NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Finck***, 2007 NSCA 32

Date: 20070327
Docket: CAC 246654
Registry: Halifax

Between:

Carline Antonia VandenElsen and Lawrence Ross Finck

Appellants

v.

Her Majesty the Queen

Respondent

Judges: MacDonald, C.J.N.S.; Bateman and Cromwell, JJ.A.

Appeal Heard: February 15, 2007, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of the Court.

Counsel: Appellants in person
Peter P. Rosinski, for the respondent

Reasons for judgment:

[1] An appreciation of the issues raised on this appeal requires a detailed review of the background facts.

BACKGROUND

[2] The appellants, Larry Finck and Carline VandenElsen met and married in Ontario in 2003. They were both embroiled in legal disputes. Later that year there were several judicial determinations affecting each: Mr. Finck's appeal from a conviction for abducting his daughter in contravention of a custody order was dismissed (**R. v. Finck** (2003), 177 C.C.C. (3d) 557; O.J. No. 2692 (Q.L.) (Ont.C.A.)); Ms. VandenElsen's acquittal from three counts of abduction of her triplet children (of a former relationship) was overturned and a new trial ordered (**R. v. VandenElsen** (2003), 177 C.C.C. (3d) 332; O.J. No.3247(Q.L.)(Ont.C.A.)); Ms. VandenElsen's access to the triplets was terminated (**L.C.M. v. C.A.V.** (2003), 49 R.F.L. (5th) 416; O.J. No. 4216 (Q.L.)(Ont. Sup. Ct.J.)).

[3] Disenchanted with both the criminal justice and child welfare systems, the couple contemplated leaving Canada. Instead they moved to live with Mr. Finck's mother, Mona Finck, in Halifax, Nova Scotia (6161 Shirley Street). Ms. VandenElsen, who was then pregnant, gave birth to their child [in the latter part of 2003] (*editorial note- original text removed to protect identity of child*).

[4] The physician attending the birth contacted the Children's Aid Society (the "CAS") with concerns about the baby's situation. Upon investigation the CAS commenced an application for a supervision order pursuant to the **Children and Family Services Act**, S.N.S. 1990, c. 5 (the "**CFSA**"). On January 13, 2004 both parents were personally served with the notice of the CAS application. The Society sought a supervision order with the child to remain in the care of her parents. Mr. Finck attended the initial hearing on January 15, 2004 alone. Neither Ms. VandenElsen nor the baby was present. Mr. Finck claimed he did not know where they were. It appearing that Ms. VandenElsen had fled with the child, the presiding Supreme Court Family Division judge ordered that the child be placed in the temporary care of the CAS.

[5] This interim temporary care order permitted both Ms. VandenElsen and Mr. Finck to have supervised access with the child. It provided as well:

> **IT IS FURTHER ORDERED** that all Sheriffs, Deputy Sheriffs, Constables, and Peace Officers shall do all such acts as may be necessary to enforce this Order and for such purposes they, and each of them, are hereby given full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this Order.

[6] Representatives of the CAS attended at the Shirley Street home that same day but did not find Ms. VandenElsen or the baby. Mr. Finck maintained that he did not know their whereabouts.

[7] It is not disputed that Ms. VandenElsen was out of the province from approximately January 14 to mid-February 2004, and that she was aware of the contents of the CAS application served on her January 13.

[8] Returning to Halifax in mid-February, Ms. VandenElsen remained "in hiding", taking measures to conceal her identity when she left the house, which she did only during night-time hours.

[9] The first temporary care order was continued on February 12, 2004. In addition to placing the child in the temporary care of the CAS that order granted supervised access by the parents and provided:

> **IT IS FURTHER ORDERED** pursuant to s. 89 of the **Children and Family Services Act** that the Respondent Carline VandenElsen shall bring [the child] before this Honourable Court forthwith.
>
> **IT IS FURTHER ORDERED** pursuant to s. 89 of the **Children and Family Services Act** that, in the event that the Respondent, Lawrence Finck is or becomes aware of the location of [the child], he shall bring [the child] before this Honourable Court forthwith.
>
> **IT IS FURTHER ORDERED** that all Sheriffs, Deputy Sheriffs, Constables and Peace Officers shall do all such acts as may need be necessary to enforce this Order and for such purposes they, and each of them, are hereby given full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this Order.

[10] On March 22, 2004 with the child and Ms. VandenElsen still missing, the judge issued an order finding the child in need of protective services pursuant to the **CFSA**, s. 22(2) paragraph (g). According to this order, the above February 12 order continued to be in full force and effect.

[11] As of late spring 2004 Ms. VandenElsen and Mr. Finck had decided they would leave Canada by July 1, 2004. On May 18, 2004, however, a sheriff from the Supreme Court Family Division in Halifax spotted Mr. Finck, Ms. VandenElsen and a baby and called the CAS. The Halifax Police were notified that same day.

[12] Police surveillance of 6161 Shirley Street began. Between 8:30 and 9:00 p.m. Sergeant Butler of the Halifax Regional Police observed Mr. Finck's vehicle return to the residence and Mr. Finck and Ms. VandenElsen enter the house. Through an unobstructed window the police officers could see Mr. Finck, Ms. VandenElsen, Mrs. Mona Finck and the baby.

[13] After confirming that the apprehension order remained in effect, the police parked two marked vehicles in front of the home and knocked on the door, identifying themselves as from the Halifax Regional Police. No one responded.

[14] Ms. VandenElsen testified that she was awakened by the knocking. Mr. Finck maintained that he did not know it was the police at the door. Over a two hour period commencing at 12:43 a.m. the police made twelve cellular telephone calls to the residence, all but one time meeting with voice mail on the other end. On the answered call there was no exchange of substance save that the police identified themselves as the callers. They left messages to the same effect.

[15] Over this time period the police observed that the residence was being secured from the inside, with the appellants barricading the doors and windows. The police continuing to identify themselves as such, commenced using a battering ram on the front door to gain entry to the residence. After several blows at the door, a shotgun blast erupted from the inside of the house. The shot missed the head of one of the police officers by only a few inches.

[16] The police took cover and brought in several negotiators. In various conversations with Mr. Finck and Ms. VandenElsen, the negotiators were unable to

resolve the situation. The standoff continued until approximately 7:30 p.m. on May 21, 2004 when Mr. Finck and Ms. VandenElsen emerged from the residence carrying Mona Finck on a stretcher. She had died that day. The baby was strapped to Ms. VandenElsen's chest. Mr. Finck was carrying a loaded shotgun. The police repeatedly yelled out to Mr. Finck to drop the gun - which he did not do. Ultimately the police tackled him, brought him to the ground and disarmed him. He and Ms. VandenElsen were arrested and placed in police custody.

[17] Mr. Finck was charged with offences between May 18 and 22, 2004, contrary to s. 129 (obstruction of a peace officer), s. 279(2) (forcible confinement), s. 282(1)(a) (abduction in contravention of a custody order), s. 244 (discharging a firearm with intent), s. 91(3) (unauthorized possession of a firearm), s. 267(a) (assault with a weapon), s. 87 (pointing a firearm at another person), s. 88 (possession of a weapon for a dangerous purpose) and s. 86(1) (careless use of a firearm) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Ms. VandenElsen was charged with offences contrary to s. 129(a) and s. 279(2) and s. 282(1)(a).

[18] Before the preliminary inquiry, the Crown advised the defendants that it would ask the Provincial Court judge (also referred to herein as the "justice" (ss. 2 and 535 of the **Criminal Code**)) to commit the parties on additional charges: For Ms. VandenElsen charges pursuant to s. 85 (using a firearm in the commission of an offence) and s. 244 (discharging a firearm with intent); and for Mr. Finck an additional charge under s. 85 (using a firearm in the commission of an offence).

[19] Following a preliminary inquiry, the parties were committed to stand trial but only on the charges contained in the information. The Crown therefore preferred an indictment containing additional charges. The appellants unsuccessfully applied to the trial judge to quash the indictment.

[20] After several pre-trial motions by the defence, the trial proper proceeded on all charges before Justice Robert Wright of the Supreme Court of Nova Scotia, sitting with a jury.

[21] After 54 court days, the trial concluded on May 12, 2005 with the following verdicts:

Charges	**Ms. VandenElsen**	**Mr. Finck**
s.129(a)	guilty	guilty
s.282(1)(a)	guilty	guilty
s.88	guilty	guilty
s.244	no verdict	no verdict
s.85(1)(a)	guilty	no verdict
s.91(3)	guilty	guilty
s.267(a)	guilty	no verdict
s.86(1)	guilty	no verdict

[22] On June 29, 2005 the judge sentenced Ms. VandenElsen to a total of 3.5 years less double credit of 200 days for her remand time served. He also ordered the mandatory weapons prohibition (s.109) and granted a DNA order (s.487.051(1)(a)). He sentenced Mr. Finck to a total of 4.5 years less double credit for the 13 months and one week already served, a total of 26 ½ months credit.

