NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Nevin*, 2024 NSCA 64

Date: 20240705
Docket: CAC 519867
Registry: Halifax

Between:

Tristian Nevin

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge:	The Honourable Justice David P. S. Farrar
Appeal Heard:	June 11, 20241, in Halifax, Nova Scotia
Subject:	Reasonable apprehension of bias – the effect of a finding of reasonable apprehension of bias on the overall proceedings – remedy
Summary:	The appellant was charged with one count of sexual assault and three counts of sexual interference and was tried before Provincial Court Judge Alain Bégin. On December 10, 2021, the trial judge found the appellant guilty of all charges. Prior to sentencing taking place, the defence took issue with some statements made by the trial judge and brought a recusal motion alleging that the trial judge had a reasonable apprehension of bias. At the recusal motion, the trial judge called two witnesses to rebut the allegations of the reasonable apprehension of bias. This was done without prior disclosure to the Crown or the defence.

	The trial judge conducted a direct examination of the witnesses and overruled objections made by defence counsel to his questions. The trial judge dismissed the reasonable apprehension of bias motion. Mr. Nevin appeals that decision.
Issues:	There were two issues for determination on appeal: (1) Should the appellant be permitted to adduce fresh evidence? (2) Did the trial judge's conduct give rise to a reasonable apprehension of bias?
Result:	The fresh evidence was admitted on the basis that it went to the irregularity of the proceeding. The trial judge had a reasonable apprehension of bias. It caused the trial judge to lose jurisdiction which required that the convictions be set aside. Normally, in cases such as this, a new trial would be ordered. However, in these circumstances the charges were stayed. The appeal was allowed, the convictions set aside, and a stay of proceedings entered.

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Judges:	Farrar, Van den Eynden and Beaton JJ.A.
Appeal Heard:	June 11, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Farrar J.A.; Van den Eynden and Beaton JJ.A. concurring
Counsel:	Lee Seshagiri, for the appellant Mark A. Scott, KC, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Reasons for judgment:

Overview

[1] This is a reasonable apprehension of bias case unlike any other.

[2] The appellant was charged with one count of sexual assault and three counts of sexual interference and was tried before Provincial Court Judge Alain Bégin. On December 10, 2021, the trial judge found the appellant guilty of all charges.

[3] The sentencing did not go smoothly. The trial judge was frustrated at the pace of proceedings. The defence took issue with some statements made by the trial judge and brought a recusal motion alleging the statements gave rise to a reasonable apprehension of bias.

[4] The trial judge took the recusal motion as a personal attack. His doing so led him to commit a number of errors of law.

[5] The Crown agrees the trial judge's conduct was fundamentally wrong.

[6] The question for this Court's determination is how the trial judge's treatment of the recusal motion affects the validity of the overall proceedings.

[7] For the reasons that follow, I would allow the appeal, find that the trial judge's conduct gave rise to a reasonable apprehension of bias, set aside the convictions, and order a stay of proceedings.

Background

[8] The proceedings in this case were extremely protracted.

[9] The appellant was charged with one count of sexual assault and three counts of sexual interference under ss. 271 and 151 of the *Criminal Code*, in an Information dated October 18, 2018. The offences occurred between March 1, 2017, and August 30, 2017. During the period of the alleged offences, the complainant, M.F., was thirteen and fourteen years old.

[10] Both the appellant and the complainant are Indigenous.

[11] The allegations were reported in late December of 2017. The appellant was arraigned on January 9, 2018. Trial dates were set for January 17 and 18, 2019.

[12] On January 17, 2019, while represented by Brian Stephens, the appellant pled guilty to a single charge of sexual interference on a Crown re-election to a summary proceeding. Counsel sought a Forensic Sexual Behaviour Program (FSBP) report and a *Gladue* report. The reports were ordered, and the matter was set for a sentencing circle on April 29, 2019.

[13] On April 29, 2019, the sentencing circle was adjourned to July 5, 2019 and the sentencing tentatively scheduled for July 8, 2019 at 1:30 p.m.

[14] The sentencing circle did not occur as scheduled. The parties appeared on July 8, 2019 and the sentencing circle was scheduled for September 13, 2019, and sentencing was put over to September 23, 2019.

[15] On September 23, 2019, Jade Pictou appeared on behalf of the appellant, replacing Mr. Stephens who had withdrawn as counsel, and the matter was adjourned to October 3, 2019.

[16] On October 3, 2019, Ms. Pictou notified the court that she had a conflict of interest. She informed the court Jeremiah Raining Bird would act as counsel for the appellant going forward. The matter was adjourned to October 24, 2019.

[17] On October 24, 2019, Mr. Raining Bird notified the court that he had instructions to bring an application to withdraw the appellant's guilty plea. An adjournment was requested to prepare.

[18] The motion was eventually scheduled for March 6, 2020.

[19] On March 6, 2020, the motion to withdraw the guilty plea proceeded before Judge Catherine Benton. The appellant argued his plea was invalid as it was made involuntarily and on an uninformed basis. After hearing evidence and the submissions of both parties, the matter was adjourned for decision to March 9, 2020.

[20] On March 9, 2020, Judge Benton granted the defence motion to vacate the guilty plea, finding it involuntary. The matter was then adjourned to March 16, 2020, for election and plea.

[21] On March 16, 2020, the appellant elected trial in Supreme Court with a judge and jury. A Preliminary Inquiry was scheduled for November 23, 2020.

[22] On November 23, 2020, the Preliminary Inquiry was held before Judge Paul Scovil, with Mr. Raining Bird appearing as counsel for the appellant. The appellant was committed to stand trial, and the matter was adjourned to January 19, 2021.

[23] On January 18, 2021, the appellant re-elected to have his trial in Provincial Court and entered a not guilty plea. Trial was scheduled for September 30, 2021.

[24] On August 4, 2021, the court adjourned the September 30, 2021, trial date – which had been inadvertently scheduled on Truth and Reconciliation Day – to October 22, 2021.

[25] The appellant's trial commenced on October 22, 2021, in Truro with Judge Bégin presiding. The complainant, M.F., testified to events that occurred at three separate locations: the home of a mutual friend, the appellant's Indian Brook apartment, and the appellant's Millbrook apartment.

