal, holding that this was not a case of a miscarriage of justice but of unsuccessful trial tactics. Mr. Wolkins now seeks leave to appeal to this Court raising essentially the same issues as he did in the SCAC.

[2] The appeal involves a tension between the individual's right to make choices about his or her defence and the right to a fair trial. Stripped to its essentials, Mr. Wolkins says that there was evidence available at trial which, if it had been called, might have resulted in an acquittal. Mr. Wolkins tries to blame the failure to call the evidence on both his agent and the trial judge. However, his efforts to avoid his own responsibility for this decision, as well as its consequences, are, in my view, completely unsuccessful.

[3] The decision not to call evidence or to testify was a decision Mr. Wolkins was entitled to make. He has not shown that anyone misled him or misinformed him about how to make that choice. Mr. Wolkins does not suggest that his agent advised him not to call the evidence or in any way prevented him from doing so. He does not suggest that he failed to understand the trial judge's explanation of the risks of not calling evidence or the clear direction to call evidence or forgo that right. In his affidavit advanced on appeal, although it appears he now wishes that he had testified at trial, he does not set out what his evidence would have been in relation to this charge. He advances the transcript of his evidence given at the trial of another charge for the same offence, but his evidence at that trial is far from compelling evidence in relation to this one. What we are left with at the end of the day, as the SCAC decided, was a trial tactic that did not work and an attempt, by way of appeal, to try something else.

[4] I would dismiss the appeal.

## II. Facts and Judicial History:

[5] Mr. Wolkins says that his agent was incompetent and the conviction is a miscarriage of justice. Proper analysis of these submissions requires a detailed review of the facts.

1. The proceedings leading to trial:

[6] Mr. Wolkins is the captain of a lobster boat and has a licence permitting him to fish in area LFA 33. In April of 1999, fisheries officers pulled some lobster traps with Mr. Wolkins' tag numbers on them from the water in an adjoining area, area LFA 34, in which he was not licensed to fish. He was charged with contravening a condition specified in his license by fishing out of his permitted area contrary to The Fisheries (General) Regulations and s. 78(a) of the **Fisheries Act**, R.S. 1985, F-14.

[7] The road to trial was long and rocky. Mr. Wolkins pleaded not guilty to the charge in June of 1999 and a trial date was set for September 9th. Mr. Wolkins did not object to the date. In fact, he confirmed at a subsequent appearance on another charge that the September 9th date was a good date and that he would be representing himself.

[8] The Crown appeared with its witnesses on September 9th but Mr. Wolkins, having given no notice, requested the matter be adjourned. He said he was not ready for trial. He told the Court that he was consulting with "legal advisers" and needed more time. The Crown did not oppose the adjournment. The judge, Prince, P.C.J., set a new trial date for October 27. Mr. Wolkins confirmed that was a good date for him. The judge drew attention to his concern that the matter move ahead and told Mr. Wolkins that he would have to be ready for trial on October 27. It was unclear at this point whether or not Mr. Wolkins intended to be represented at trial.

[9] From the transcripts in the record, it appears that Mr. Wolkins thereafter appeared with his agent, Mr. Grady. Mr. Grady appeared on his behalf on October 15 and confirmed the trial date of October 27. On that date, Mr. Wolkins appeared with Mr. Grady for trial. It appears the case was not reached until early afternoon. Mr. Grady advised the Court that he expected a full day would be needed and that it would be best to put the trial over to a date that would permit "a

morning start." After discussion, the trial (as well as the trial of another charge not before us) was put over until March 8 and 9, 2000.

[10] On March 2, 2000, Mr. Grady appeared to speak to a notice he had delivered on behalf of Mr. Wolkins apparently concerning a **Charter** application he intended to make. The judge decided that: the **Charter** application would proceed first; Mr. Grady would provide a list of his witnesses and will-say statements on the **Charter** issues; the matter would return to Court on June 8th, 2000; and that the trial would be adjourned to November 2 and 3.

[11] Mr. Grady sent a letter to the Court dated June 6, 2000 in purported compliance with this direction. The letter asserted that the case was important not only for the defendant, but "for the future" of the Southwest Fisherman's Rights Association. However, the letter shed no light on the nature of the so-called "**Charter** defence" or its factual foundation. Subsequently, the trial was adjourned to March 29 and 30, 2001, and adjourned again before finally starting on September 6, 2001, two years after the initial trial date.

[12] From the transcripts in the record, it appears that the trial judge was presiding over other cases in which Mr. Grady was also appearing as agent, one in relation to another fisher charged with fisheries offences and another involving Mr. Wolkins on other charges.

2. The trial:

[13] On September 5, 2001, the day before the trial was to begin, the judge received a fax from the Southwest Fisherman's Rights Association. The letter requested that the Association be permitted to intervene in Mr. Wolkins' case and identified him as its president.

[14] At the opening of the trial on September 6, the judge referred to this fax. Mr. Grady indicated that he could appear on behalf of the application. He confirmed that the Association was seeking additional time to get representation to make its intervention application. The case for delay was hardly compelling. It is obvious from Mr. Grady's June 6th, 2000, letter to which I referred earlier, that the alleged importance of the case to that Association had been identified well over a year earlier. Mr. Grady indicated that he "...had no indication that the application should be ... placed before the Court with the appropriate evidentiary context." Mr.

Grady said he could have his witnesses “tomorrow”. The judge was obviously and rightly disturbed by this attempt to further delay the trial. An exchange between the Court and Mr. Grady ensued:

> **THE COURT**: The problem is, is that the obligation is counsel and in your case, the agent, to make themselves aware of the requirements of the law with respect to these matters so that number one, appropriate notice can be given to all parties, so that all necessary evidence can be marshalled and presented at a time which won’t interfere with the progress of the trial. As I’ve said, this matter’s been ongoing for several years without any progress being made. The trial time was booked to ensure that the matter was dealt with in a timely - as timely as we can now, with the passage of two years, and that’s the Court’s ruling, so we’ll move on.
>
> **MR. GRADY:** If I may, Your Honour, ah, if it pleases the Court and the interest of justice, we would be prepared to bring those witnesses before the Court tomorrow.
>
> **THE COURT:** I’ve already ...
>
> **MR. GRADY:** Our understanding ...
>
> **THE COURT:** I’ve already made my ruling. This was something that should’ve been done beforehand. Is the Crown ready to proceed with its case?
>
> **MR. DIPERSIO:** It is, Your Honour.
>
> **THE COURT:** Call your first witness please. Okay.

[15] Mr. Grady then indicated that the defence had several preliminary motions to make. The first related to disclosure. Upon questioning the Crown and the Crown’s confirmation of certain facts with the fisheries officers, the judge was satisfied that proper disclosure had been made. Mr. Grady then indicated that “..we’d like to note for the record, an exception to that rule.”

[16] Mr. Grady sought, and the judge granted, an order excluding witnesses. He then sought instruction from the Court regarding the elements of the offence which had to be proved by the Crown which the judge provided.

[17] The Crown then called its case. Mr. Grady cross-examined the Crown witnesses at some length, at times "noting exceptions" to adverse rulings by the judge in relation to some of his questions.