[23] Mr. Finck and Ms. VandenElsen have appealed, with Mr. Finck representing both.

ISSUES ON APPEAL:

[24] The appellants raise the following issues:

1. The Judge erred in law in permitting the Crown to prefer the indictment dated March 2, 2005;

2. The Judge erred in law by deciding as a matter of law that "the police were not on trial, and engaged in the lawful execution of their duty";

3. The trial Judge erred in law by finding as a matter of law that "the civil order was valid beyond question or inquiry";

4. The trial Judge occasioned a miscarriage of justice as a result of his bias against the defendants;

5. The trial Judge erred in law by ruling that the wiretap evidence that the Defendants wished to introduce was not admissible;

6. The trial Judge erred in law by not permitting the defence to call/subpoena witnesses it wished to present evidence at the trial;

7. The trial Judge erred in law in his application of the "air of reality" test, and declining the defendants the opportunity to present their "necessity" defence to the jury;

8. The trial Judge erred by not declaring a mistrial or dismissing a jury member;

9. The trial Judge erred in law and fact in his charge to the jury;

10. The trial Judge erred in law respecting his jury exhortation and caused a miscarriage of justice;

11. The defendants were prejudiced by incompetent counsel at their trial;

12. That the jury's returning of "no verdict" on some counts amounts to an inconsistent verdict situation which resulted in a miscarriage of justice.

[25] In addition to a reservation to raise “such other grounds as may arise upon a review of the transcript”, they appeal their sentences.

ANALYSIS

The Preferred Indictment:

“Wright J. erred in law permitting the Crown to prefer the indictment contrary to the decision and or the determination of the learned Judge

> *Williams who presided over the pre-liminary inquiry. In addition the perferrment (sic) is contrary to Sections 574(1)(b), 565 and 566 of the Criminal Code of Canada and common law authority R. v. Tapaquon (1993), 87 CCC (3d) 1 SCC"*

[26] As set out above, in a preliminary motion before the trial judge the appellants challenged the preferring of the indictment. The details of their trial submissions are reviewed in the judge's March 1, 2005 decision on the motion which is reported as **R. v. Finck (L.R.) et al.** (2005), 232 N.S.R. (2d) 205; N.S.J. No. 191 (Q.L.).

[27] In that decision Wright, J. wrote:

> [1] This is an application on behalf of both accused to quash the preferred indictment laid by the Crown in this proceeding on August 17, 2004.
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> [2] By way of background, the two accused were arrested following an armed standoff with police at a Halifax residence between May 18-21, 2004. By an Information dated May 22, 2004 Ms. VandenElsen was charged with obstruction of a peace officer, unlawful confinement and abduction of a child in contravention of a custody order, contrary to sections 129(a), 279(2) and 282(1)(a) of the **Criminal Code** respectively. Mr. Finck was charged under the same Information with the same three offences, plus six additional related firearms offences under sections 244, 91(3), 267(a), 87, 88, 86(1) of the Code respectively.
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> [3] The accused both requested a preliminary inquiry which took place on August 3, 4, 9 and 10, 2004. Ms. VandenElsen was represented at the preliminary inquiry by Mr. Burnley Jones, with Mr. Finck representing himself.
>
> [4] Near the outset of the preliminary inquiry, Crown counsel informed both accused of their intention to call evidence that would also support committal for trial on additional charges not contained in the existing Information. The main thrust of the Crown's intention was to lay an evidentiary foundation supporting committal for trial of Ms. VandenElsen on related firearms offences similar to those that Mr. Finck was already charged with (as well as a further firearms charge against them both under s. 85(1)). The Crown also intended to change the subsection of s. 244 (from (b) to (c)) under which it sought further committals against both.
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> [5] After several witnesses were called by the Crown, the preliminary inquiry took a very unusual turn of events. Having heard the evidence to date, and

knowing of the Crown's intention to seek a committal for trial on additional charges, both accused informed the court of their decision to consent to a committal for trial, but only on the charges contained in the existing Information. Because the Crown continued to seek committals on additional charges, in respect of which there was no consent forthcoming from the accused, the Crown withheld its own consent required under s. 549(1) of the **Criminal Code** to cut short the preliminary inquiry and allow the committals on the existing charges to go forward without taking any further evidence.

[6] Although the preliminary inquiry judge then expressed his displeasure with the Crown's position, he recognized that he was bound to let the preliminary inquiry proceed. In doing so, however, he told Crown counsel that he was not prepared to allow the introduction of further evidence which was intended to support the additional charges which the Crown sought. He expressed the view that that is not the purpose of a preliminary inquiry where the accused had already consented to committal on all the charges contained in the original Information. He therefore directed Crown counsel that he would only allow the introduction of further evidence that pertained to the existing charges with the proviso that it not be too repetitive or inappropriate.

[7] The preliminary inquiry judge admonished Crown counsel that if they wanted to pursue additional charges, they ought to do so through other means, alluding to an amended Information or perhaps a new draft indictment, rather than relying on the unpredictable outcome of a preliminary inquiry. Crown counsel then attempted to give the preliminary inquiry judge an indication of the additional charges upon which committals for trial would be sought, only to have the judge state in reply that he didn't want to know of them unless something was formally before him. The judge reiterated that where the accused had already consented to committal for trial on all the charges in the existing Information, it would be an abuse of the preliminary inquiry process to allow the Crown to lead evidence on additional charges not presently before the court.

[8] Notwithstanding this directive, in the calling of further police witnesses, Crown counsel persisted in trying to include evidence that supported not only the charges contained in the original Information but the additional charges upon which it sought committals as well. This was done in the context of the preliminary inquiry judge having wavered on his position at one point, saying he would have to hear the evidence put forward and make further rulings as necessary. He ultimately permitted the Crown to introduce in evidence its firearms expert report, although he excluded an appendix thereto on the basis that it did not pertain to the charges presently before the court. The judge then repeated his intention to only hear evidence related to the charges presently before

> the court and to which the accused had consented to be tried on. With that, the Crown closed its case on the preliminary inquiry, after tendering various exhibits.
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> [9] In closing submissions at the preliminary inquiry, Crown counsel submitted that based on all the evidence before the court, there was a sufficient evidentiary basis for committal of both accused on additional charges under s. 244(c) and 85(1) of the **Criminal Code**. Because of his earlier ruling, however, the preliminary inquiry judge was not receptive to hearing submissions pertaining to committals on any additional charges.
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> [10] In rendering his decision, the preliminary inquiry judge ruled that with both accused having consented to committal for trial on all the charges contained in the existing Information, the Crown was thereby left with a committal only on those charges. The judge then went on to say, paradoxically given the restrictions he had placed on the Crown, that he was not satisfied that there was sufficient evidence before him to put the accused on trial for those additional offences which the Crown suggests arise out of the same transaction. In the result, the judge committed the accused to stand trial on all the counts contained in the Information before the court (with minor amendments not in issue here) and those counts only.
>
> [11] Faced with that result, the Crown decided to lay a preferred indictment a week later under s. 574(1) of the **Criminal Code**. That indictment expanded the charges from the original Information by adding further charges against Ms. VandenElsen under sections 88, 244(c), 85(1)(a), 91(3), 267(a), 87 and 86(1), (which are all related firearms offences). Mr. Finck was also further charged with an offence under s. 85(1)(a). The Crown also expanded the time span of the offences from between May 18th and 22nd, 2004 to between January 13th and May 22nd, 2004.
> (Emphasis added)

[28] The preferred indictment contains three types of charges: (i) those with which the appellants were charged in the information (and to which they consented to committal) - ss. 129(a); 279(2); 282(1)(a); 88 (Finck only); 244 (Finck only); 91(3) (Finck only); 267(a) (Finck only); 87 (Finck only); and 86 (Finck only) (ii) those which were not contained in the information and upon which committal was not sought at the preliminary inquiry, but which were founded on the facts disclosed by the evidence taken on the preliminary inquiry - ss. 88 (VandenElsen only); 91(3) (VandenElsen only); 267(a) (VandenElsen only); 87 (VandenElsen only); and 86 (VandenElsen only); and (iii) those additional charges upon which

the Crown unsuccessfully attempted to seek committal at the preliminary inquiry - s. 244 (VandenElsen only) and s. 85(1)(a).

[29] There is no issue on the inclusion in the indictment of the first group of charges upon which the appellants consented to committal. Nor is there any question that the charges under group (ii), above, were founded on the evidence at the preliminary inquiry. As such, pursuant to s. 574(1)(b) of the **Criminal Code**, the Crown was entitled to prefer an indictment on those additional charges:

> 574. (1) Subject to subsection (3), the prosecutor may, whether the charges were included in one information or not, prefer an indictment against any person who has been ordered to stand trial in respect of
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> (a) any charge on which that person was ordered to stand trial; or
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> (b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial.