[26] It is not necessary to review M.F.'s evidence in detail for the purposes of this appeal. It is sufficient to say he testified to serious sexual misconduct on the part of the appellant which included sexual touching, masturbation and fellatio on a number of occasions.

[27] The appellant gave evidence in his own defence. He either denied the events occurring or testified he could not recall anything due to his heavy drinking.

[28] Closing submissions were made on October 22, 2021. The matter was adjourned for decision to December 10, 2021.

[29] The trial judge's decision was delivered orally on December 10, 2021. He found the complainant's evidence to be credible and reliable and accepted it over that of the appellant. The appellant was convicted of all charges.

[30] The defence sought an updated *Gladue* report and updated FSBP report. The judge granted the request for the *Gladue* report but refused to order an updated forensic assessment report.

[31] A sentencing circle was scheduled for April 29, 2022. The initial sentencing circle referral to the Mi'kmaw Legal Support Network (MLSN) was lost. As a result, the sentencing circle was adjourned to June 10, 2022.

[32] The sentencing circle went forward on June 10, 2022. The trial judge was present. While on a break, it was brought to Mr. Raining Bird's attention the trial

judge intended to impose sentence the same day. After the break, Mr. Raining Bird advised the judge he did not anticipate the sentencing would occur that day given correspondence he had received from MLSN and caselaw he had reviewed. He sought an adjournment to prepare for sentencing, including filing materials in support of his position on sentence. The judge responded that he was "shocked, pissed off, and outraged" by this request. The trial judge's outrage is difficult to understand considering he had previously, on at least two occasions, scheduled the sentencing circle and the sentencing on different dates. The trial judge reluctantly granted an adjournment to June 14, 2022.

[33] On June 14, 2022, the defence sought a further adjournment of sentencing on two grounds; whether there was a need to comply with the *Constitutional Questions Act*[1] (in order to rely on the decision in *R. v. Sharma*, 2020 ONCA 478, removing the statutory bar against Conditional Sentence Orders, rev'd 2022 SCC 39) and to allow the appellant to complete the FSBP program in which he was participating.

[34] After considerable discussion, including statements by the trial judge expressing significant frustration towards defence counsel and his client, the adjournment was granted. A new sentencing date was scheduled for September 6, 2022.

[35] On September 2, 2022, Gordon Allen, representing the appellant, filed a Notice of Application for Recusal with a supporting affidavit from Mr. Raining Bird. The Notice alleged:

> Throughout the course of these proceedings and as well as other proceedings involving the same defence counsel, the Honourable Judge Alain Bégin has made comments that taken in their totality, give rise to a reasonable apprehension of bias.

[36] The recusal hearing took place on October 13, 2022.

[37] On his own motion and without prior notice or disclosure being provided to the Crown or defence, the trial judge called two witnesses: Mona O'Brien and Mindy Gallant-Zwicker. Both witnesses were employees of the MLSN. According to the judge, the witnesses were called to lay a factual basis to refute what he referred to as the baseless allegations against him. The judge conducted direct

[1] R.S.N.S. 1989, c. 89.

examination of both witnesses. Ms. Gallant-Zwicker was present in the courtroom while Ms. O'Brien gave her testimony.

[38] In addition to eliciting information about his own conduct at the sentencing circle on June 10, 2022, the trial judge asked for both witnesses to comment on his past conduct toward members of the Indigenous community. The witnesses were also asked to comment on Mr. Raining Bird's conduct, professionalism, and preparedness in this case. Defence counsel raised several objections throughout the recusal hearing, all of which were overruled.

[39] After receiving submissions from the parties, the trial judge delivered an oral decision denying the recusal motion. The trial judge's reasons addressed the evidence of the two MLSN witnesses, explaining they were called to testify as representative members of the community. The trial judge asked the witnesses to attend. He stated he did not need to subpoena them because "there's a respect for this bench as to my relationship with Indigenous persons".

[40] The trial judge repeatedly stated that he did not have any bias towards Indigenous offenders, Indigenous counsel, or Indigenous people. He concluded: "No reasonably informed person, for one second, believed [sic] that I have a bias towards indigenous offenders".

[41] In the course of his recusal decision, the trial judge took strong issue with the conduct of defence counsel. He repeatedly suggested Mr. Raining Bird was unprepared and claimed that the defence was unprepared from start to finish. The trial judge then suggested Mr. Raining Bird had under-represented his client, was misleading the Court when he sought an updated FSBP report, had misinformed his client as to what the possible and likely sentence was going to be (it is unclear from his decision how he would be aware of solicitor-client privileged communications between Mr. Raining Bird and the appellant), and had acted in a manner inconsistent with his duty as an officer of the court.

[42] After the recusal decision was rendered, Mr. Raining Bird sought to be removed as solicitor of record for the defence. Mr. Allen agreed to represent the appellant at sentencing. The case was adjourned for Mr. Allen to prepare.

[43] On November 16, 2022, after hearing from the parties, the trial judge sentenced the appellant to a period of five years' incarceration.

[44] The appellant filed a Notice of Appeal on December 14, 2022. An Amended Notice of Appeal was filed on October 23, 2023.

Issues

[45] Two issues arise for consideration from the Amended Notice of Appeal:

1. Did the trial judge's conduct give rise to a reasonable apprehension of bias?

2. Should the appellant be permitted to adduce fresh evidence?

[46] I will consider the introduction of the fresh evidence when addressing the reasonable apprehension of bias issue.

Standard of Review

[47] Bias has been defined as "a predisposition to decide an issue or a cause in a certain way which does not leave the judicial mind perfectly open to persuasion or conviction".[2] The test for establishing a reasonable apprehension of bias has been consistently applied by Canadian courts of all levels since the case of *Committee for Justice and Liberty v. Canada (National Energy Board)*:[3]

> […] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. […] that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the trier of fact], whether consciously or unconsciously, would not decide fairly."
>
> […] The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[48] The notion of fairness in the context of reasonable apprehension of bias was further commented on by the Supreme Court of Canada in *R. v. R.D.S.*:[4]

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[2] *Per* Watt J. (as he then was) in *R. v. Gushman*, [1994] O.J. No. 813 (Gen. Div.), at ¶29 and 30.
[3] [1978] 1 S.C.R. 369, at pp. 394 and 395.
[4] [1997] 3 S.C.R. 484, at ¶94.