[18] In brief, the case for the Crown was this. Fisheries officers were patrolling the line between areas 33 and 34. They pulled some baited traps from area 34 and, by the tag numbers, discovered they belonged to Mr. Wolkins who was licensed only for area 33.

[19] After the Crown's second witness, at about 1:30 in the afternoon, Mr. Grady indicated that the next day would be "too soon" to start the trial on the second charge against Mr. Wolkins because of the **Charter** arguments he intended to make. It became clear that, contrary to the judge's clear direction, Mr. Grady had failed to serve material setting out in any meaningful way the evidentiary basis of his application. The judge made it crystal clear that the defence would have to be ready to go at the close of the Crown's case. The following exchange between the judge and Mr. Grady ensued:

> **THE COURT:** Now, my point is and we'll move on from here with the Crown's case, is that we've got to be ready to argue this in the appropriate stages in the time frame that - that's shaping up right now ...
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> **MR. GRADY:** Yes, Your Honour.
>
> **THE COURT**: ... so, we gotta be prepared if the Crown's case finishes today, we gotta be prepared to start the defence's case. Okay.
>
> **MR. GRADY:** With all due respect Your Honour, the defence is in no position to call witnesses and evidence - call witnesses and evidence ah, in connection with its **Charter of Rights** challenge.
>
> **THE COURT:** Well, how come?
>
> **MR. GRADY**: Tomo ...
>
> **THE COURT:** How come?

**MR. GRADY:** Because Your Honour, ah, we've only - in fact at this moment, we've - we're only a certain distance into the Crown's case and it's already 1:30 p.m.

**THE COURT:** How many more - how many more witnesses do you have?

**MR. GRADY**: On the 6th or 7th.

**MR. DIPERSIO:** Two Your Honour, one of which will be brief, and then the individual we'll be seeking to qualify to give opinion evidence with respect to marine navigation.

**THE COURT:** Even thinking that the rest of the Crown's case will take today, which it may not if the Crown's assessment of the witness and the number of witnesses is accurate, you have to be ready to go by tomorrow. That's - that's what I'm insisting on, and if you're not ready to go tomorrow, ah, in my view it's inappropriate, because we've booked this time to deal with these matters and you had many many months to prepare and many many months to have the witnesses ready to go.

**MR. GRADY:** Forgive me Your Honour, if I sound as though I'm puzzled, but the defence understood that it had given notice as required onto the **Act**, that there would be constitutional questions arising. The defence also gave notice that it would be calling certain categories of witnesses and the defence did not name those categories or state tht it was prepared to carry it forward on that defence.

**THE COURT:** Well, it doesn't matter whether the - whether the defendant says that. I - I'm the one who has to manage these - these cases ...

**MR. GRADY:** Yes, Sir.

**THE COURT:** ... and I have to manage them in an appropriate way ...

**MR. GRADY:** Yes, Sir.

> **THE COURT:** ... and in my view, with the length of time that's intervened between the first appearance and today, it would seem to me that it would not have been a big stretch to be prepared to deal with the evidence on the days that we'd set, so that there wouldn't be a necessity to adjourn matters for months and months and this matter's gone on for several years.
>
> **MR. GRADY:** With all due respect, Your Honour, ah, in order to have evidence for presentation in court tomorrow, the defence would have had to subpoena its witnesses and inform the Crown of the substance of the testimony to be provided by these witnesses and again, I do make apology Your Honour, but it does not seem likely that we'll be able to do that, namely name the witnesses and inform the Crown of the substance of the evidence that these witnesses would give until we've heard the witnesses and had an opportunity to review their testimonies.
>
> **THE COURT:** It's not the way - it's not the way it's going to work, and all I'm telling you is if the **Charter** - if you have the **Charter** application to proceed, okay.
>
> **MR. GRADY:** Yes.
>
> **THE COURT:** It's going to have to proceed when the Crown's finished the case. It's as simple as that. If - if you have witnesses, you have witnesses, if you don't, you don't, because as I say, it's the responsibility of the applicant to make sure that the application can proceed. It's the responsibility of the applicant to ensure that witnesses are subpoenaed if witnesses are - are required for the application. It's the responsibility of the applicant to ensure that the Crown has received notice and a disclosure of the type of evidence that's expected from each witness, so that there can be preparation. If that hasn't happened here, I'll deal with that when we're through with - with this. That's the way it's going to be.

[20] By 1:30 on the first day of trial no one, including Mr. Grady and Mr. Wolkins, could have been in any doubt that the defence would have to be ready to proceed the next day.

[21] The Crown then called its remaining two witnesses, including an expert. The judge instructed Mr. Grady on the process and legal test for the admissibility of expert witnesses. Mr. Grady cross-examined the expert on the qualifications *voir*

*dire* and presented arguments concerning the inadmissibility of the proposed expert's testimony. The judge found the witness qualified to give opinion evidence concerning "... marine navigation in the plotting of boundaries and locations on marine charts." The witness testified that he plotted the location of the traps and found that they were just over half a mile inside the boundary of area 34.

[22] The Crown closed its case and Mr. Grady once again said he had **Charter** matters to raise but that he would not be ready to proceed with them the next day. This exchange ensued:

> **THE COURT:** ... Well, then you'll be in a position to call evidence then tomorrow and we'll deal with those issues at that time.
>
> **MR. GRADY:** Yes, Sir, but if I may say so, so that I go away understanding, we are not prepared to call witnesses and evidence on the constitutional issues arising from this matter until the defence has had a reasonable opportunity to review the evidence presented by the Crown and it's side of the case today, and to prepare the necessary materials, including the names of the final witnesses.
>
> **THE COURT:** Well, you're going to have to do something between now and tomorrow, because that's going to have to be argued by tomorrow.
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> **MR. GRADY:** Your Honour.
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> **THE COURT:** And, that's my ruling.
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> **MR. GRADY:** Yes, Sir. You've been very very kind to me, and I appreciate your kindness, but I'm, with all due respect, I can hardly see how it's possible for us to review the evidence of today and the exhibits of today, in time to begin tomorrow morning.
>
> . . .
>
> **THE COURT:** Okay. I'm - I'm not going to debate this anymore. What I've told you is the position that the Court's taken.

> You - you must be prepared to do something with your case tomorrow morning.
>
> **MR. GRADY:** With our case, with pleasure, Your Honour. With the constitutional questions, with all due respect ...
>
> **THE COURT:** What - you're going to have to deal with this case tomorrow and as far as the - if we have time to deal with all issues tomorrow, we're going to deal with them one way or another. ...

[23] By the end of the first day of trial, the judge had directed, at least seven times, that the defence be ready to proceed the next day.