[30] Thus the appellants' challenge to the indictment can relate only to the third group of charges. It was and is the appellants' submission that the Crown was not at liberty to prefer an indictment on those charges because the Crown had sought committal on those offences at the preliminary inquiry and the justice there had declined to commit.

[31] The appellants further submitted on the motion that permitting the trial to proceed on those charges amounted to an abuse of process because they had chosen not to cross-examine the witnesses about these additional charges after the judge at the preliminary inquiry had restricted the Crown from calling further evidence. For that reason, submitted the defence, it would be unfair to the accused to force them to trial on these charges when they did not have the effective benefit of a preliminary inquiry. They said, as well, that additional unfairness arose because they were denied an opportunity to elect the mode of trial on these further charges.

[32] The trial judge concluded that the preliminary inquiry judge had not discharged his duty pursuant to s. 535 of the **Criminal Code**, which requires him

to commit an accused to stand trial on any indictable offences disclosed on the evidence, whether contained in the information or not:

> 535. If an accused who is charged with an indictable offence is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part. (Emphasis added)

[33] In particular, the trial judge found that the justice erred in refusing to permit the Crown to call further evidence relevant and material to the additional charges "where they bore a close connection with the charges already before the court". There was, he said, no prejudice to the accused as the risk that additional charges will materialize from the evidence is a part of the preliminary inquiry process. The accused cannot pre-empt the right of the Crown to call further evidence by consenting to committal for the charges contained on the information nor insulate himself from the risk of additional charges by so doing (see **R. v. Pawluk**, [2005] S.J. No. 578 (Q.L.) (C.A.)).

[34] The trial judge also dismissed the allegation of unfairness in relation to the accused's election. He said:

> 22 It should also be observed, as did the British Columbia Court of Appeal in *R. v. Garcia* (1990) 75 C.R. (3d) 250, that any election by the accused concerning the mode of trial is made in recognition of the Crown's right to add any additional charges founded on the facts disclosed at the preliminary inquiry. That is to say, accused persons make their election on the footing that after the preliminary inquiry, the Crown may exercise its right under s. 574(1)(b) to add such additional counts as are founded on the evidence taken on the inquiry.

[35] We are not persuaded that the trial judge erred in his conclusion that the charges preferred on the indictment were properly before him. As noted in his remarks quoted above, the Crown advised near the outset of the preliminary inquiry that it intended to seek committal on charges in addition to those contained in the information. In the midst of the Crown's evidence, the appellants indicated their consent to committal but only on the charges contained in the information. The Crown, having no forewarning of this change in position by the appellants,

refused its consent to committal and sought to continue with the evidence in furtherance of its intent to seek committal on the additional charges.

[36] While the justice purported to permit the Crown to continue to call evidence, as the inquiry proceeded, he made it clear on the record a number of times that the Crown would be limited to calling evidence relevant only to the charges contained on the information and that any additional evidence would be considered abusive, repetitive or otherwise inappropriate. In support of his authority to limit the evidence he cited s. 537 of the **Code**.

[37] The truncating of the inquiry and committal of an accused cannot be done unilaterally and requires the consent of both the Crown and the accused:

> 549. (1) Notwithstanding any other provision of this Act, the justice may, at any stage of the preliminary inquiry, with the consent of the accused and the prosecutor, order the accused to stand trial in the court having criminal jurisdiction, without taking or recording any evidence or further evidence.

[38] Yet, in rendering his decision, the justice, without the Crown's consent, committed the appellants to stand trial only on the charges contained in the information. Section 549 (1) prevents such unilateral action.

[39] The appellants cite **R. v. Tapaquon**, [1993] 4 S.C.R. 535; S.C.J. No.133 (Q.L.) in support of their submission that the motions judge erred in permitting the trial to proceed on the additional charges. At issue in **Tapaquon** was whether a prosecutor could prefer an indictment under the authority of s. 574(1)(b) for the offence originally alleged in the information, even though the judge at the preliminary inquiry had committed the accused on a lesser included offence rather than on the original charge.

[40] Tapequon was charged with assault causing bodily harm under s. 267(1)(b) of the **Criminal Code**. Following a preliminary inquiry, the presiding provincial court judge found there was insufficient evidence to warrant committal on the original charge, but committed him for trial on the lesser included offence of common assault. The prosecutor preferred an indictment against the appellant on the original charge of assault causing bodily harm. The appellant brought a motion to quash the indictment. The trial judge concluded that the accused had been "discharged" on the original offence and it was therefore not open to the Crown to

prefer an indictment on the original charge pursuant to s.574 of the **Code**. The only avenue available to the Crown would be to proceed under s. 577 (a direct indictment with the consent of the Attorney General). Reversing that decision on appeal, the Saskatchewan Court of Appeal concluded that a committal on a lesser charge was not a "discharge" under s.548(1)(b). I repeat that section here for ease of reference:

> 548 (1) When all the evidence has been taken by the justice, he shall
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> > (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
> >
> > (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.
>
> (Emphasis added)

[41] On further appeal to the Supreme Court of Canada, Sopinka J., writing for the majority of the Court, cast the issue as follows at pp. 544-45:

> . . . Specifically, the issue in this case is whether the prosecutor can prefer an indictment under s. 574(1)(b) for the offence originally alleged in the information, even though the preliminary judge has not committed the accused to stand trial on the original charge, committing only on a lesser, included offence. This requires an examination of the judge's powers and duties at the preliminary inquiry.

[42] In allowing the appeal he continued at p. 547:

> If an accused is not committed to stand trial with respect to a charge in the information, what is its status? Clearly the accused is no longer charged with that offence. There has been a judicial determination that there is no evidence to support it so as to permit the Crown to proceed to trial. In order to proceed with the charge a new charge would have to be laid either by a new information or a preferred indictment. In requiring the judge to specify the charges in respect of which the accused is ordered to stand trial, it follows that with respect to other charges in the information the disposition is that the accused is discharged. Since the judge has a duty to inquire into all charges, surely the judge must make some disposition of all charges. A charge cannot simply be left in limbo. The

> appropriate disposition of charges for which there is insufficient evidence to put the accused on trial is discharge of the accused on those charges.
> (Emphasis added)

[43] In discussing the meaning of the term “discharged” the Court, in **Tapequon**, agreed with the view of the Newfoundland Court of Appeal in **R. v. Myers** (1991), 65 C.C.C. (3d) 135 that “discharged” for the purposes of s. 577 (direct indictment) means, not committed on the charge laid. The Court opined that “discharged” should carry the same meaning for s. 574. Sopinka J. said at p. 553:

> . . . Applying it to the circumstances of this case, s. 574 must be interpreted as subject to the restriction that an indictment cannot be preferred under that section in a case in which the accused was "not committed on the charge laid".
>
> This restriction applies notwithstanding the words "in addition to or in substitution for any charge" which appear in s. 574(1)(b). They do not extend to permit the addition or substitution of a charge for which the accused was discharged. On the other hand, the power of the prosecutor to prefer an indictment for an offence not charged but which is based on facts disclosed in the evidence is preserved. This is a power which the prosecutor had before the 1985 amendments when a similar power was first given to a preliminary judge. See *R. v. Chabot*, *supra*, and *McKibbon v. The Queen*, *supra*. It was not the intention of Parliament to remove this power from the prosecutor in giving it to the judge.
> (Emphasis added)

[44] Prior to amendments to the **Code** in 1985 the justice’s power to commit was limited to the charges contained in the information. The expansion of the justice’s power to commit to include offences not charged but founded on the indictment did not, however, restrict the prosecutor’s powers to prefer an indictment pursuant to s. 574(1)(b). As Sopinka, J. summarizes at p. 553:

> . . . the prosecutor in a proceeding governed by Part XIX of the *Code* relating to "Indictable Offences - Trial Without Jury" has the following power to prefer an indictment:
>
> > (1) an indictment may be preferred on any charge in respect of which the accused has been ordered to stand trial;
> >
> > (2) an indictment may be preferred in respect of any charge founded on facts disclosed in the evidence taken at the preliminary

> hearing, provided that it is not an offence charged and in respect of which the accused was not ordered to stand trial.

(Emphasis added)

[45] The justice may not “discharge” the accused on counts not laid in the information. It cannot be otherwise for if the failure of the preliminary inquiry judge to commit on additional counts not laid in the information amounts to a “discharge”, there would be no residual discretion left with the Crown to prefer an indictment under s.574(1)(b). As the majority in **Tapequon** notes, "It was not the intention of Parliament to remove this power from the prosecutor in giving it to the judge" (at para. 43, above). On a more simplistic analysis, the same result would flow. An accused cannot be “discharged” in relation to an offence with which he has not been “charged”.