> [94] […] Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.

[49] Proving a reasonable apprehension of judicial bias requires clearing a high bar, in large part owing to the strong presumption of judicial impartiality which is a cornerstone of our legal system. The legal principles engaged by reasonable apprehension of bias claims were described by Saunders J.A. in *Nova Scotia (Attorney General) v. MacLean*:[5]

> [39] First, as a matter of law, there is a strong presumption of judicial impartiality, which is not easily displaced. Second, there is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of bias. Third, whether a reasonable apprehension of bias exists is "highly fact-specific". Such an inquiry is one where the context, and the particular circumstances, are of supreme importance. The allegation can only be addressed carefully in light of the entire context. There are no shortcuts. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45.

[50] The standard of proof for a reasonable apprehension of bias test is objective.[6] The Supreme Court of Canada has emphasized, in support of this standard, "the oft-stated idea that 'justice must be seen to be done' […] cannot be severed from the standard of reasonable apprehension of bias".[7]

[51] Moreover, the Supreme Court of Canada in *R.D.S.* cautioned judges about the significant role the objective standard plays in guiding judicial conduct:

> [118] […] Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

[52] The reasonable apprehension of bias test remains case specific. As noted in *R.D.S.*:

> [136] Allegations of reasonable apprehension of bias are entirely fact-specific. It follows that other cases in which courts have dealt with similar allegations are of very limited precedential value. It is simply not possible to look at an individual

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[5] 2017 NSCA 24 [*Nova Scotia (A.G.) v. MacLean*].
[6] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, at ¶67.
[7] *Wewaykum*, at ¶67.

> case and conclude that the determination of the presence or absence of bias in that case must apply to the case at bar. Nonetheless, it is helpful to review some selected cases in which similar allegations have been made if only to observe the benchmarks against which the allegations were measured.

[53] With these principles in mind, I will now turn to their application to this appeal.

Analysis

[54] The recusal motion below raised several concerns about the trial judge's behaviour. These include prejudging the appellant's Forensic Sexual Behaviour Assessment and making problematic comments about the circumstances of other unrelated Indigenous offenders, as well as substance use and addiction, in relation to a *Gladue* analysis. It was argued that individually and collectively these facts gave rise to a reasonable apprehension of bias.

[55] In contrast, the appellant's reasonable apprehension of bias claim in the present appeal focuses on the trial judge's response to, conduct of, and statements and decisions made at the recusal motion itself. The facts giving rise to the claim on appeal include the trial judge's actions in: (1) entering the fray, (2) pre-judging the recusal motion, (3) personalizing the bias claim, and (4) denigrating the defence. I will address each of these in turn.

Wrongfully Entering the Fray

[56] The trial judge's conduct in this case was extraordinary. Perhaps foremost was his decision to enter the fray by calling two witnesses on his own motion, to provide evidence in the court's favour in response to the recusal motion. His actions violated basic principles of procedural fairness.

[57] The leading case on judges calling witnesses is *R. v. Finta*.[8] The Supreme Court of Canada made it clear the discretion of a trial judge to call witnesses is highly circumscribed and must be rarely exercised. Speaking for the majority, Justice Cory stated that to take this "unusual and serious step of calling witnesses, the trial judge must believe it is essential to exercise the discretion in order to do justice in the case".[9]

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[8] [1994] 1 S.C.R. 701.
[9] *Finta*, at ¶198.

[58] In the present case, the trial judge called Ms. Mona O'Brien of the MLSN at the start of the recusal hearing. The judge then engaged in a direct examination of Ms. O'Brien. The Crown did not question Ms. O'Brien. In cross-examination by the defence, she confirmed, "His Honour asked me to be present today".

[59] A similar procedure occurred for Ms. Mindy Gallant-Zwicker, also of the MLSN. The trial judge called Ms. Gallant-Zwicker to the stand and engaged in a direct examination. Again, the Crown declined to ask any questions. In cross-examination by the defence, Ms. Gallant-Zwicker confirmed she had been asked to attend by "His Honour Bégin".

[60] The trial judge's stated purpose for calling the witnesses was to create a factual foundation:

> There will be a factual basis set, so if this goes to the Court of Appeal, it will not just be these baseless allegations by Mr. Raining Bird, but there will be an actual factual foundation as to how I deal with indigenous persons.

[61] Before us, the appellant seeks to introduce the fresh evidence of Ms. Paula Marshall, Executive Director of MLSN to address certain aspects of the trial judge's conduct and conclusions at the recusal hearing and his subsequent decision. In doing so, the appellant relies on this Court's decision in *R. v. Wolkins.*[10]

[62] In *Wolkins*, Cromwell J.A. discussed when fresh evidence may be admitted on an appeal. There are essentially three categories of fresh evidence:

- Where it is directed at an issue decided at trial;
- Where it is directed to other matters that go to the regularity of the process; or
- A request for an original remedy at the appellate court.[11]

[63] I am satisfied it is appropriate to introduce Ms. Marshall's affidavit under the second branch of *Wolkins*. It goes to the regularity of the process. It is in the proper form, and she was not cross-examined.

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[10] 2005 NSCA 2.
[11] *Wolkins*, at ¶58-61.

[64] Ms. Marshall's affidavit confirms she spoke with Ms. O'Brien and Ms. Gallant-Zwicker prior to them testifying at the recusal hearing. Ms. Marshall's understanding was that her employees would be speaking to the sentencing circle process/procedure only. She did not anticipate the witnesses would be used by the court to create a factual foundation against the allegations for recusal. Ms. Marshall understood from both Ms. O'Brien and Ms. Gallant-Zwicker, and verily believed, they were made to feel very uncomfortable by the trial judge's actions and statements at the recusal hearing.

[65] The trial judge's stated reason for calling the MLSN employees went beyond what Ms. Marshall understood to be the purpose for their appearance in court that day.