[24] When Court resumed the next morning, Mr. Grady moved for a directed verdict of acquittal. The judge explained the nature of a directed verdict motion and specifically mentioned on two occasions that if there was "some" evidence, then the accused had to decide whether to present evidence. He stated:

> **THE COURT:** ... the motion for directed verdict has nothing to do with proof beyond a reasonable doubt. It's simply whether or not there is sufficient evidence, so that a properly instructed jury, acting judicially, could return a verdict of guilt. So, that in relation to that test, which is the test that always has to be applied in a motion for directed verdict, what - what the Court has to do is to determine if there's some evidence, and not even weighing the quality of the evidence, I'm not permitted to do so. If there's some evidence, the matter has to go - to - to the point where the defendant has to choose whether or not he wishes to call evidence.
>
> In addition, if the case is a circumstantial case, I'm not permitted to weigh what inferences the trier of fact, the jury might draw from the facts, so that if there is some circumstantial evidence from which some inference may be possible, then I'm bound to call upon the defendant to present their case or to announce whether they want to present their case. So, I tell you that, so you can have some background ah, on which to frame your arguments.

[25] Mr. Grady advanced three main points in support of his directed verdict motion. First, he submitted that there was no evidence that Mr. Wolkins intended to place his traps in the wrong area; second, the Crown evidence did not show that Mr. Wolkins had been the person responsible for placing the traps where they were discovered; and third, the Crown evidence did not establish that the traps were, in fact, outside the correct area. During these submissions, the judge explained to Mr. Grady that the finding of baited traps bearing Mr. Wolkins' tags in the wrong area was circumstantial evidence which could support an inference that Mr. Wolkins placed them there.

[26] Following submissions, the judge dismissed the motion, holding that there was some evidence on each of the essential elements of the charge. The judge then called on Mr. Grady to proceed with the case. Mr. Grady again attempted to delay the trial. He did not succeed.

> **THE COURT:** Thank you. I'm satisfied that there exists some evidence on the essential ingredients of the offence so that a properly instructed jury acting judicially could return a verdict of guilt. Call your first witness, please.
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> **MR. GRADY:** I'm sorry Your Honour.
>
> **THE COURT:** Call your first witness, please.
>
> **MR. GRADY:** I believe, Your Honour, we - we did briefly canvass - I assume you're asking us to call our first witness in the substantive defence Mr. Wolkins wishes to make in reply.
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> **THE COURT:** I'm just asking you to call a witness, so that we can use the time that we've allotted for this matter.
>
> **MR. GRADY:** Thank you, Your Honour. As we explained to the Court yesterday, we are not in a position to call witnesses today, because as Your Honour, I hope will recall, some months ago we indicated to Your Honour that we would have to hear, assess and review the Crown's case before we would be able to make a substantive reply and defence.
>
> **THE COURT:** Okay. Well, I'm gonna deal with that issue at some point today, whether or not the motion has to proceed, but

what I want you to do now, is to announce whether or not you have a witness to call, and if you do have witnesses to call, to call them.

**MR. GRADY:** Your Honour, I hope you - I hope you will not be - you'll not find what I'm saying inappropriate in any way, but we have indicated prior to the calling of this trial and yesterday afternoon, that while we are perfectly prepared to ...

**THE COURT:** Okay. Well, if you're pre ...

**MR. GRADY:** ... make a defence, we are not in a position - sorry Your Honour.

**THE COURT:** Okay. Well, I'm gonna deal with that issue.

**MR. GRADY:** We are not in a position to make that - to make that defence today.

**THE COURT:** You're not in a position to make the defence to the substantive charge today?

**MR. GRADY:** We're not in a position to call witnesses today in respect to the - to the case of the Crown. However, Your Honour, if it is of any assistance to the Court, we are prepared to call those witnesses within a reasonable period of time, necessary for us to review the record of the - of the case made by the prosecution and to issue Summonses to our contemplated witnesses, and we would respectfully request that the Court provide us with that reasonable period of time.

**THE COURT:** Well, you've had three years to be in a position to defend this case.

[27] The judge canvassed with Mr. Grady the reasons why he was not prepared. The judge, obviously (and in my view appropriately) was concerned with the long delays. He reviewed the chronology of the matter. He then recessed for 15 minutes with a direction to Mr. Grady to be ready to say whether he was in a position to proceed with the defence. Following the recess, another lengthy discussion ensued which, as the judge prudently remarked, was "getting us nowhere." The judge then directed that argument on the trial issues would take place and it did.

[28] During Mr. Grady's submissions on the guilt or innocence of the accused, the issue of defence evidence was raised once again. The judge gave the defence another opportunity to call evidence:

> **THE COURT:** Well, I'll give you the chance, despite the fact that I've let the Crown argue their case, I'll give you the chance to call that evidence, but it's gotta be called today.
>
> **MR. GRADY:** It's the "but it's gotta be called today," that poses a problem, Your Honour.
>
> **THE COURT:** Well, he's here. Your client's here. He's - he's right in front of us.
>
> **MR. GRADY:** Yes, Your Honour.
>
> **THE COURT:** Is there - if you wanted to call him you could. I'm gonna give you that - that opportunity - that even despite the fact that the Crown has closed their case and argued their case, I'm still - I'm still willing to let you call that evidence.
>
> **MR. GRADY:** We would be most willing to do that ...
>
> **THE COURT:** Well, do it - do it now.
>
> **MR. GRADY:** ... if Your - if - if, forgive me, Your Honour, I like the end of sentences too, if Your Honour would permit us a reasonable time to assemble the witnesses necessary to make this portion of the case.
>
> **THE COURT:** No. What I'm going to do ...
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> **MR. GRADY:** To force Mr. Wolkins to - to force the defence to call Mr. - Mr. Wolkins today is already a settled matter at law in the Supreme Court of Canada ...
>
> **THE COURT:** No. I'm not forcing you to do anything.
>
> **MR. GRADY:** ... and the Supreme Court of Canada says ...
>
> **THE COURT:** I'm giving you the - listen to me.

**MR. GRADY:** ... according - the Supreme Court ... - I will, Sir.

**THE COURT:** I'm giving you the opportunity to call evidence today. The witness is here. If you want to call the witness, I'll give you the opportunity to do so. To make out whatever defence you can - you can possibly make out. ...

. . .

**THE COURT:** I'm gonna make it abundantly clear. Despite the fact that the Crown has closed their case and argued it and in view of the suggestion that there might have been evidence which may be available today before the Court to call, I'm giving you that further opportunity. If you don't want to take it, fine, you can continue with the argument, but I just wanted to give you that opportunity, that's all.

**MR. GRADY:** Thank you, Your Honour, but we ...

**THE COURT:** So, if you don't want to take that opportunity, I'll - I'll hear the rest of your argument.

**MR. GRADY:** We - we wouldn't expect the Court to call witnesses for us, and we do appreciate that the Court is making, as we understand it, an offer that if we wish, we may call Mr. Wolkins today.

**THE COURT:** No. You can call anybody you want.

**MR. GRADY:** That we may call anyone we want today.

**THE COURT:** Okay. So, you don't want to do that. Continue with your argument, please.

**MR. GRADY:** We're in no position to - to make those calls today, however, when we've had an opportunity to review the Crown evidence and an opportunity to subpoena witnesses in a proper way under the rules of procedure, we are prepared to do that, and we hope ...

**THE COURT:** Okay. Con - continue with your argument then. Thank you.

[29] The judge then heard the conclusion of the submissions and gave reasons in which he found Mr. Wolkins guilty. He reserved entering the conviction in order to afford Mr. Grady an opportunity to present the much discussed **Charter** application.