[46] I am fortified in this view by reference to the decision of the Manitoba Court of Appeal in **Regina v. Hyde** (1990), 55 C.C.C. (3d) 251. Hyde was charged with four offences in one information. In a separate information the Crown also charged him with two additional offences arising from the same transaction. At the conclusion of the preliminary inquiry based only on the first information, the Crown asked the justice to order the accused to stand trial on the offences contained in the second information which were disclosed on the evidence. The justice refused to do so on the basis that the Crown proceeded with the charges separately. He committed the accused to stand trial on only the four charges contained in the first information. The Crown preferred an indictment containing all charges. The trial judge dismissed Hyde’s objection to the inclusion of the additional charges and the trial proceeded on all. On appeal it was held that the justices's refusal to commit on the additional charges was not a "discharge" within the meaning of s. 548. Therefore, the Crown was entitled to prefer the indictment under s. 574. Twaddle, J.A. wrote for the court at p. 254:

> It is inconsequential, in our opinion, that the Crown asked the Provincial Court judge to commit the accused on the charge of attempted murder and that the Provincial Court judge declined to do so. He did not discharge the accused, but committed him to stand trial. The prosecutor then exercised his prerogative to add the charge of attempted murder, correctly so, it being a charge founded on the evidence. ...

(See also E.G. Ewaschuck, **Criminal Pleadings and Practice in Canada**, vol. 1, 2nd ed., looseleaf (Aurora: Canada Law Book Ltd., 2007) para. 11:1135 where the

author concludes that the refusal of the justice at the preliminary inquiry to order an accused to stand trial on additional offences disclosed by the evidence does not amount to a discharge on those offences.)

[47] Thus, the fact that the justice here declined to commit the appellants to stand trial on the additional charges sought by the Crown is not a "discharge" and did not preclude the Crown from including those counts on the indictment.

[48] As Sopinka, J. wrote in **Tapequon**, **supra**, at pp. 545-56, where a justice declines to commit on a charge contained in the information, it is presumed there has been a judicial determination that the evidence is insufficient:

> As *Shephard* emphasizes, the preliminary judge has no discretion in making this decision. If there is any evidence, s. 548 expressly states that the preliminary judge has a duty to commit the accused to stand trial. When the accused is not committed on an offence specifically charged in the information, it must be presumed that the judge has turned his or her mind to the evidence as it relates to that particular offence. Once the judge has heard all of the evidence, his or her refusal to commit on an offence charged in the information amounts to a judicial determination that the charge is not "founded on the facts disclosed by the evidence".
> (Emphasis added)

No such presumption arises in relation to offences founded on the evidence but not contained in the information.

[49] Quite apart from the reasoning above, on any fair reading of the transcript from the preliminary inquiry, it was clear that the justice would not and did not entertain the prospect of additional charges arising from the evidence. Having indicated his unwillingness to consider the additional charges and having restricted the Crown from marshalling relevant evidence, there could be no presumption of a "judicial determination" that those charges were not founded on the facts disclosed by the evidence.

[50] Wright, J. did not err when, in relation to the appellants' abuse of process argument, he said:

> [33] There is nothing whatsoever in this case that would lead the court to conclude that the Crown is guilty of bad faith or improper motives in preferring the indictment as it did. ...
>
> [34] The Crown was placed in a difficult position in this case by the preliminary inquiry judge's rulings. It cannot be faulted in the circumstances either for withholding its consent for committal under s.549(1) part way through the preliminary inquiry and continuing to call evidence, or in preferring the indictment as it subsequently did. Both these rights are expressly conferred by the **Criminal Code** and therefore cannot be characterized as an abuse of process in the absence of bad faith. ...

[51] The Crown made all reasonable efforts to bring evidence on the additional charges before the justice. It was prevented from doing so. As was the Crown's prerogative, it preferred an indictment. The appellants had full opportunity to cross-examine the witnesses and were aware of the risk of facing additional charges arising from the evidence (s. 574(1)(b)).

[52] The three counts in question included an additional charge against Ms. VandenElsen under each of s. 85(1)(a) (using a firearm in the commission of an offence) and s. 244 (discharging a firearm with intent) and a further charge against Mr. Finck under s. 85(1)(a). They clearly arise from the original transaction.

[53] Evidence about the essentials of each of the additional charges was presented at the preliminary inquiry (see **R. v. Skogman**, [1984] 2 S.C.R. 93; S.C.J. No. 32 (Q.L.) and **R. v. Arcuri**, [2001] 2 S.C.R. 838; S.C.J. No. 52 (Q.L.)). As to the s. 85(1)(a) and s. 244 charges against Ms. VandenElsen, Cst. Crowell testified that 10:25 p.m. on May 18, 2004 he observed Ms. VandenElsen wearing a peach coloured shirt. Cst. Brien viewed the interior of the residence through the hole created by the battering ram immediately prior to the shotgun blast and observed a person resembling a female wearing "a peach coloured faded pink or peachy coloured shirt". The report of Darryl Barr, an expert in firearms and trajectory of firearms, tendered at the preliminary inquiry hearing, placed the origin of the shotgun blast in the same place where Cst. Brien had seen the person wearing the "peachy coloured shirt". There was further evidence from the wiretaps read into the record from which the jury could conclude Mona Finck was upstairs in bed at the time of the shotgun blast. Consequently, it would be open for a jury to conclude that Ms. VandenElsen had fired the shotgun.

[54] As for the s. 85(1)(a) offence against Mr. Finck, he had consented to committal on the charges in the information which included ss. 244 (discharging a firearm with intent) and 267(a) (discharging a firearm with intent) offences. The additional charge would be supported by the same evidence underlying these two offences.

[55] Neither s. 565 nor s. 566 referred to by the appellants in the statement of the ground of appeal have any relevance to this issue.

[56] In summary, this ground of appeal is without merit.

The Validity of the CAS Order/Police in Lawful Execution of Duty

> *"Wright J. erred in law by continually and unalaterly (sic) determining that:*
>
> > *a) "the police were not on trial and engaged in the lawful execution of their duty"*
> >
> > *b) "the civil order was valid beyond question or inquiry"*
>
> *Therefore both "A" and "B" constitute directed verdicts of guilt a concept unknown to criminal law that justifies a miscarriage of justice;"*

[57] The appellants were charged and found guilty of obstructing a police officer in the lawful execution of his duty (s. 129(a), **Criminal Code**):

> 129. Every one who
>
> > (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer, . . is guilty of
> >
> > (d) an indictable offence and is liable to imprisonment for a term not exceeding two years . . .

[58] The Indictment charged:

> that they between the 13th day of January, A.D 2004 and the 22nd day of May A.D. 2004 at, or near Halifax, Nova Scotia, did unlawfully and wilfully obstruct Lindsay Hernden, a Peace Officer, while engaged in the lawful execution of his duty, contrary to Section 129(a) of the Criminal Code;

[59] The Crown was required to establish that Mr. Finck knew that Lindsay Hernden was a peace officer; that he carried out an act of obstruction; that any act of obstruction was intentional; and that Lindsay Hernden was in the lawful execution of his duty. The appellants' complaint is with the trial judge's instruction to the jury on the last element of the obstruction charge. On the question of lawful execution of duty, the judge instructed the jury as follows, with respect to Mr. Finck:

> The next question is: Was the officer, Mr. Hernden, in the lawful execution of his duty when he was obstructed? The answer to that lies in the orders of the Supreme Court, entered as Exhibits 20, 21 and 22. Now I will read the one from the January15th order, which contains what is really standard wording for such orders...
>
> ... Now, ladies and gentlemen, I can tell you as a matter of law that Mr. Hernden was in the lawful execution of his duty when he attempted to enter the premises at 6161 Shirley Street on the night of May 18th. That is so because he was acting under the authority of a court order.
> (Emphasis Added)

[60] And to the same effect, he said in relation to the charge against Ms. VandenElsen:

> My instruction to you on this is exactly the same as it was in relation to Mr. Finck. I read out to you the operative part of the January 15th order authorizing the police to make entry to carry out the order, and I again tell you as a matter of law, that Mr. Hernden was in the lawful execution of his duty when he attempted to enter the premises at 6161 Shirley Street on the night of May 18th. That is so because he was authorized to do it by the court order.

[61] The standoff resulted when the police sought to enforce the March 22, 2004 Supreme Court order finding the child in need of protection and placing the child in the temporary care of the CAS:

> It is further ordered pursuant to s.39(4)(e) [and s.39(3) of the Children and Family Services Act] that the child, [...], [shall be and is hereby placed in] shall remain placed in the temporary care and custody the Applicant, the Children's Aid Society of Halifax.

[62] The protection order of March 22, 2004, pursuant to which the police sought to apprehend the child, continued the provisions of the February 12, 2004, order as "in full force and effect", pursuant to which the police were required to act to enforce the court's order (See para. 9 above).