[66] In addition to the witnesses being uncomfortable, Ms. Marshall's affidavit speaks to a second concern that is also troubling. It is the inappropriate reliance on the MLSN witnesses as representative members of the Indigenous community. The trial judge's recusal decision states:

> …there's a reason I asked, I didn't summons, I didn't subpoena Ms. O'Brien or Ms. Gallant-Zwicker. I asked them if they would come and, clearly, I think there's a respect for this bench as to my relationship with indigenous persons that they showed up without me having to subpoena them, telling them that there's an application based on my bias towards indigenous persons. And they willingly and voluntarily came. They are members of the community and they're representative members of the community because they deal with myself regularly with regards to indigenous people in court. That Ms. O'Brien was here for six years, she confirmed my open-door policy. There is no … there's definitely no conscious bias and I strongly suggest there is no unconscious bias by me toward indigenous persons.[12]

[67] Ms. Marshall's affidavit makes it clear the MLSN is a professional and independent organization that in no way speaks on behalf of the broader Indigenous community. Her affidavit says:

> [34] THAT MLSN employees provide Nova Scotia's Indigenous communities with assistance and information regarding sentencing circles. MLSN employees are representatives of MLSN only, not the Indigenous communities we serve or the broader community of Indigenous peoples. MSLN employees do not and cannot speak for all Indigenous peoples or any specific Indigenous/Mi'kmaq communities of Nova Scotia;

[12] Recusal Decision, at p. 13.

[68] Furthermore, the trial judge's holding contradicts the evidence of the witnesses, who both testified that they could not and did not speak on behalf of the broader Indigenous community. In her cross-examination, Ms. O'Brien said:

> Q. Okay. All right. And do you speak for all indigenous persons or offenders?
>
> A. No.
>
> Q. Do you feel you're doing that here?
>
> A. Absolutely not, no.
>
> Q. Okay.
>
> A. No.
>
> Q. Do you speak for band council and Millbrook band council here today?
>
> A. No.
>
> Q. No, okay. You're just here today speaking, I guess, what? For yourself and your own opinion and own experience?
>
> A. I ... I'm here under my capacity with Mi'kmaw Legal Support Network.
>
> Q. Right, okay. Now, why can't you speak for all indigenous persons here today?
>
> A. I ... I don't ... because I ... I can't do that. I'm not ... I'm not able to do that.

[69] Also in cross-examination, Ms. Gallant-Zwicker likewise confirmed that she was not speaking for all Indigenous people.

[70] By calling these witnesses, the trial judge decided to take matters into his own hands on the recusal motion in a misguided attempt to vindicate himself. This was patently wrong.

[71] The trial judge improperly led evidence in relation to the key question before the court on the recusal motion—the appearance of his own impartiality.

[72] By the trial judge's own admission, his actions were taken in opposition to the defence's concerns and claims as to the fairness of the process. An accused who legitimately fears a reasonable apprehension of bias on the part of a trial judge should get a fair and unbiased hearing on the issue, not an additional litigant in judicial robes who is opposed in interest to the defence.

[73] Defence counsel on the recusal motion did not hold back when addressing the trial judge on the unfairness of the proceeding:

> First of all as a whole, interesting proceeding here. I've been involved in a recusal application before not like this, and occasionally, you'll see a ... the prosecution call witnesses, and you'll see, occasionally, a judge ask questions of a witness, especially if it's something for clarification.
>
> ***I've never seen a circumstance where a judge calls his own witnesses and, in fact, calls them on the phone to attend, not by subpoena, and then conducts a direct examination and then rules on objections to your own questions at that point in time. It ... I think that sort of undermines the notion of impartiality in relation to this proceeding, so we object to it, on that basis, and the testimony of the witnesses for that***.[13]
>
> [Emphasis added.]

[74] The trial judge took on the role of judge and advocate. This created a reasonable apprehension of bias in favour of the prosecution position that recusal was not necessary.

Pre-Determining the Recusal Motion

[75] By both his words and actions, the trial judge sent the unmistakable signal he had pre-judged the recusal motion itself. A reasonably informed member of the public would see that the question of the trial judge's recusal was decided before the hearing even started.

[76] The trial judge's pre-judgment is evident from statements he made on the record shortly after commencing the recusal hearing. In response to a defence objection, the trial judge twice characterized the defence's recusal motion as a "baseless allegation":

> THE COURT: All right. So, my response to that is it's a baseless allegation that I am [biased] towards indigenous people. The best people to get a response to that from, to lay an actual factual basis that we can discuss this on, is people from the indigenous community who are involved in it. That would be Ms. O'Brien, who is the MLSN worker, who saw me dealing with indigenous people for the last six years, and also I intend to call, and I will be calling, Mindy Gallant-Zwicker, who's at the back there, who was at the circle and also performs the same role.
>
> There will be a factual basis set, so if this goes to the Court of Appeal, it will not just be these baseless allegations by Mr. Raining Bird, but there will be an actual factual foundation as to how I deal with indigenous persons. I am going to continue. I note your objection.[14]

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[13] A.B., Vol. II, Tab 23, pp. 578-579.
[14] A.B., Tab 23, p. 535, lines 5-19.

[77] These comments are problematic. They signal at the outset of the recusal hearing, before hearing submissions from the parties, the trial judge had already concluded the defence motion lacked merit. This raised a reasonable apprehension of bias by indicating that the trial judge was no longer open to persuasion on the issue and would not listen to further evidence or submissions with an open mind.

[78] In *R. v. Ontario Corp. 844781*, a similar situation arose.[15] The court found a reasonable apprehension of bias where the trial judge made comments that indicated he had pre-determined the issue of penalty:

> [11] The impression is, regrettably, even stronger with respect to the judge's attitude towards the Crown's position on sentencing. It is clear that "the right to a fair trial" enures to the benefit of both the defence and the Crown. Where a trial judge states his conclusion in respect of the Crown's case before the trial is completed, it may give rise to a reasonable apprehension of bias. ***In chambers, the trial judge expressed that the Crown's position regarding penalty was "bull shit".*** In his reasons, he stated that the Crown's response to his inquiry as to their position on a plea of guilty:
>
> > ... provoked from me my rude remark that I thought demonstrated what I thought of the penalty in these circumstances.
>
> He stated:
>
> > It was that discussion with the Crown Attorney and the penalty that the Crown was asking for, which it was obvious to me was provoking the extension of this trial time. The application as I see it from the Crown now, while it's framed in the form of bias, is really designed simply that they would like to have a judge who might agree with what I believe to be their outrageous request for penalty.
>
> [12] ***It is apparent from those reasons that the trial judge has predetermined the issue of penalty and a reasonable, informed member of the public would have a reasonable apprehension that the judge might not listen to evidence or submissions on the point with an open mind.***
>
> [Footnote omitted; emphasis added.]