[30] The judge then turned to that matter. He ruled that he would afford Mr. Wolkins 15 days to show that there was an evidentiary basis for the proposed **Charter** application.

[31] The **Charter** matter came back to court on January 31, 2002 with Mr. Wolkins appearing with his agent, Mr. Grady. In the meantime, Mr. Grady had filed a letter dated 20 September, 2001 relating to the **Charter** application. The Crown submitted that it did not clearly articulate the nature of the **Charter** application or provide an evidentiary or legal basis for it. Ultimately the judge agreed.

[32] At one point during submissions, Mr. Grady referred to two cases and the judge asked to see them. Mr. Grady said initially he could provide them within three days. He then asked for a 15 minute recess to get the cases, saying to the Court, "... if you'd give me a 15 minute recess, I'll give you the cases." The judge granted the requested recess. On resumption, Mr. Grady raised other matters. The judge inquired directly of him, more than once, whether he had the cases he had said he would obtain. Finally, after giving a series of evasive or non-responsive answers to the judge's question, Mr. Grady finally admitted he still did not have the cases.

**THE COURT:** Do you - do you have the cases here, yes or no?

**MR. GRADY:** Do I have the cases to support our response to Mr. Dipersio's motion for summary dismissal?

**THE COURT:** Yes.

**MR. GRADY:** I do have those cases, Your Honour.

**THE COURT:** Okay. Where are they?

**MR. GRADY:** They are at home where they belong.

[33] The judge canvassed in detail, at length and unsuccessfully with Mr. Grady what his proposed **Charter** application was really about. The judge finally concluded that there was no rational or factual basis for any of the allegations of breach and that it was unnecessary to have an evidentiary hearing. He accordingly dismissed the **Charter** application and entered a conviction.

[34] Mr. Grady continued to represent Mr. Wolkins at the trial of the second charge, which ended in an acquittal, and filed a notice of a summary conviction appeal from the first conviction on Mr. Wolkins' behalf.

3. The Summary Conviction Appeal:

(a) Fresh evidence:

[35] Mr. Wolkins retained counsel to appear on the summary conviction appeal which was heard by Coughlan, J.

[36] Before the SCAC, the focus of the case shifted from the location of Mr. Wolkins' fishing to the competence of Mr. Grady's advocacy. It was submitted that Mr. Grady's acts or omissions constituted incompetence which resulted in a miscarriage of justice and that the trial judge had failed in various ways to protect Mr. Wolkins from his incompetent agent.

[37] To support these submissions, Mr. Wolkins proffered fresh evidence: an affidavit of Mr. Grady and an affidavit of Mr. Wolkins to which was annexed the transcript of his second trial. In response, the Crown filed an affidavit from the trial Crown, Mr. DiPersio. Both the Crown and the defence were content to have the fresh evidence issue decided without cross-examination on any of these affidavits.

(i) The affidavits:

[38] The defence affidavits set out the background of the relationship between Mr. Grady and Mr. Wolkins, refer to Mr. Grady's experience appearing as agent

for fishers charged with fisheries offences, the history of the relationship between Mr. Grady and Mr. Wolkins and the defence evidence leading to his acquittal at the second trial which Mr. Wolkins said could have been called at the first. The Crown affidavit responds to some of the factual assertions made in Mr. Grady's affidavit.

[39] The affidavits show that the appellant was and is president of the Southwest Fisherman's Rights Association. He got to know Mr. Grady after he wrote a letter of support for the association following the Association's occupation of DFO offices in Barrington in 1996. Mr. Grady "... offered advice and support to [the Association's] membership on numerous occasions". When Mr. Wolkins was charged in April of 1999, Mr. Grady offered to act as his "legal representative." Mr. Wolkins says in his affidavit that he believed Mr. Grady to be a very intelligent and well educated man and felt that he would be able to competently represent him at trial.

[40] The affidavits of Mr. Wolkins and Mr. Grady are more significant for what they do not say. Mr. Wolkins does not suggest that Mr. Grady did anything outside the express and implied authority of his agency. Mr. Wolkins does not suggest that either he or his witnesses were unavailable to be called at the time the judge directed the defence to proceed. Mr. Wolkins does not suggest that he misunderstood the judge's clear direction that the defence would have to proceed with its witnesses. He does not depose that Mr. Grady advised him not to call these witnesses or that Mr. Grady was acting otherwise than in accordance with his instructions. Significantly, while it appears Mr. Wolkins now wishes that he had testified, he does not set out the details of what his evidence would have been on this charge.

[41] Mr. Grady's affidavit does not indicate that he made any effort to call evidence, notwithstanding the clear direction of the judge that he should be prepared to do so. He does not assert that the witnesses who he says were willing to testify and to whom he had spoken were not available. In fact, his affidavit states that he spoke with Messrs. Atkinson, Nickerson and Cunningham who all indicated they were available to testify on September 6th and 7th. Although they were not under subpoena, the affidavit does not state any attempts were made to have them appear on September 7th, even though it was clear by 1:30 on September 6th that the defence would have to be ready to proceed the next day.

[42] Some parts of Mr. Grady's affidavit make interesting reading in light of the trial record. Mr. Grady swore as follows:

> 23. At the close of the Crown's case on September 6, 2000, I expected the trial would be adjourned to allow me to prepare the Appellant's case, including reviewing the Crown's evidence, preparing my argument and calling witnesses. As a result I had no witnesses present in Court, nor was I prepared at all to argue the Appellant's case. I therefore advised the Court that I was seeking an adjournment on the Appellant's behalf.
>
> ...
>
> 25. I was flabbergasted that I was being ordered to call Defence witnesses or otherwise present the Defence's case without being granted an adjournment during which to prepare.

(Emphasis added)

[43] In light of the judge's clear direction around 1:30 on September 6th that the defence would have to be ready to go at the close of the Crown's case, it is hard to understand how Mr. Grady could have expected the trial to be adjourned at the close of the Crown's case as he says he did in paragraph 23 of his affidavit.

[44] Three paragraphs in Mr. Wolkins' affidavit are also particularly noteworthy. In essence, they state that both Mr. Wolkins and the trial judge knew that Mr. Grady had been responsible for many of the delays during trials of other fisherman whom he had represented before the trial judge over the preceding five years:

> 38. Mr. Grady advised me that the Honourable Judge Prince would not allow the adjournment because he was concerned about delaying the trial. Mr. Grady advised me that he had been responsible for many of the delays during the trials of other fishermen he had represented before the Honourable Judge Prince over the course of the preceding five years.
>
> 39. Mr. Grady advised me that he had delayed the previous trials in an effort to gather more facts and to garner more

> public support for the Southwest Fishermen's Rights Organization.
>
> 40. I do not think that Mr. Grady had done anything wrong in his representation of me, and was informed by Mr. Grady that the judge had made errors in his conduct of my trial.