[63] As outlined above, Ms. VandenElsen had absconded with the child, thereby refusing to surrender her to the CAS. She eventually returned, clandestinely, and was residing again with the child and Mr. Finck at Mona Finck's residence. By the order the police were authorized to enter upon the premises at 6161 Shirley Street to assist the CAS in taking temporary care and custody of the child.

[64] The appellants sought to prove at their trial on the criminal charges that none of the Supreme Court orders was valid, thus the police were not acting "in the execution of their duty" as is required by s.129, above. It was the Court's position that the validity of the orders could not be challenged in the criminal proceeding. This, say the appellants, was error by the trial judge. I disagree.

[65] The long-standing rule barring collateral attacks on court orders is clearly explained by the Ontario Court of Appeal in **R. v. Domm** (1997), 111 C.C.C. (3d) 449; O.J. No. 4300 (Q.L.), leave to appeal ref'd, [1997] S.C.C.A. No. 78. At issue was an appeal from a conviction for breach of a partial publication ban. In his defence the accused attempted to challenge the validity of the publication ban. Doherty, J.A., writing for the Court, said at pp. 455-56:

> The rule of law encompasses several interrelated and, in some ways, countervailing principles: . . . Judicial orders are one manifestation of the law with which the state and the individual must comply. The rule of law, however, does more than demand compliance with the law. To validate this demand, the law must provide individuals with meaningful access to independent courts with the power to enforce the law by granting appropriate and effective remedies to those individuals whose rights have been violated: .. . .This court must give effect to both the compliance and the remedial components of the rule of law in determining whether the appellant is entitled to challenge the order of Kovacs J. at his trial.

> The compliance component of the rule of law is manifested in the rule barring collateral attacks on court orders. A judicial order made by a court having jurisdiction to make that order must be obeyed unless set aside in a proceeding taken for that purpose: *R. v. Wilson, supra*, at 117. Referring to the rule in *Litchfield, supra*, Iacobucci J. said at p. 110:
>
> > The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal. ...
>
> The rule against collateral attack on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order. For example, in *R. v. Reed* (1994), 91 C.C.C. (3d) 481 (B.C.C.A.) at 499, the court held that the accused could not defend against a charge of breaching a term of his probation by arguing that the term was invalid. Similarly, in *R. v. Rent*, [1989] N.S.J. No. 177 (Q.L.) [reported 91 N.S.R. (2d) 112] (N.S.S.C. App. Div.), the court invoked the rule against collateral attack in holding that an accused charged under the predecessor section to s. 127 of the *Criminal Code* could not attack the validity of the restraining order which he was alleged to have disobeyed: see also, *R. v. Dawson* (1995), 100 C.C.C. (3d) 123 (N.S.C.A.), per Jones J.A. (for the majority on this point), at pp. 130-131; further appeal to Supreme Court of Canada dismissed November 21, 1996 without reference to this issue: [1996] S.C.J. No. 113 (Q.L.) [now reported 111 C.C.C. (3d) 1 (S.C.C,)]. (Emphasis added)

[66] The appellants say the child welfare proceeding and the resulting orders constituted a “violation of their rights”. This submission, even if accepted, does not alter the rule against collateral attack. Continuing in **R. v. Domm**, **supra**, Doherty J.A. wrote at pp. 458-61:

> Nor does giving the challenge to the validity of a court order a constitutional flavour open the door to collateral attack on such orders. Even orders that are constitutionally unsound must be complied with unless set aside in a proceeding taken for that purpose. . . .
>
> . . .

> The recent decision in *R. v. Sarson* (1996), 107 C.C.C. (3d) 21 (S.C.C.) is also relevant. Sarson was convicted of second degree murder based on the constructive murder provisions in the *Criminal Code*. Several months after his conviction, those provisions were declared unconstitutional. As the appellant no longer had any right of appeal, he challenged his detention by way of *habeas corpus* relying on the subsequent declaration of unconstitutionality. Sopinka J., at pp. 30-31, for a unanimous court on this issue, held that the *habeas corpus* application amounted to an impermissible collateral attack on the conviction even though the conviction rested on a statutory provision which had been subsequently held to be unconstitutional.
>
> 29 In my opinion, an allegation that an individual's constitutional rights have been violated by a court order cannot justify the abandonment of the rule against collateral attack. In such cases (and this is a good example), there are usually fundamental and conflicting values to be balanced. It is very much in the community's best interests that those whose values clash settle their competing claims by resort to established judicial procedures and not by preemptive acts by those convinced of the righteousness of their cause. I would, however, add that where constitutional rights are implicated, the court must be particularly concerned about the availability of an effective remedy apart from collateral attack when considering whether an exception should be made to the rule against collateral attack.
>
> . . .
>
> 31 The rule against collateral attack on court orders serves to reinforce the compliance component of the rule of law and enhance the repute of the administration of justice by providing for the orderly and functional administration of justice: R. v. Litchfield, supra, at pp. 110-111. If a collateral attack on an order can be taken without harm to those interests, then the rule should be relaxed. Review by a trial judge of orders made on pre-trial motions provides an example of a situation in which those interests are not harmed by collateral attack: Litchfield, supra, at p. 111; Dagenais, supra, at pp. 311-312. (Emphasis added)

[67] The appellants' attempted challenge to the child welfare orders here does not fall within the limited exceptions to the Rule. (See **LaRoche**, **infra**, paras. 74 to 77)

[68] The rule against collateral attack most commonly arises when a person is accused of violating a court order. In those circumstances the accused, in

defending, seeks to attack the validity of the order, as did the accused in **R. v. Domm**, **supra**. Here the appellants were not charged with breaching the apprehension order, but they nonetheless attempted to challenge the order in defending the s. 129(a) charge. This is a prohibited collateral attack. The judge did not err in so holding. The order in question was reviewable in the civil courts and, indeed, was under appeal by the appellants at the time of the standoff. That appeal was ultimately unsuccessful. However, even in the face of a successful challenge, a court order is presumed valid until struck down. (See also **R. v. Wilson**, [1983] 2 S.C.R. 594; S.C.J. No. 87 (Q.L.) ; **Quebec (Attorney General) v. Laroche**, [2002] 3 S.C.R. 708; S.C.J. No. 74 (Q.L.); **R. v. Rent** (1989), 91 N.S.R. (2d) 112 (C.A.); N.S.J. No.177 (Q.L.) (N.S.S.C.A.D.)).

[69] The focus of the appellants' defence on this charge was the alleged invalidity of the order. For completeness, we will consider additional issues which might have arisen in relation to this charge.

[70] Firstly, should the issue of whether the police were acting with lawful authority have been referred to the jury? Questions of law are for the judge, questions of fact for the jury. For the reasons below,we are satisfied that in the circumstances of this case, the issue of the lawful authority of the police, as it relates to the validity of the order, was a question of law, appropriately decided by the judge.

[71] Here the police were acting on specific direction to enforce the order in question. In so doing they were not only acting in accordance with the terms of the order but carrying out their statutory duties pursuant to s. 91 of the **CFSA**:

> 91 (1) It is the duty of all peace officers to assist agents in carrying out the provisions of this Act.
>
> (2) It is the duty of peace officers to serve any process issued out of any court.

. . .

and s. 42(2) of the **Police Act**, S.N.S. 2004, c. 31:

> 42(2) Subject to this Act and the regulations, or any other enactment or an order of the Minister, the authority, responsibility and duty of a member of a municipal police department includes

> (a) maintaining law and order;
>
> (b) the prevention of crime;
>
> (c) enforcing the penal provisions of the laws of the Province and any penal laws in force in the Province;
>
> (d) assisting victims of crime;
>
> (e) apprehending criminals and offenders who may lawfully be taken into custody;
>
> (f) laying charges and participating in prosecutions;
>
> (g) executing warrants that are to be executed by peace officers;
>
> (h) subject to an agreement respecting the policing of the municipality, enforcing municipal by-laws within the municipality; and
>
> (i) obeying the lawful orders of the chief officer,
>
> and the person shall discharge these responsibilities throughout the Province.

[72] Not only were the police authorized and required by law to enforce the order, they were entitled to use as much force as necessary for that purpose. Section 25(2) of the **Criminal Code** provides:

> 25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> . . .
>
> (b) as a peace officer or public officer,
>
> . . .
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
>
> (2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(See **Cluett v. The Queen**, [1985] 2 S.C.R. 216)

[73] In **Eccles v. Bourque** (1974), 14 C.C.C. (2d) 279 (B.C.C.A.); affirmed [1975] 2 S.C.R. 739, Robertson, J.A. described the operation of s. 25 as follows at 281:

> ... The purpose of s. 25(1) is twofold; it absolves of blame anyone who does something that he is required or authorized by law to do, and it empowers such person to use as much force as is necessary for the purpose of doing it.

[74] In some circumstances, the question of whether a peace officer was engaged in the lawful execution of duty may not be a pure question of law. This could occur, for example, where an issue arises about the extent of force used by the police in enforcing the order. In such circumstances, the issue is a factual one to be left to the jury. We are not persuaded that such was the case here. While the appellants were critical of the actions taken by the police, we are not persuaded that an allegation of "excessive force" was made by the defence or reasonably arose on the record.