[79] In *R. v. MacLean*,[16] a trial judge informed counsel prior to hearing closing submissions that he had already written his decision, Chipman J.A. stressed the need for judges to remain impartial:

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[15] [1996] O.J. No. 4496 (Gen. Div.).
[16] (1991), 106 N.S.R. (2d) 213 (C.A.) [*MacLean*].

> [5] In our opinion, it is incumbent upon a trial judge to give a party appearing before him an opportunity to present argument before making a decision on any issue. In particular, a party must be allowed to make submissions at the close of the evidence. See **Aucoin v. R.**, [1979] 1 S.C.R. 554. In the context of a criminal case, these rights are among those guaranteed to an accused as a component of fundamental justice under s. 7 of the **Charter**, and more particularly by s. 11(d) thereof, and by s. 802(1) of the **Criminal Code**.

[80] The reasoning in *MacLean* is equally applicable in the present case. The materials filed on the recusal motion show that it was brought with an evidentiary foundation and based on legitimate concerns held by the accused. It was incumbent on the trial judge to approach the motion with an open mind. Instead, the trial judge's comments at the commencement of the motion show a clear intent to rule against the defence prior to hearing submissions.

[81] Furthermore, the trial judge's comments are even more problematic when viewed in context of the court calling its own witnesses on the motion. Both of the court's witnesses were present in the courtroom when the trial judge stated the defence motion was "baseless".

[82] The trial judge thereby tainted his own witnesses with his comments pre-judging the motion. As defence counsel tried to explain to the judge, his comments were evidence of his prejudging the motion:

> So, those comments were made almost axiomatic, kind of evidence of pre-judging, that the witnesses would hear.

[83] Finally, both of the witnesses testified to being contacted by the trial judge at least a month prior to the recusal hearing. Given the trial judge's stated purpose in calling the witnesses was to rebut the defence's baseless allegations, a reasonably informed person could infer his pre-determination of the motion occurred well before the hearing itself.

Erroneously Personalizing the Analysis

[84] The trial judge's apprehension of bias analysis suffers from a third fatal flaw: failure to properly apply the objective component of the reasonable apprehension of bias test.[17] Instead of focusing on the proper objective question – whether a reasonable person, with knowledge of the relevant circumstances, would

[17] *R. v. K.J.M.J.*, 2023 NSCA 84, at ¶57.

have a reasonable apprehension of bias – the trial judge took the reasonable apprehension of bias allegations personally. Consequently, and despite the efforts of defence counsel on the motion, the recusal hearing was an inquiry about whether the trial judge was personally biased.

[85] For example, at the very outset of the October 13, 2022 hearing, the trial judge framed the matter as an "application for me to recuse myself for my bias towards indigenous persons".

[86] When faced with an objection from defence counsel on his characterization of the issue, the trial judge stated "it's a baseless allegation that I am [biased] towards indigenous people". And again, on an objection ruling, the trial judge stated: "Someone has to be careful. They accuse someone of not having respect for people that are indigenous and then themselves behave in that way".

[87] This repeated personalization of the analysis led defence counsel to emphasize that the appellant's claim was based on a reasonable apprehension of bias, not actual bias:

> THE COURT: So, your ... your application and your brief refers to my bias towards indigenous offenders. Now, as you're talking this afternoon, you keep throwing out that Mr. Raining Bird's an indigenous lawyer. So, now you're broadening your claim of bias against me to now include indigenous lawyers as well as indigenous offenders, just to be clear?
>
> MR. ALLEN: If I make it clear, it's not a claim of bias against you. It's a claim, could someone have an apprehension of bias in the circumstances based upon these things …
>
> […]
>
> THE COURT: ... you're also alleging unconscious bias by me against indigenous lawyers. Is that correct?
>
> MR. ALLEN: It could ... whether it's unconscious bias or not or any bias or not, is not the test. It's would someone have ...
>
> THE COURT: Yes, yeah.
>
> MR. ALLEN: ... a reasonable apprehension of bias based on all that we're saying. And I'm ... I'm going to argue at the end of all this, the cumulative effect of all this is that one could. And I'm going to, when I get to argument, I will make that point, and that's the test.
>
> It's not whether you have an unconscious bias or not. You may, you may not, you may not at all. I have some unconscious bias that I don't even know about. And you ... you know in your heart you ... you ... you may not have any bias

> whatsoever, but it's like looking at these circumstances from someone who's in ... from the community and informed of the cir- ... you know, the circumstances and these facts, what would that person think? Would there be an apprehension of bias? That's the test, not whether there is.

[88] Again, despite defence counsel's best efforts, the trial judge's personalization of the analysis spilled over to his reasons. His reasons demonstrate a fundamental misapplication of the reasonable apprehension of bias analysis by repeatedly focusing on the question of his own bias or lack thereof.

[89] At the outset of the reasons in his recusal decision, the trial judge framed the question as whether he was personally biased:

> What started off as an application of my bias toward indigenous offenders morphed into my bias towards indigenous offenders and indigenous counsel. [18]

[90] His personalization of the issue echoed throughout the decision:

> I was firm with Mr. Raining Bird, whatsoever, none of it was a conscious bias. Obviously if it's an unconscious bias, I wouldn't know it because it's unconscious, but I vehemently dispute any bias by myself towards indigenous people. I repeat the comments I made previously of everything I've done for the indigenous offenders in this province and the steps I've taken to assist them.[19]
>
> […]
>
> My comments are recorded. Absolutely they're out of frustration with an unprepared lawyer, repeatedly unprepared lawyer. That does not mean I have a bias against indigenous offenders. It does not mean I have a bias against indigenous lawyers. I do not.[20]
>
> […]
>
> I agree with [the Crown] and there's a reason I asked, I didn't summons, I didn't subpoena Ms. O'Brien or Ms. Gallant-Zwicker. I asked them if they would come and, clearly, I think there's a respect for this bench as to my relationship with indigenous persons that they showed up without me having to subpoena them, telling them that there's an application based on my bias towards indigenous persons. … There is no … there's definitely no conscious bias and I strongly suggest there is no unconscious bias by me toward indigenous persons.[21]
>
> […]

[18] Recusal Decision, at p. 3.
[19] Recusal Decision, at p. 7.
[20] Recusal Decision, at p. 9.
[21] Recusal Decision, at p. 13.