[45] Mr. Wolkins also says that he also knew that Mr. Grady had deliberately delayed these trials for the purpose of garnering more public support for the Southwest Fisherman's Rights Association. Mr. Wolkins, of course, had been president of the Association since 1996. In other words, Mr. Wolkins knew that the delay of those trials was a deliberate tactic on the part of Mr. Grady to serve the interests of the Association of which Mr. Wolkins was president.

(ii) The transcript

[46] As noted earlier, Mr. Wolkins had also been charged with fishing out of his area on May 27, 1999. The trial took place immediately after the disposition of the **Charter** application in the trial of the charge giving rise to this appeal. As fresh evidence on appeal, Mr. Wolkins proffers the trial transcript of the second charge. He says this shows that the defence evidence, which was available but not called at the first trial, resulted in an acquittal at the second trial. That evidence consisted of the testimony of six witnesses including Mr. Wolkins. What is most relied on is testimony from Mr. Wolkins and two other witnesses, Mr. Atkinson and Captain Cunningham, relating to Mr. Wolkins' due diligence as a lobster fisherman and the variety of ways in which his tags could have ended up in the wrong area even with due diligence.

[47] Mr. Atkinson, who fished with Mr. Wolkins in April and May of 1999, testified that he was a very careful captain, but that he had problems with people emptying and even taking his traps. He said that Mr. Wolkins had a lot of enemies and thought that the traps "probably" got over the line in the same way others went missing, that someone probably put them there to frame him. Captain Cunningham testified that traps could be moved by the tide, accidentally towed by other boats or deliberately moved by competing fishermen. He also said that the Loran device relied on by fishermen for positioning can often be wrong. Mr. Wolkins testified that in 1999 his gear was continually being tampered with and spoke of the steps he took to ensure he placed his traps in the right area. However, he conceded in

cross-examination that he was not saying that his navigation equipment was responsible. He simply maintained that he didn't know how they got there and suspected somebody else must have put them there.

[48] Some of Mr. Wolkins' testimony in the second trial related to the facts giving rise to the first charge. While he at one point asserted that he never set pots in district 34, he also testified that, following the first charge, he was concerned that some of his pots might be "quite close" to the line. He spoke to Fisheries Officer d'Entremont, asking whether he could tell Mr. Wolkins whether his pots were over the line. He testified that shortly after the first charge he moved some other pots from the position where he had set them. He thought they were not over the line, but was obviously concerned enough to ask about whether they were or not to speak with a fisheries officer and to move the pots.

[49] The judge acquitted Mr. Wolkins on the second charge, saying that on of all of the evidence, he was not satisfied that the circumstantial evidence of the pots being found in the wrong area demonstrated that there was no other rational conclusion except guilt.

(b) Decision of the SCAC:

[50] The SCAC (now reported at (2004), 220 N.S.R. (2d) 393; N.S.J. No 45 (Q.L.)(S.C.)) held that the proposed fresh evidence was not admissible, that there had been no miscarriage of justice and that the accused had not been denied the right to make full answer and defence.

## III. Issues:

[51] The appeal in my view raises two related issues:

Did the SCAC err in law:

1. by refusing to admit the fresh evidence?
2. by failing to find that the conviction was a miscarriage of justice as a result of Mr. Grady's conduct, the judge's failure to conduct an inquiry about Mr. Wolkins' choice of agent, the judge's failure to

remove Mr. Grady as agent or the trial judge's refusal of an adjournment?

## IV. Analysis:

[52] Analysis of these issues requires consideration of the legal principles relating to five topics: the standard of review on appeal, the judicial discretion respecting adjournments, the admissibility of fresh evidence on appeal, the role of a non-lawyer agent appearing on behalf of an accused person and the law relating to what constitutes a miscarriage of justice. I will briefly set out these principles and then apply them to this case.

1. Standard of Review:

[53] On the appeal to the SCAC, s. 686(1)(a) applied. The SCAC, therefore, was entitled to allow the appeal if the trial verdict was unreasonable, the trial court erred on a question of law or (under s. 686(1)(a)(iii)) "... on any ground there was a miscarriage of justice."

[54] It is common ground that the appeal to this Court is governed by s. 839 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46; the appeal may be taken with leave on a question of law alone: see s. 78 of the **Fisheries Act**, s. 34(1)(b) of the **Interpretation Act**, R.S. 1985, c. I-21 and s. 822 of the **Criminal Code**. The question, therefore, is whether the SCAC made a legal error: **R. v. Croft** (2003), 218 N.S.R. (2d) 184 (C.A.) at para. 8.

[55] In my view, all of the appellant's arguments amount to this: the SCAC should have set aside the conviction as a miscarriage of justice under s. 686(1)(a)(iii). The issue on appeal to this Court, therefore, is whether the SCAC erred in law by failing to find this conviction was a miscarriage of justice. The standard of review on that question of law is correctness.

2. Fresh evidence:

[56] Mr. Wolkins submits that the SCAC erred by failing to admit the fresh evidence. To consider that submission, I must review briefly the principles governing admission of fresh evidence on appeal. In my view, these principles

lead to the conclusion that the fresh evidence should be admitted if it, in light of the trial record, shows that the conviction was a miscarriage of justice.

[57] Both the SCAC and this Court have a wide discretion to admit new evidence on appeal where it is in the interests of justice: **Criminal Code**, s. 683(1). Case law has structured the exercise of this discretion in the various contexts in which new evidence may be advanced.

[58] Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced. Mr. Wolkins advances evidence of both types.

[59] Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called **Palmer** test. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial: **R. v. Palmer**, [1980] 1 S.C.R. 759 at 775. This rule makes it clear that the place for the parties to present their evidence is the trial. If evidence that with due diligence could have been called at trial were admitted routinely on appeal, finality would be lost and there would be less incentive on the parties to put forward their best case at trial. The rule requiring due diligence at trial is therefore important because it helps to ensure finality and order, two features which are essential to the integrity of the criminal process: **R. v. G.D.B.**, [2000] 1 S.C.R. 520 at para. 19. In that paragraph of **G.D.B.**, the Supreme Court adopted these words of Doherty, J.A. in **R. v. M.(P.S.)** (1992), 77 C.C.C. (3d) 402 at 411:

> While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(*d*) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate

> process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen*, *supra*, at p. 148.
>
> The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.
>
> In my view, these considerations are equally relevant in the context of an appeal from sentence. Accordingly, due diligence in producing fresh evidence is a factor that must be taken into account in an appeal from sentence, on the same basis as the other three criteria set out in *Palmer*.

[60] But finality and order, important as they are, must give way in the interests of justice. Accordingly, the due diligence criteria is not applied inflexibly and yields where its application might lead to a miscarriage of justice: **R. v. G.D.B., supra** at paras. 17 - 21; **R. v. Lévesque**, **supra** at para. 15. The due diligence requirement is one factor to be considered in the "totality of circumstances": **G.D.B.** at para. 19. In considering whether the due diligence requirement has been met, the appellate court should determine the reason why the evidence was not available or was not used: **G.D.B.** at para. 20. The absence of an explanation or the fact that the failure to call the evidence was a deliberate tactical choice will weigh against its admission: **R. v. Warsing**, [1998] 3 S.C.R. 579 at para. 51.