[75] This ground is without merit.

Allegation of Bias by Trial Judge:

> ***"****Wright J. erred in law by repeated subjective and selective rulings of law and fact directing the jury to a pre-designed conclusion of guilt accumulating into a miscarriage of justice"*

[76] The appellants make a general allegation of bias on the part of the trial judge. They disagree with virtually all of the trial judge's rulings where their position did not find favour. Such rulings, they say, were motivated not by proper application of the law but by the trial judge's alleged bias against them.

[77] The claim here is actual bias. This Court thoroughly canvassed the law on both actual and apprehended bias in **Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.** (2001), 196 N.S.R. (2d) 118; N.S.J. No.271 (Q.L.)(C.A.). Hallett, J.A., writing for the Court cited extensively from **R. v. S.(R.D.)**, [1997] 3 S.C.R. 484; S.C.J. No. 84 (Q.L.). There Cory, J. wrote that the fundamental right to a fair trial is rooted in the requirement that the adjudicator be free of bias. Freedom from

bias must be both objectively demonstrated and subjectively present (**R. v. S.(R.D.)** at paras. 91 to 94). He described bias:

> 5 In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:
>
> > The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). [Emphasis in original.]
>
> Scalia J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable — in other words, it is not "wrongful or inappropriate": *Liteky, supra*, at p. 1155.
>
> ¶ 106 A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:
>
> > In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.
>
> See also *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.), at para. 64; *Gushman, supra*, at para. 29.

[78] Recognizing that it is usually impossible to determine whether a decision maker was driven to a particular result by a truly biased state of mind, the test to be applied is whether there was a reasonable apprehension of bias. Cory, J. wrote:

> ¶ 111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
>
> > [T]he 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. . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through – conclude. . . ."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra*, at pp. 54-55; *Gushman, supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark, supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

[79] The appellants are exceedingly difficult litigants. The trial was marred by their persistent disrespect for the court, unreasonable demands, often incoherent submissions, petulance, outright rudeness and general ill temper. Their level of in-court civility deteriorated rapidly when each discharged his/her counsel part way through the trial. This proceeding consumed 54 court days. It was replete with frivolous and misguided motions launched by the appellants, which were bound to fail. In the face of persistent insults and unnecessarily and unreasonably protracted proceedings, the judge treated these litigants with the utmost courtesy and patience. They now attack the judge's impartiality. The fact that he was biased, they say, is self-evident in the number of times their motions failed.

[80] In **R. v. Schneider** (2004), 226 N.S.R. (2d) 110; N.S.J. No.314 (Q.L.)(C.A.), leave to appeal refused [2004] C.S.C.R. No. 485, this Court considered a similar allegation of bias. As the Court's remarks in that case are equally applicable here I will quote at length:

> **[50]** The appellants allege that the trial judge committed a host of errors in his conduct of the trial and submit that he acted toward them not only with bias, but malice. They claim that this is evident in the manner in which the trial was conducted and from the sentences imposed. . . .
>
> **[52]** This was a difficult trial. Ms. Schneider appeared unable or unwilling to accept the trial judge's directions concerning the proper conduct of the trial. She was unable or unwilling to refrain from asking highly leading questions of her own witnesses. She failed to accept that it was not proper for her to simply ask witnesses to confirm statements she herself had made. She also misunderstood, or was unwilling to accept, the proper scope of relevant evidence at trial. As the trial judge attempted to have her conform her behaviour to the rules governing the conduct of a trial, she became belligerent and disrespectful towards him. . . .
>
> **[54]** At trial, Ms. Schneider, among other things, accused the trial judge of favouring the Crown, of preventing the presentation of the defence and expressed doubt as to whether the Court was entitled to respect. The trial judge found it necessary to inform and to remind Ms. Schneider of the law concerning contempt of court and, as a result of her conduct, to have her removed from the court room while he was giving his reasons for judgment. . . .
>
> **[55]** ... While Ms. Schneider may have perceived these interventions as impeding the presentation of the defence, the trial judge in fact acted to enforce fundamental rules of trial procedure which he had explained to Ms. Schneider. . .
>
> . . .
>
> **[57]** The main duty of a trial judge is to do everything he or she can reasonably do to ensure that the trial is fair. ... The trial judge must be left a large measure of discretion as he or she responds to the particular challenges of a specific case. At the end of the day, what counts is that a trial be free of legal error and conducted with fairness [citation omitted].

[81] Nothing in the transcript from this trial, nor in the jury charge, remotely supports the appellants' allegation of real or apprehended bias.

[82] The words of Proulx, J.A. for the court in **R. v. Fabrikant** (1995), 97 C.C.C. (3d) 544; Q.J. No. 300 (Q.L.) (C.A.), leave to appeal dismissed [1995] S.C.C.A. 211, are apt here, at p. 574:

> The right of an accused to make full answer and defence entitles the accused to adduce relevant evidence, to advance legal argument and to address the court. It carries with it no licence to paralyze the trial process by subjecting an endless stream of witnesses to interminable examination on irrelevant matters.
>
> In this regard, an unrepresented accused enjoys no particular privilege. On purely formal matters, he, untrained in legal science, will generally be permitted reasonable latitude in putting questions, in formulating objections, and in arguing points of law. By renouncing the assistance of counsel, however, an accused gains no right to proceed by different fundamental rules.

[83] Concurring in the result, Baudouin J.A., added:

> The present case is a good example of how the rules devised to protect the accused against arbitrariness and unfairness are abused and turned against the system itself. In such cases, the presiding judge who is not only the guardian of equity and justice, but also the protector and keeper of the integrity of the criminal justice system as a whole, has both the unquestionable right and the clear duty to intervene to preclude a travesty or a parody of justice.
>
> The complete trust and confidence of the public in its system of justice is a fundamental value of our democracy. If the very tools and weapons that are given to the accused to ensure his full protection against despotism and arbitrariness are manipulated and used against the system itself, there is, because of the very frailty of the system, a clear danger that the whole structure of criminal justice would become subject to ridicule and that public confidence in it might thereby be eroded.

[84] The appellants' allegations of bias are completely without merit.

Wiretap Evidence:

> *"Wright J. erred in law not permitting the defence to use the wiretaps consented to by all the parties within trial exhibit number 27 and pursuant to Section 655 of the Criminal Code of Canada. Yet another miscarriage of justice;"*

[85] During the 67 hour standoff the telephone lines to the Finck residence were cut off. Through the residence telephone the occupants could only be in contact with the police. All communication between the police and the appellants was recorded, producing approximately ninety wiretap intercepts. The Crown sought to introduce into evidence a number of these intercepts as a part of its case.

[86] There was no challenge to the technical aspects of the interception. It was agreed, as well, that the written transcripts of the interceptions accurately represented what was recorded on the master media, including the identification of the voices. The appellants consented to the admission by the Crown of certain of the intercepts (numbers 1, 11, 19, 23, 27, 28, 35, 42, 44, 46, 47 and 59 to 90). As the trial unfolded the Crown introduced only eight of those agreed to be admissible (numbers 23, 35, 46, 47, 82, 84, 86 and 90).

[87] The appellants sought to introduce various intercepts not proffered by the Crown. This included the balance of the intercepts that the defence had agreed were admissible as well as three additional intercepts (numbers 49, 52 and 53). We will refer to this group, collectively, as the "requested wiretaps".

[88] It was the appellants' position that the Crown should be required by the judge to introduce these requested wiretaps. Mr. Finck's submission was that the contents of the additional wiretaps would be relevant to his state of mind at the time of the standoff, in particular, to the danger of imminent harm to the child and to the common-law defence of police or government entrapment. In addition, Mr. Finck said the wiretaps would reveal that it was Mona Finck who had fired the gun.

[89] The trial judge ruled that the additional wiretaps were not admissible because to do so would violate the rule prohibiting the admission of prior consistent statements.

[90] The rule regarding the admissibility of prior consistent statements is explained in **R. v. Simpson**, [1988] 1 S.C.R. 3; S.C.J. No. 4 (Q.L.) (per McIntyre J., for the Court) as follows at p. 22:

> As a general rule, the statements of an accused person made outside court — subject to a finding of voluntariness where the statement is made to one in authority — are receivable in evidence against him but not for him. This rule is

> based on the sound proposition that an accused person should not be free to make an unsworn statement and compel its admission into evidence through other witnesses and thus put his defence before the jury without being put on oath and being subjected, as well, to cross-examination. . . .