> In September, 2016, I took my oath as a Provincial Court Judge and, in that oath, which I took very seriously, I swore ‘‘I will do well ... I will well do right to all manner of people after the laws of the Province of Nova Scotia without fear, favor, affection or ill will.” I have always abided by that oath. I’ve never deviated from that oath.
>
> It’s my view, my decision that no informed person, reasonably informed, knowing the history of this case, knowing what’s gone on, knowing the repeated unpreparedness by Mr. Raining Bird, knowing my six-plus years’ involvement with indigenous offenders, and I joke, but I am, I am the Millbrook judge. I have been for six years; I’ll be for another 10 years. That’s the reality; Millbrook is in my jurisdiction. No reasonably informed person, for one second, believed that I have a bias towards indigenous offenders.[22]

[91] The end result was a misapplication of the law. The trial judge erroneously personalized the recusal motion and lost sight of the most fundamental principle in a reasonable apprehension of bias analysis: justice should not only be done but should manifestly and undoubtedly be seen to be done.[23]

Unjustified Attacks on the Defence

[92] The trial judge’s strategy in responding to the recusal motion appears to have been to blame the defence. The trial judge’s attacks were unjustified. They added to the alleged apprehension of bias.

[93] In *R. v. Valley*,[24] Martin J.A. explained the question to be asked when it is alleged a reasonable apprehension of bias arises from critical judicial comments against counsel:

> [52] […] whether the comments made by the judge on the conduct of counsel amounted to more than mere discourtesy to counsel and unfairly reflected on the integrity of the defence, thereby destroying the appearance of a fair trial. […]

[94] In *R. v. Gushman*, Watt J. explained when a trial judge crosses the line of being more than discourteous to counsel:

> [38] The excerpted passages but exemplify the attitude of the presiding judge towards the prosecutor during the proceedings of August 31. Nothing changes on the following day. Their exchanges were unseemly. The presiding judge was

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[22] Recusal Decision, at pp. 19-20.
[23] *K.J.M.J.*, at ¶1, per Lord Hewart C.J., *The King v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256 at p. 259, quoted by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at ¶66.
[24] [1986] O.J. No. 77 (C.A.).

> grossly discourteous. His remarks were derogatory and demeaning of the prosecutor and denigrated his abilities in the presence of witnesses, accused and any others who may have been present in the court room about their lawful business. The comments included an invitation to the prosecutor to leave the court room. The remarks are reflective of a state of mind or temperament that is the antithesis of proper judicial conduct and anathema to impartial determination of causes by a neutral and detached arbiter. What occurred and was to continue ought occupy no place in our administration of criminal justice.

[95] In the present case, the trial judge suggested that "[the appellant] was under-represented by Mr. Raining Bird" and that defence counsel conducted himself in a way that was "inconsistent with a lawyer's duty as an officer of the court". He further stated:

> … And I endorse the comments of [the Crown] in her brief, page two, and I've said this before, a lot of what happened is based on [defence counsel, Mr. Jeremiah Raining Bird] being unprepared for this matter from start to finish. He was unprepared for the section 278 application; he was unprepared for the sentencing circle. He's been unprepared many times throughout this matter. He's unprepared when he sought an update from the report …
>
> […]
>
> … He was unprepared when he was looking ... for an updated report, not knowing where one was even available, when he could easily have just called and say, Is this doable? That's why I challenged him and it turns out I was correct. There's not a whole new report being done but there's a discharge summary - big difference.
>
> […]
>
> I stand by my comment that Mr. Raining Bird approached me, either here in Truro or in Shubenacadie, because we've had hearings in both places, I'm pretty sure it was in Shubenacadie, during the trial, he indicated to me he did not feel comfortable doing serious criminal matters and he'd never do serious criminal matters again after this one. I think that is reflected throughout how this matter proceeded.
>
> I have a duty, as a judge, that if someone's under-represented, to step in and make sure that they still get a fair trial. And, yes, I get frustrated when people are being under represented, not properly represented. I have a frustration with that and it was a growing frustration throughout this matter. …
>
> […]
>
> I was well informed, right ahead of time, that Mr. Raining Bird had informed his client that he should get a CSO. And Mr. Raining Bird comes and sees me and I tell him we're looking at *Friesen* here. Mr. Raining Bird had no

> idea as to the severity of the matters that his client was facing and I believe misinformed his client as to what he was looking at and misinformed his client as to what the possible and likely sentence was going to be.
>
> […]
>
> …And, if it wasn't for me pushing Mr. Raining Bird to confirm what he was telling me about the forensic assessments, because he had no idea; he was guessing, yes, he was misleading the Court. He was telling me something he didn't know. I stand by that comment. He was misleading the Court because he was telling me something is available but he didn't know. I sent him out to make the phone call to figure out what was going on.[25]

[96] The trial judge accused Mr. Raining Bird of:

- Being unprepared;
- Inadequate representation of his client;
- Not having knowledge of the law; and
- Misleading the court.

[97] These are very serious allegations for a trial judge to make against a defence lawyer.

[98] The appellant seeks to introduce the February 2, 2024 Affidavit of Jeremiah Raining Bird as fresh evidence responding to the trial judge's allegations of misconduct in his recusal decision.

[99] As with Ms. Marshall's affidavit, I am satisfied Mr. Raining Bird's Affidavit ought to be admitted under the second category in *R. v. Wolkins*: to address the regularity of the process.