[61] The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the **Palmer** test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see **R. v. Taillefer; R. v. Duguay**, [2003] 3 S.C.R. 307 at paras. 73 - 77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order

sought: see e.g. **United States of America v. Shulman**, [2001] 1 S.C.R. 616 at paras. 43 - 46. Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see **R. v. G.D.B., supra**.

[62] The fresh evidence put forward by Mr. Wolkins is of both types. On the one hand, the transcript of evidence given at the second trial is directed to showing that there was evidence available that, if adduced at the trial of this charge, may have resulted in an acquittal. This evidence goes to an issue decided at trial and is therefore subject to the **Palmer** due diligence requirement, which may be relaxed to prevent a miscarriage of justice. The evidence called by the defence at the second trial was available to be called at the first. Therefore, Mr. Wolkins cannot meet the due diligence requirement. The issue is whether that requirement should be relaxed and the evidence admitted to prevent a miscarriage of justice.

[63] On the other hand, the affidavits of Mr. Grady and Mr. Wolkins (apart from the paragraphs relating to the second trial and the transcript of that trial which is annexed to Mr. Wolkins' affidavit) relate to the trial process and Mr. Grady's representation of Mr. Wolkins at the trial. This evidence is not directed to an issue resolved at trial and the **Palmer** due diligence requirement does not apply to it. The key issue relating to its admissibility is therefore whether it shows that Mr. Grady's representation led to a miscarriage of justice.

[64] I conclude that the key issue in relation to the admissibility of all of the fresh evidence is whether it should be admitted to prevent a miscarriage of justice.

3. The judicial discretion respecting adjournments:

[64] Adjournments are within the discretion of the presiding judge: **R. v. Rose (C.A.)** (1995), 140 N.S.R. (2d) 151 (S.C.). Of course, this discretion must be exercised judicially and according to correct legal principles. Where material witnesses are absent, an adjournment ordinarily should be granted if the party requesting the adjournment has not been guilty of neglect in procuring their attendance and there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial: **Darville v. The Queen** (1956), 116 C.C.C. 113 (S.C.C.).

4. Representation by Agent:

[64] It is submitted that Mr. Grady was incompetent in his representation of Mr. Wolkins and that the trial judge failed in his duty in two respects. First, it is submitted that the judge failed to conduct an inquiry to satisfy himself that Mr. Wolkins' decision to be represented by an agent was an informed one. Second, Mr. Wolkins says that the judge failed to exercise his discretion to remove Mr. Grady as agent once his incompetence became apparent.

[65] These submissions bring into play the legal principles about representation by agent. Both parties rely on the judgment of the Ontario Court of Appeal in **R. v. Romanowicz** (2000), 45 O.R. (3d) 506; O.J. No. 3191 (Q.L.)(C.A.). In my view, **Romanowicz** correctly establishes four principles which apply to this case. First, an accused has the right to choose how he or she will defend a charge. Second, an accused who chooses to be represented by an agent waives the right to effective assistance of counsel. Third, the fact that an agent is not a competent lawyer is not a ground of appeal. Fourth, the presiding judge has certain duties to an accused represented by agent which are similar to the duties owed to a self-represented person. I will deal with each in turn.

[66] In what follows, I am discussing the situation in which the accused has a statutory right to appear by agent subject to judicial discretion not to permit the agent to appear. In this case, s. 800(2), 802(2) and 802.1 of the **Criminal Code** apply by virtue of s. 34 (2) of the **Interpretation Act**. (I mention s. 802.1 simply because its application may have been overlooked at the second trial).

(a) An accused has the right to choose how he or she will defend a charge:

[66] The criminal law places great emphasis on personal responsibility. It also respects individual autonomy. Accused persons are entitled to decide many things in the course of a prosecution. These include whether to co-operate with the investigation, what mode of trial to choose, whether or not to plead guilty and whether or not to testify. These decisions will be respected by the Court and binding on the accused so long as he or she is fit to stand trial and the decisions are not tainted by the breach of any right of or duty owed to the accused. Thus an accused person's choice of representation, subject to applicable laws, will be respected. So, for example, a person's choice to represent him or herself, even if unwise and manifestly not in the person's best interests, will not be interfered with: see e.g., **Vescio v. The King**, [1949] S.C.R. 139; **R. v. Swain**, [1991] 1

S.C.R. 933 at 970 - 972; 63 C.C.C. (3d) 481 at 505 - 6; **R. v. Mian**, (1998), 172 N.S.R. (2d) 162 (C.A.) at paras. 6 - 7.

[67] At times, the principle respecting individual autonomy may appear to conflict with the right to a fair trial. For example, an accused may insist on representing him or herself even in situations in which, the court would appoint counsel for the accused, if asked, because a fair trial would not be possible otherwise. But this apparent conflict is resolved very simply: an accused cannot complain about his or her decision not to be represented by counsel provided that it is not tainted by the breach of any right of or duty owed to the accused: see, e.g., **R. v. Howell** (1995), 146 N.S.R. (2d) 1; N.S.J. No 483 (Q.L.)(C.A.) at para. 49; aff'd [1996] 3 S.C.R. 604. As the Alberta Court of Appeal aptly put it in **R. v. Cai** (2002), 170 C.C.C. (3d) 1; A.J. No 1521(Q.L.)(C.A.) at para. 42, "To allow an accused ... to spurn counsel and plead for mercy on grounds of lack of counsel would set a very dangerous precedent. To do so in the name of fairness would be very contrary."

(b) A person who chooses to be represented by an agent waives the right to the effective assistance of counsel:

[68] In **Romanowicz**, the Court found that an accused who elects to be represented by an agent waives the right to effective assistance of counsel. It follows that the fact that an agent does not meet the standard of competence expected of counsel cannot, on its own, support an argument that the trial was unfair or that a miscarriage of justice has occurred: see paras. 27 - 31. This conclusion rests on the common sense proposition referred to at para. 28 of the judgment: "[a]n accused cannot at the same time exercise the right to proceed without the assistance of counsel and yet demand the right of effective assistance of counsel."

(c) An agent's incompetence is not a ground of appeal:

[68] A person who retains counsel expects that counsel to be competent -- that his or her actions and advice will be based on reasonable, professional and ethical judgment. This is a reasonable expectation. Lawyers are licensed under the

authority of statute and held out to the public to be competent to practice law. Lawyers are taken "... by virtue of their professional training, [to] bring to their task an expertise which others, including the accused, do not possess," (**Romanowicz**, para. 27). An accused who retains counsel is constitutionally entitled to competent representation: *Ibid*.

[69] It follows that when a lawyer does not provide competent representation, the courts will intervene to prevent any resulting miscarriage of justice. The individual's choice of counsel does not mean that the individual is stuck with the consequences of unreasonable legal advice; the freedom to choose counsel is not taken as waiver of counsel's duty to be competent. To the contrary, the accused is entitled to assistance which reflects the expertise rightly expected of lawyers: **Romanowicz** at para. 27.