[91] There are exceptions to the rule. The Court continues in **Simpson** at p. 22:

> . . . It is, however, not an inflexible rule, and in proper circumstances such statements may be admissible; for example, where they are relevant to show the state of mind of an accused at a given time or to rebut the suggestion of recent fabrication of a defence. The first exception has been recognized in the authorities and in the text writings. In *Phipson on Evidence* (13th ed. 1982), para. 7-34, the following appears:
>
> > Whenever the physical condition, emotions, opinions and state of mind of a person are material to be proved, his statements indicative thereof made at or about the time in question may be given in evidence. In the case of physical condition or emotions, if they were the natural language of the affection, whether of body or mind, they furnish original and satisfactory evidence of its existence, and the question whether they were real or feigned is for the jury to determine.
>
> In the English case of *R. v. Willis* (1959), 44 Cr. App. R. 32, at p. 37, Parker L.C.J. put it in these terms:
>
> > ... provided the evidence as to his state of mind and conduct is relevant, it matters not whether it was in regard to the conduct at the time of the commission of the offence or, as here, at a subsequent time to explain his answers to the police and his conduct when charged.
>
> (Emphasis added)

[92] In **R. v. Demetrius** (2003), 179 C.C.C. (3d) 26; O.J. No. 3728 (Q.L.)(C.A.), Sharpe, J.A., writing for the court, provided this rationale for the general rule and explained the circumstances in which there might be an exception:

> [12] There is a well established rule that self-serving evidence, such as prior consistent statements are generally not admissible at trial. In *R. v. Toten* (1993), 83 C.C.C. (3d) 5 (Ont. C.A.) at 36, Doherty J.A. identified the rationale for generally rejecting prior consistent statements as resting "not ... on any principle unique to prior consistent statements, but on the very practical assessment that,

> generally speaking, such evidence will not provide sufficient assistance to the trier of fact to warrant its admission." As David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 2nd ed. (Toronto, Ont.: Irwin Law, 1999) at 305, explain: "In most cases, the evidence is ... of no value. It is redundant and potentially prejudicial to allow the testimony to be repeated. It may gain false credence in the eyes of the trier of fact through the consistency with which it is asserted." Another frequently cited reason for excluding prior consistent statements is related to the ease with which they can be fabricated. Admitting such evidence would be contrary to the principle that no witness should be allowed to create or manufacture evidence to support his or her own case: see John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Markham, Ont: Butterworths, 1999) at 313.
>
> [13] As with other exclusionary rules, there are recognized exceptions allowing proof of prior consistent statements in certain circumstances. These specific exceptions flow from a more general principle, identified in *Toten, supra* at p. 36:
>
> > "Where, however, circumstances render evidence of prior consistent statements of potential significance to the trier of fact, either with respect to the credibility of the declarant/witness or with respect to a fact in issue, the common law admits those statements."
>
> (Emphasis added)

[93] While we would agree that the additional intercepts were not admissible as of right in the defence case, it does not follow that all of the intercepted communications were necessarily inadmissible at the instance of the accused.

[94] In his evidence, Mr. Finck stated that both he and his wife were lying throughout the intercepted communications. On this ground of appeal he is therefore claiming that the judge erred by preventing him from adducing as evidence before the jury statements by him and Ms. VandenElsen which he testified were untrue. Even assuming the exclusion was wrong (which we do not think it was), there was certainly no injustice occasioned by it in these circumstances. The appellants can hardly be heard to complain about not being allowed to lead their own previous false statements about their state of mind, the identity of the shooter and their intent.

[95] We have reviewed the intercepts in question. As the written transcripts at points indicate that the words recorded are “inaudible”, we have reviewed the

audio tapes as well. We conclude that there is no evidence on the requested intercepts that would be admissible within the exceptions to the general rule. Nor are we persuaded that the statements made by the appellants, even had they been true, or Mona Finck recorded on those intercepts, varied or qualified the evidence at trial.

[96] The collection of offences with which the appellants were charged include: obstruction of a peace officer; forcible confinement; abduction in contravention of a custody order; discharging a firearm with intent; unauthorized possession of a firearm; assault with a weapon; pointing a firearm at another person; possession of a weapon for a dangerous purpose; careless use of a firearm; and using a firearm in the commission of an offence.

[97] The appellants asserted that the refused intercepts were relevant to: (a) their state of mind; (b) police entrapment: and, (c) the identity of the person who fired the gun. Specifically, it was Mr. Finck's submission at trial that in order to make out the s. 282(1)(a) charge (abduction in contravention of a custody order) the Crown must prove "criminally minded intent" and the evidence on the tapes was relevant to that issue. He said, as well, the tapes were relevant to establish imminent harm to the child (s. 285) and the common law defence of police entrapment. At the time this issue arose Mr. Jones was still representing Ms. VandenElsen. Counsel advised the court that he thought the introduction of all of the intercepts would be prejudicial to his client. He did not clearly state whether he wanted the introduction of any of the refused intercepts on Ms. VandenElsen's behalf.

[98] Mr. Finck says that the tapes reveal that the police officers told them to stay inside the house, in other words, that they did not want the standoff to end. He further says that a statement by Mona Finck expressing concern that she might go to jail, indicates that she is the one who fired the gun. He further says the appellants' statements on the intercepts demonstrate their fear of harm to the child should apprehension occur, thus the necessity of their actions.

[99] As to the allegation of police entrapment - in that the police wanted the standoff to continue - the only comments by the police on the intercept related to the appellants not exiting the house are in the context that, for reasons of safety, they could not leave the house carrying a gun. It is clear from comments made by

Ms. VandenElsen on the intercepts that she was aware they could surrender and walk out of the house at any time. The intercepts do not support the appellants' allegation of police entrapment.

[100] Section 285 of the **Code** delineates the necessity defence:

> 285. No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm.

This defence could only pertain to the s. 282(1)(a) charge against each appellant - abduction in contravention of a custody order.

[101] This entire event was precipitated by the appellants' claimed belief that apprehension of the child by the CAS would put the child at risk. Their actions were therefore "necessary", they say, to protect the child from imminent harm (s. 285, above). Recorded on some of the refused intercepts were their own comments attesting to their stated beliefs that harm would come to the child. The appellants say the record of these stated beliefs was important to their necessity defence.

[102] For the purpose of the following analysis we will be leaving aside the problem created by Mr. Finck's evidence that the appellants' statements on the intercepts were false.

[103] A defence should be put to the jury only if there is an evidential foundation for it. The alleged defence is subjected to an "air of reality" test. The judge has a positive duty to keep from the jury defences lacking an air of reality. To the extent that the intercepts revealed their "state of mind", they were only admissible if that state of mind was relevant to advance an <u>available</u> defence of necessity. The key issue is whether, here, there was an air of reality to the defence of necessity. The air of reality test requires the judge to decide ". . . whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit". (**R. v. Cinous**, [2002] 2 S.C.R. 3, at para. 49) In **Cinous**, McLachlin, J., as she then was, wrote for the majority:

> 53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. . . . The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. . . ..

[104] In our view, there was no air of reality to the necessity defence.

[105] To engage the common law defence of necessity, there are three prerequisites (see **R. v. Perka**, [1984] 2 S.C.R. 232):

> (i) The situation must be urgent and the peril imminent.
>
> (ii) Compliance with the law must be demonstrably impossible such that there is no reasonable legal alternative to disobeying the law.
>
> (iii) The harm inflicted must be proportional to and not greater than the harm sought to be avoided.

[106] The leading case on the statutory defence of necessity under s. 285 of the **Code** which applies only to abduction offences is **R. v. VandenElsen**, **supra**, coincidentally, a case involving this Ms. VandenElsen. (see also, **R. v. Adams** (1993), 19 C.R. (4th) 277 (Ont. C.A.). She had absconded with her triplets in the face of a custody battle with her former husband, the children's father. She was acquittal at trial. On appeal, the court set aside her acquittal and remitted the matter for trial. The trial judge had erred at law in permitting the necessity defence to go to the jury. Feldman, J.A., writing for the Court, explained the necessity defence as it relates to breach of a custody order:

> [19] The respondent mother feared that at the resumption of the custody hearing in October, the trial judge would deprive her of all access to her children. She believed that if that happened, the children would suffer psychological and emotional harm being raised by caregivers and without a mother. The imminence of the harm was the court date, after which she felt she would have no ability to carry out her plan to remove the children. In effect, the imminence of the harm to the children was not the perceived psychological and emotional harm that would result from being deprived of a loving mother, the effect of which would accrue over time, but the fact that after the court order, the respondent anticipated that