[100] I am also satisfied the proposed evidence is credible and is relevant to issues raised by the trial judge in his recusal decision.

[101] I do not intend to delve deeply into the contents of Mr. Raining Bird's Affidavit other than to say that it counters the allegations being made by the trial judge about Mr. Raining Bird's conduct during the proceedings. The trial judge's bald accusations about Mr. Raining Bird not being prepared, misleading the court, and under-representing his client are certainly not borne out by the Affidavit or the

[25] Recusal Decision, at pp. 3-8.

record. In his affidavit, in response to the trial judge's allegations Mr. Raining Bird details the steps he took to represent his client:

> 19. That the record demonstrates that I attempted to and did diligently advance Mr. Nevin's interests, in accordance with my duties as defence counsel and as an Officer of the Court throughout the proceedings I was involved with, including but not limited to:
>
> - Conducting a merit assessment on Mr. Nevin's grounds to withdraw his guilty plea (entered with the assistance of other counsel).
> - Successfully arguing the motion to withdraw the guilty plea.
> - Questioning the complainant at the Preliminary Inquiry.
> - Pursuing relevant records in the hands of third parties.
> - Representing Mr. Nevin at trial, including calling defence evidence.
> - Seeking an updated Gladue Report and Sentencing Circle in light of Mr. Nevin's Indigenous heritage.
> - Requesting an updated forensic sexual behavior report in light of Mr. Nevin's participation in the Forensic Sexual Behaviour Program offered by the Nova Scotia Health Authority. This program is specifically designed for individuals convicted of sexual offences in order to address criminogenic needs associated with sexual reoffence.
> - Filing *Charter* notice to rely on the (then) law in *R. v. Sharma*, 2020 ONCA 478 [hereinafter "*Sharma* (ONCA)"] and raising the potential need for notice to be served on the Attorney General of Canada under the *Constitutional Questions Act*.
> - Providing evidence via Affidavit in support of Mr. Nevin's motion for recusal of the Trial Judge.

[102] It is not necessary to go into any further detail with respect to Mr. Raining Bird's affidavit. This appeal is not about Mr. Raining Bird's conduct, nor was the recusal motion. There was no allegation of ineffective assistance of counsel at any time.

[103] The trial judge's allegations about Mr. Raining Bird's conduct were inappropriate and undermined the integrity of the appellant's defence. They created a reasonable apprehension of bias.

[104] Perhaps the most concerning comment by the trial judge was when he attempted to justify his criticisms of Mr. Raining Bird's conduct by attributing

similar concerns to another Provincial Court judge. In his recusal decision, he stated:

> My view on Mr. Raining Bird, sorry, unprepared, is echoed by [a Provincial Court judge] who was there. She's not here to give evidence but, I tell you, I spoke to her at that time and I spoke to her since when this application was brought forward and discussed this with her.[26]

[105] The trial judge also attempted to bolster his criticisms by suggesting Mr. Raining Bird had made an admission of a lack of confidence and/or competence in a prior off-the-record conversation:

> I stand by my comment that Mr. Raining Bird approached me, either here in Truro or in Shubenacadie, because we've had hearings in both places, I'm pretty sure it was in Shubenacadie, during the trial, he indicated to me he did not feel comfortable doing serious criminal matters and he'd never do serious criminal matters again after this one. I think that is reflected throughout how this matter proceeded.[27]

[106] The first statement improperly attributes negative comments about a member of the Bar to another sitting judge, inappropriately pulling her into the fray. It also put her in the position of being unable to respond to the comments attributed to her.

[107] With respect to the trial judge's second comment, Mr. Raining Bird's February 2, 2024 Affidavit categorically denies making the off-the-record admissions alleged by the trial judge:

> 48. That I never stated that I was overwhelmed or that I did not feel comfortable providing legal representation on serious criminal matters, including Mr. Nevin's case.

[108] If it was necessary to decide the issue, this Court would be faced with a contest of competing narratives between counsel and the trial judge. In any event, credibility would have to determined. Regardless of which version is preferred, the integrity of the judicial process is diminished.

[109] Finally, after stating several times Mr. Raining Bird was "unprepared", the trial judge held:

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[26] Recusal Decision, at p. 4.
[27] Recusal Decision, at p. 4.

> My comments are recorded. Absolutely they're out of frustration with an unprepared lawyer, repeatedly unprepared lawyer. That does not mean I have a bias against indigenous offenders. It does not mean I have a bias against indigenous lawyers. I do not. ***I have a bias against unprepared lawyers***, that I will acknowledge. I'll openly acknowledge on the record I do have that bias. It's frustrating. These are busy, busy, busy courts. Delays go a long ways. I'll tell you right now, for me to set a one-day trial in this court, December of 2023, very busy. We don't have time for people to show up unprepared and not sure what they're talking about, making stuff up.[28]
>
> [Emphasis added.]

[110] The trial judge's admission of "a bias against unprepared lawyers" was aimed directly at Mr. Raining Bird, given the trial judge's criticisms of him being unprepared. That being the case, the only lawful outcome was for the trial judge to recuse himself. His failure to do so was in error.

Remedy

[111] In his factum, the appellant asked for a new trial. Prior to the oral hearing, the Court requested the parties be prepared to address the issue of a stay of proceeding of the charges. At the hearing, the appellant requested a stay.

[112] The Crown says the trial judge's handling of the recusal motion invalidated that motion because it breached fundamental fairness. However, it goes on to argue the remedy should be confined to the sentencing stage of the proceeding.

[113] I disagree with the Crown's position. It is not supported by the case law. As Bryson J.A. recently explained in *R. v. K.J.M.J.*:

> [58] Once a reasonable apprehension of bias is found the only remedy is a new trial because the judge has lost jurisdiction.

[114] This conclusion follows the Supreme Court of Canada's reasoning in *R. v. Curragh Inc.*:[29]

> [5] The properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held. ***In circumstances where reasonable apprehension of bias is demonstrated the***

[28] Recusal Decision, at p. 117.
[29] [1997] 1 S.C.R. 537.