[70] A lawyer is the client's agent. That agency relationship, coupled with the lawyer's assumed expertise, mean that "... where counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice.": **R. v. G.D.B**., **supra** at para. 533. In other words, an accused who choses to be represented by a lawyer is taken to have accepted his or her professional judgment, but only to the point that the judgment displays reasonable professional competence and ethics. Where the judgment is shown to have been otherwise, the courts protect the client from the lawyer's actions to prevent a miscarriage of justice.

[71] A person who chooses to be represented by a non-lawyer agent is in a completely different situation. Agents are not licensed or held out to the public by the state as being competent nor do they owe professional obligations to the courts in which they may appear. There is no constitutional right to effective assistance by an agent. The choice to be represented by an agent, therefore, carries with it no reasonable expectation of competent representation such as exists in the case of representation by a lawyer. An accused has to live with the consequences of his or her informed choice to be represented by an agent. An accused is not entitled to complain on appeal simply that the agent did not perform like a competent lawyer.

[72] When an accused has chosen to be represented by an agent, the agent acts in the place of the accused and those acts will be taken to be the acts of the accused represented. By electing representation by agent, the accused indicates to the Court that the agent speaks on his or her behalf. That, after all, is what an agent is. It

follows that the accused, generally, is bound by the acts of the agent and will not be able to complain that those acts were unwise. While incompetent acts of a lawyer are presumed to have been without the client's understanding or authority, there can be no similar presumption in relation to an agent. The non-lawyer agent, in the eyes of the court, is not a professional adviser, but rather simply someone who stands in the shoes of the accused and whose acts are the acts of the accused.

[73] There may be circumstances, however, in which the accused will be permitted to show that this was not the case. Unauthorized acts of the agent cannot be attributed fairly to the accused and some relief should be available if those unauthorized acts give rise to a miscarriage of justice. While an accused cannot complain on appeal about simple incompetence of an agent, unauthorized acts by the agent which the accused could not correct and which give rise to a miscarriage of justice might well justify appellate intervention.

[74] A person who choses to be represented by an agent, therefore, is in a closely analogous situation to a person who choses to represent him or herself. In either situation, the person has elected to forgo the right to the effective assistance of counsel: **Romanowicz** at para. 28. That choice will be respected by the courts, but, of course, the person cannot thereafter complain that the agent did not perform with the competence of a lawyer. The following remarks from **Davids v. Davids**, [1999] O.J. No. 3930 (Q.L.)(C.A.) at para. 36 are apposite:

> **[36]** ... The fairness of this trial is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case as effectively as counsel. Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. ...

(d) The judge's duty to a person represented by an agent:

[74] As noted, persons appearing by agent are in many ways in the same situation as persons who choose to represent themselves. The similarity of their situations suggests that the well-recognized duties of a trial judge to provide reasonable assistance to self-represented litigants should in general apply to those appearing by agent as well. There are three main areas in which these duties of the trial judge come into play.

[75] Just as the judge will ensure that an accused has chosen to forgo legal assistance, the judge should generally take steps to ensure that the accused's choice of representation by agent is an informed one. For example, it will usually be appropriate for the judge to tell the accused that: agents, unlike lawyers, do not have to demonstrate any level of competence or professional accomplishment; the law in relation to the conduct of a criminal trial imposes no standard of competence upon agents; and that the acts of the agent will generally be taken to be the acts of the accused and be binding on the accused.

[76] Just as the judge will take all reasonable steps to assist a self-represented person, the same approach should be taken in respect of persons appearing by agent.

[77] Just as the judge has the authority to ensure that a self-represented person does not abuse the court's process or undermine the trial process, the judge has the authority to prevent an agent from appearing or continuing to appear where his or conduct merits taking that step.

[78] How the judge discharges these obligations must be left to the sound judicial discretion of the presiding judge. Providing that the discretion is exercised in accordance with the correct legal principles, a failure by the judge to discharge these obligations is not, of itself, a free-standing ground of appeal. The question is whether the failure has occasioned a miscarriage of justice.

[79] This last point is made in **Romanowicz** and it bears repeating. As the court made clear in para. 40, the overriding concern is the fairness of the trial. The sorts of steps just discussed will help ensure a fair trial both in fact and in appearance. But as the Court emphasized, the important question on appeal is not simply whether these steps were or should have been taken, but whether any failure to take them has given rise to a miscarriage of justice.

[80] The nature of the advice and assistance provided by the judge can only be assessed in light of the requirement for a fair trial in the particular case and cannot be captured by any specific, binding guidelines as to what that advice and assistance ought to consist of. The fairness of a trial is a matter of fact in each case. The question on appeal is the fairness of the trial and that must be determined in light of the specific facts of each case: **Romanowicz** at paras. 36 - 41; **R. v. Hardy** (1991), 69 C.C.C. (3d) 190 (Alta. C.A.) *per* Major, J.A. (as he then was) at 191; **R. v. Landry** (2003), 174 C.C.C. (3d) 326 (N.S.C.A.) at para. 39; and, **R. v. Phillips** (2003), 172 C.C.C. (3d) 2985; A.J. No. 14 (Q.L.)(C.A.) at para. 26.

[81] I conclude that a trial judge generally should: (i) satisfy him or herself that the accused's choice to be represented by an agent is an informed one; (ii) provide the sort of assistance given to self-represented persons; and, (iii) in appropriate circumstances, exercise the discretion to remove an agent. But where it is alleged after the fact that there has been a failure to do any of these things, the question is whether the alleged failure resulted in trial unfairness. As McIntyre, J. said in R**. v. Fanjoy,** [1985] 2 S.C.R. 233 at 240, if the accused is deprived of a fair trial, the conviction is a miscarriage of justice. That is the proper focus on appeal. The inquiry on appeal cannot be simply on whether certain desirable steps were not taken by the trial judge but whether as a result the accused was deprived of a fair trial such that the conviction is a miscarriage of justice.

4. Miscarriage of justice:

[82] In my view, all of the appellant's submissions boil down to this: Mr. Grady's incompetence and the judge's alleged failings gave rise to a miscarriage of justice.

[83] But what is a miscarriage of justice?

[84] The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that, it is much easier to give examples than a definition; there can be no "strict formula .. to determine whether a miscarriage of justice has occurred": **R. v. Khan**, [2001] 3 S.C.R. 823 *per* LeBel, J. at para. 74. However, 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:

**Fanjoy supra**; **R. v. Morrissey** (1995), C.C.C. (3d) 193 (Ont. C.A.) at 220 - 221. 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: **R. v. Cameron** (1991), 64 C.C.C. (3d) 96 (Ont. C.A.) at 102; leave to appeal ref'd [1991] 3 S.C.R. x.

[85] What the interests of justice require must be assessed in light of the demands of the adversary process as well as the soundness of its results: see **R. v. M.(P.S.)**. Absent legal error, there should generally be one trial not a series of trials pursuing different trial strategies with different evidence. Justice results from an appropriate balance between the goals of finality and order and the assurance of right results.

5. Application of the principles:

[86] Did any of the things Mr. Wolkins complains about result in an unfair trial or otherwise give rise to a conviction that is a miscarriage of justice? In my view, they did not.

[87] The fresh evidence, had it been called at the trial, might have affected the result. However, Mr. Wolkins had the right to decide whether to call that evidence or not. Provided his decision was not tainted by any improper action by his agent or by any failing on the part of the trial judge, he cannot now seek to undo it simply on the basis that the result might have been different.

[88] To permit this would give rise to a succession of trials in which, on the basis of different evidence, the accused could advance different positions while deciding which evidence to "save" for the next trial. The deliberate choice not to call available evidence or to testify, which is not explained by incompetent advice or misapprehension of rights, must generally bind the accused. While this is only one of the relevant circumstances, it is one weighing heavily against the admission of the "fresh" evidence in this case.

[89] Although Mr. Wolkins asserts he should have testified, nowhere in his affidavit does he set out his proposed testimony in relation to the charge. In fact, the evidence which he gave at the second trial was to the effect that, after the first charge was laid, he was concerned enough about the position of some of his other pots that he sought the advice of a fisheries officer and moved some of them to

ensure compliance. That testimony, had it been given on the trial of the first charge, might have undermined any reasonable doubt about whether he was responsible for setting the pots in the wrong area.

[90] The appellant makes much of Mr. Grady's alleged incompetence. However, these submissions are not persuasive for several reasons.

[91] According to Mr. Wolkins, Mr. Grady in the past had intentionally delayed trials for the purpose of garnering more public support for the Association of which Mr. Wolkins was president. The trial record in this case is much more consistent with Mr. Grady again pursuing this objective than with his incompetence. A reading of the record suggests that Mr. Grady attempted to delay this trial and, at times, to bait the trial judge. It was an illegitimate strategy. But as Mr. Wolkins says in his affidavit, he saw nothing wrong with Mr. Grady's approach. He can hardly complain that the judge rightly, if belatedly, put an end to it.

[92] Mr. Wolkins cannot be heard to complain that Mr. Grady did not act with the competence of a lawyer. By selecting representation by agent, Mr. Wolkins waived the effective assistance of a lawyer.

[93] It is said that the judge should have told Mr. Wolkins about the difference between representation by an agent and representation by a lawyer. In my view, that submission should be rejected for two reasons.

[94] First, we know from the record and the fresh evidence that the judge was well aware of the relationship between Mr. Wolkins and his Association and Mr. Grady. We also know that the Association was apparently content that Mr. Grady had delayed previous trials in what was perceived to be the interests of the Association during the time Mr. Wolkins was its president. The judge could rightly have concluded that any inquiry into Mr. Wolkins' choice of Mr. Grady as agent was superfluous in these circumstances. I do not think that exercise of discretion in all of the circumstances was wrong.

[95] Second, but most importantly, there is no evidence that Mr. Wolkins relied on any advice from Mr. Grady with respect to calling evidence or that Mr. Wolkins misunderstood the judge's direction as to when evidence would be called. There is simply no link between any failure on the part of the judge to make the inquiry and the failure to call the evidence.

[96] In my view, the same analysis applies to the appellant's submission that the judge erred in failing to remove Mr. Grady as agent. I agree entirely that, subject to the applicable statutory provisions, the trial judge, as part of the authority to control the trial process, has a broad discretion to control the conduct of agents before the Court including the authority to prevent agents from acting. As the Ontario Court of Appeal said in **Romanowicz** at para. 77, this authority, like any other facet of the court's power to control its processes, must be exercised judicially on the basis of the circumstances present in a given case and with due regard to the rights of interested persons to be heard before that discretion is exercised. The failure to exercise that discretion in a particular case will only constitute reversible error where it results in an unfair trial.

[97] While there may have been grounds to justify Mr. Grady's removal, I cannot fault the judge for his restraint. One can well imagine that had he done so and a conviction been entered, we would now be hearing on appeal about the judge's interference with Mr. Wolkins' right to his choice of representative. But more importantly, there is simply no link in the record between the decision not to call evidence and Mr. Grady. In light of the judge's clear direction repeatedly given in Mr. Wolkins' presence, I do not accept that the decision not to call evidence was other than an informed decision made by Mr. Wolkins. At no point in the proposed fresh evidence does he suggest otherwise. It was a decision he was entitled to make and having made it, he should generally be bound by it.

[98] The judge's refusal of the adjournment is, with respect, a non-issue. It is not suggested that the evidence now relied on was not available on the day of trial or that an adjournment was needed to secure the attendance of witnesses. The judge obviously drew the conclusion, and on this record that conclusion is inescapable, that the strategy was one of delay and that the time had come to put an end to it.

[99] In summary, the appellant's claim of a miscarriage of justice in this case centres on the failure to call evidence which might have resulted in an acquittal as it did in his trial on the second charge. This submission rests on the proposition that it was Mr. Grady's fault that the defence evidence was not called.

[100] I do not in the slightest accept that proposition. Nowhere in the 139 paragraphs of the two fresh evidence affidavits is it suggested that Mr. Grady advised Mr. Wolkins not to call evidence. Mr. Wolkins does not allege that he

misunderstood the trial judge's direction, clearly given, that the defence would proceed at the close of the Crown's case. Mr. Wolkins does not suggest that he failed to understand what the judge meant when he said that the fact his tags were found on traps in the wrong area was circumstantial evidence of guilt and that it was therefore necessary for the defence to decide whether to call evidence. Mr. Wolkins cannot claim, of course, that he was not available to testify as he was present in court; the judge told Mr. Grady that if he wanted to call evidence the accused was "sitting right there." Mr. Wolkins does not suggest that the other witnesses he now relies on were not available to testify. Mr. Wolkins cannot and does not suggest that the judge failed to provide every opportunity to him to call evidence had he wished to do so. The judge would even have permitted the defence to call evidence in the middle of submissions. Mr. Wolkins does not suggest that Mr. Grady was acting beyond his authority as agent or in any way contrary to his instructions. The record simply does not support the proposition that Mr. Wolkins relied on Mr. Grady's advice about calling evidence or that the failure to call evidence was the result of anything other than his own choice.

[101] The submission also rests on the proposition that the evidence called at the second trial would have led to an acquittal if called at the first. However, nowhere in his lengthy affidavit does Mr. Wolkins set out his proposed evidence on the first charge. In fact, his evidence given at the second trial was to the effect that, after the first charge, he was concerned that he might have other pots in the wrong area which led him to seek the advice of a fisheries officer and to move some of them. This testimony is in marked contrast to Mr. Wolkins' evidence about the events giving rise to the second charge.

[102] In summary, the evidence advanced on appeal does not show that Mr. Wolkins' decision not to testify resulted from any failing of his agent or of the trial judge. Mr. Wolkins does not set out in his affidavit what his testimony would have been in relation to the first charge and his testimony at the second trial which bears most directly on the facts giving rise to the first is to the effect that he was concerned that he might have pots in the wrong area. Considering the totality of the circumstances, the "fresh" evidence does not persuade me that there has been a miscarriage of justice.

## V. Disposition:

[103] The fresh evidence does not show that a miscarriage of justice has occurred. It should not, therefore, be admitted. I would grant leave to appeal but dismiss the appeal.

Cromwell, J.A.

Concurred in:
Glube, C.J.N.S.
Fichaud, J.A.