> ***trial judge has no further jurisdiction in the proceedings and there is no alternative to a new trial.***
>
> […]
>
> [8] Certainly, every order of a trial court is enforceable and must be obeyed until it is declared void by an appellate court. In this sense the order may be viewed as voidable. ***However, when a court of appeal determines that the trial judge was biased or demonstrated a reasonable apprehension of bias, that finding retroactively renders all the decisions and orders made during the trial void and without effect.***
>
> [Emphasis added.]

[115] In *R. v. Abukar*,[30] the Crown conceded a new trial was warranted on several counts due to a reasonable apprehension of bias but argued that convictions on three remaining counts should be upheld because the reasonable apprehension of bias did not affect the whole of the proceedings. This severability argument was rejected:

> [2] While we appreciate the distinction the Crown urges upon us, in our view, the law is clear that where the high threshold of a reasonable apprehension of bias has been established on the part of a decision maker, all orders and convictions arising from the trial must be set aside. A reasonable apprehension of bias taints the entire proceeding not just those aspects that were directly affected by improper use of evidence that gave rise to the Crown's concession. In that regard, see *R. v. S.(R.D.)*, (1997) 10 C.R. (5th) 1, *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at 645; *R. v. Curragh*, [1997] 1 S.C.R. 537, at para. 6.

[116] The decision in *Abukar* accords with the decision of the Supreme Court of Canada in *R.D.S.*:

> [100] If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. … the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias …

[30] 2007 ABCA 286.

[117] Likewise, in *R. v. Broulliard*,[31] Lamer J. (as he then was) held a new trial is required even if a verdict is not unreasonable, the trial judge did not err in law, and there was no error in assessing the facts:

> [12] The role of a trial judge is sometimes very demanding, owing to the nature of the case and the conduct of the litigants (parties). Like anyone, a judge may occasionally lose patience. He may then step down from his judge's bench and assume the role of counsel. When this happens, and, *a fortiori*, when this happens to the detriment of an accused, it is important that a new trial be ordered, even when 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.

[118] A new trial was ordered in *R. v. Kaminsky*,[32] where a reasonable apprehension of bias arose from judicial comments at the outset of sentencing. The Alberta Court of Appeal stated:

> [19] No authority has been cited which deals directly with the issue as to whether the sentencing process should be treated separately from the proceedings prior to conviction for the purpose of assessing apprehension of bias. However, the relationship between these processes has been considered in the context of other issues. In *R. v. Gardiner*, [1982] 2 S.C.R. 368, the court dealt with the standard of proof to be applied in a sentencing proceeding. Dickson J., as he then was, noted at 415 that "crime and punishment are inextricably linked" and accepted that it is "well established that the sentencing process is merely a phase of the trial process."

[119] These principles have been applied to justify new trials in cases like the present one, where the reasonable apprehension of bias arises from circumstances occurring after conviction and before sentencing.

[120] Although the usual remedy in a situation such as this is a new trial, I am of the view the only appropriate remedy here is a stay. The granting of a new trial would not adequately disassociate the justice system from the conduct of this proceeding. By saying this, I am not in any way calling into question the conduct of the Crown.

[121] In this case, the trial judge engaged in conduct so offensive to societal notions of fair play that to continue with the proceeding would be harmful to the

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[31] [1985] 1 S.C.R. 39.
[32] 2008 ABCA 230.

integrity of the judicial system. This case falls within the residual category as set out by the Supreme Court of Canada in *R. v. Babos*:[33]

> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid*., at para. 57).
>
> [33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (*O'Connor*, at para. 71). But while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the "main" or "residual" category is invoked.
>
> […]
>
> [35] ***By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system***. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
>
> [36] In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, this Court described the residual category in the following way:
>
> > For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not

[33] 2014 SCC 16.

> be met unless the former is as well — society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. ***There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive***. But such cases should be relatively very rare. [para. 91]
>
> [37] Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example (see, e.g., *R. v. Keyowski*, [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), 68 N.S.R. (2d) 247 (S.C., App. Div.)).
>
> [Emphasis added.]

[122] This is one of those rare cases where a stay is necessary to protect the integrity of the justice system.

[123] In *R. v. Conway*,[34] Justice L'Heureux-Dubé writing for the majority held there are times when the affront to fair play and decency outweighs society's interest in the effective prosecution of criminal cases:

> […] The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, per Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[124] Similar comments were expressed by Moldaver J. in *R. v. Babos*:

> [85] Of course the public has an interest in trials on the merits, but it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual's loss of liberty, it will put fairness above expedience. Justice is not only about results, it is about how those results are obtained.

[34] [1989] 1 S.C.R. 1659, at p. 1667.

[125] I outlined earlier in these reasons the extent of the unfairness of the process the trial judge undertook in this case. While his conduct alone would justify a stay, other factors also support it, including: the charges date back to 2017; the appellant has already served a year in prison as a result of the conviction; he had been under bail restrictions while awaiting trial and is on restrictions awaiting the decision on this appeal. If a retrial was ordered, it would probably not take place for another year.

[126] The continuation of this proceeding in these circumstances would bring the administration of justice into disrepute. Regardless of the serious nature of the allegation of sexual offences laid against the appellant and the consequences of the imposition of the stay for his alleged victim, I am of the view a retrial would undermine the public's confidence in the integrity of the judicial system.

[127] As the Ontario Court of Appeal did in *R. v. Huang*,[35] I make a final observation. This is the second case in less than a year where this Court has allowed appeals from decisions of this judge on the basis of a reasonable apprehension of bias. In both instances, the perception of bias arose as a result of the conduct of the trial judge. The end result was that public resources were wasted, great inconvenience to the parties resulted, and the integrity of the administration of justice was tarnished.

[128] Although both the appellant and Crown counsel expressed it in different ways, they commented the hearing of this appeal was a sad day for the administration of justice in Nova Scotia. I agree. This Court takes no pleasure in admonishing the trial judge for his conduct in the proceeding. It was inexplicable and unprecedented. As appellate counsel said in his closing remarks before us – if this case is not an affront to the administration of justice, it is hard to imagine a case that would be.

[35] 2013 ONCA 240.

Conclusion

[129] I would allow the appeal and stay the charges.

Farrar J.A.

Concurred in:

Van den Eynden J.A.

Beaton J.A.