> she might no longer have the opportunity to exercise self-help to remove the children.
>
> [20] The issue is whether the respondent's fears, accepting that they were honestly held, and viewing the matter from her perspective taking into account her condition and situation, can amount in law to "imminent harm" within the meaning of s. 285 and the requirements of the necessity defence. In my view it is clear that they cannot. There is neither harm, nor imminence in this situation.
>
> [21] The defence provided by s. 285, according, as it does, a lawful excuse for breaching a court custody order, is designed to deal with an emergent situation of danger, arising in circumstances that were not foreseen or contemplated by the court that granted the custody order. In this case, the opposite is true. Here, the danger or harm contemplated by the respondent mother is the very condition that would be created by the court if it were to grant custody of the children to the father with no access to the mother. Such an unusual order would only be made if the court were completely satisfied that it was in the best interests of the children, including their psychological and emotional interests.
>
> [22] For the criminal court to hold that a situation deliberately created in the children's best interests by the custody court after a trial could be considered a situation of imminent harm to the children, would invite a regime of anarchy and chaos within the family law domain. Parents unhappy with the outcome of custody proceedings would feel entitled to ignore, with apparent impunity, unfavourable court orders regarding their children. Instead, what the parents must do is operate within the legal system. The first route is an appeal. Another is to revisit the custody and access issues from time to time as circumstances change for the various affected parties.
>
> [23] Not only was the harm contemplated by the respondent not the type of harm for which the defence can be invoked, but there was also no emergent situation which required immediate action by the respondent. A deadline was looming when the access decision would be made in the family court proceedings. However, that deadline did not create an emergency situation requiring immediate action to rescue the children from imminent danger. The imminence analysis is inextricably linked with the second requirement for a necessity defence, alternative legal avenues.
> (Emphasis added)

[107] Similarly, the appellants here cannot set up the court’s temporary care order, which the judge pronounced as in the best interests of the child, as a situation which placed the child in imminent harm.

[108] Not only was the harm not that for which the defence could be invoked, there were other reasonable legal avenues available to the appellants. As reviewed above, this sad saga commenced when the CAS initially sought a supervision order regarding the child. In response, Ms. VandenElsen fled. Thereafter she failed to appear in court with the child as required. Consequently an interim temporary care order was issued, pending further hearings. Not only were there to be further hearings, the appellants were actively appealing the interim order.

[109] Absent evidence on these two essential elements of the necessity defence, there was no air of reality. Consequently, the appellants' state of mind as evidenced on the intercepts was not relevant. Even assuming that such statements were not properly excluded as prior consistent statements, their admission would not be justified as providing evidence of the appellants' state of mind.

[110] Finally, Mr. Finck asserts that, on the intercepts, Mona Finck admits to firing the gun. A review of the requested wiretaps does not support this submission. Generally, Mona Finck is not speaking directly on the intercepts and can only be heard in the background. In many places on the transcript her words are marked "unintelligible". Her comments, where unintelligible, are not clarified on the audio tapes. At certain points on the intercepts one can hear both appellants assuring Mona Finck that she will not go to jail. She says nothing, however, about firing the gun, nor do they refer to her doing so. Her concern, if expressed, about going to jail could not lead to the inference that she fired the weapon. It is reasonable to infer that Mona Finck would have been worried about the prospect of incarceration as a result of her role in the standoff and in withholding of the child. The intercepts are therefore not admissible for that purpose of establishing the identity of the person who fired the gun.

[111] A prior consistent statement may be admitted to rebut an allegation of recent fabrication. During the cross-examination of Mr. Finck, Crown counsel suggested that the appellants had an opportunity, after Mona Finck's death, to put together the story that Mona Finck had fired the gun. Assuming, without deciding, that such a question amounts to an allegation of recent fabrication, the requested intercepts would not be admissible in rebuttal because there is nothing in the statements of the appellants or of Mona Finck to suggest she fired the gun.

[112] Finally, following a principled approach, a prior consistent statement may be admitted where its probative value outweighs the prejudicial effect. In **R. v. Toten**, (1993), 83 C.C.C. (3d) 5 at p. 36 Doherty, J.A. wrote, for the Court, at p. 36:

> In my opinion, the common law position which generally rejects evidence of a prior consistent statement made by a witness is not founded on any principle unique to prior consistent statements, but on the very practical assessment that, generally speaking, such evidence will not provide sufficient assistance to the trier of fact to warrant its admission. The common law starts from the premise that evidence of prior consistent statements made by witnesses is, at worst, irrelevant and, at best, superfluous. Where, however, circumstances render evidence of prior consistent statements of potential significance to the trier of fact, either with respect to the credibility of the declarant/witness or with respect to a fact in issue, the common law admits those statements . . .

[113] For the reasons outlined above, the requested wiretaps would have been of no assistance to the trier of fact. They contained no statements of probative value.

[114] In summary, the refused intercepts do not qualify or vary the evidence at trial and are not otherwise admissible under any exception to the rule against prior consistent statements. Accordingly, while the judge should have reviewed the requested intercepts before ruling on their admissibility, his failure to do so did not impair the appellants' right to a fair trial.

Issuance of Subpoenas:

> *"Wright J. erred in law not permitting the defence to call approximately 15 witnesses either favourable to their defence to the charges within the indictment and/or to establish an evidentiary foundation to qualify the Criminal Code of Canada defences following and pursuant to Sections 285 and 8;"*

[115] Section 698 of the **Criminal Code** provides:

> 698(1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

[116] The Saskatchewan Court of Appeal in **Foley et al. v. Gares** (1989), 53 C.C.C. (3d) 82 said this of s.626 of the **Criminal Code** [now s. 698], per Bayda, C.J. at pp. 87-88:

> Although it does not expressly so provide, s.626 of the *Code* [now 698] implicitly provides that before issuing the subpoena a justice (as well as a Provincial Court judge, a superior court judge or a clerk of the court, as the case may be) should satisfy himself or herself that the person required by the intended subpoena to attend the proceeding is "a person [who] is likely to give material evidence in [that] proceeding". ...
>
> What type of inquiry is a justice acting under ss. 626 and 627(2)(a) required to make? It is safe to say that the standard of inquiry is not so high, for example, as that expected of a judge acting under s. 627(3) [now s. 699(3)], but the justice none the less should make some examination of the circumstances. He is given discretion in the matter of issuing the subpoena and he should exercise it judiciously if not judicially. The justice may choose not to insist upon evidence on oath, but he may want to conduct an oral examination, if only a cursory one, of some person who has knowledge of the circumstances. The extent of such an examination will depend on the circumstances of each situation. One thing however is certain. If he takes no steps whatever to satisfy himself that the person is likely to give material evidence, the justice is abusing his power and his discretion if he issues the subpoena."

(see also **R. v. Ross** (1994), 131 N.S.R. (2d) 258; N.S.J. No.267 (Q.L.)(S.C.) at para. 21; and **R. v. Regan (G.A.)** (1998), 173 N.S.R. (2d) 298; N.S.J. No.282 (Q.L.) (S.C.) at para. 8).

[117] The appellants complain that they were prevented from issuing subpoenas for a number of witnesses. As is evident in the transcript, on every occasion when a witness subpoena was sought by the appellants the trial judge inquired into the nature of the evidence a proposed witness might provide. Several subpoenas were issued.

[118] Only where the appellants failed to indicate the nature of the evidence or how the witness would assist the court did the judge decline to issue the subpoena.

[119] Many of the persons for whom subpoena's were sought were acquaintances and supporters of the appellants and resided out of this province. It is unclear, in those circumstances, why a subpoena would have been necessary or of assistance.

As the trial judge advised the appellants, they were free to call those persons as witnesses without a subpoena, if any had material evidence to offer. No witnesses were prevented from attending voluntarily.

[120] Mr. Finck said in argument that a Mr. Baxter was an important defence witness on the issue of necessity but the judge did not issue a subpoena for him. Mr. Baxter apparently resided in Ontario. It was not suggested that he had any knowledge of any alleged imminent harm to the child at issue in this case.

[121] The request for subpoenas was revisited repeatedly throughout the trial at the insistence of the appellants. On each occasion the judge explained the foundation necessary for a subpoena to be issued. The trial judge correctly applied the law on this issue. This ground of appeal is without merit.

Air of Reality Test:

> *"Wright J. erred in law applying and or determining the "Air of Reality" test with a modified objective test of the entire evidence. However 75% thereof was not permitted to be adduced by the Justice as reffered (sic) to and pleaded within grounds of appeal 2, 3, 4 and 5 above. This curtailment of the opportunity to present a defence to the jury infringed the rights of the Appellants to "Trial by jury Section 11 (f) of the Charter;"*

[122] The ground of appeal appears to relate to the appellants' defence of "necessity". This has already been addressed above.

Juror Issue

> *"Wright J. erred in law by not declaring a mistrial or alternatively dismissing with regards to the jury member, [Juror P]. The justice erred by not conducting a proper inquiry into the allegations brought to the attention of the Court. He erred again when allowing the then questionable Mr. [P] to re-join the rest of the jury panel without proper warnings or having made or adjudicating a final determination. This therefore tainted the entire panel of jurors and prejudiced the accused right to a fair trial. In addition the current "police investigation" into a complaint made "Jury Tampering or*

> *alternatively obstruction of Justice" is being conducted by an involved party; the Halifax Regional Police. This further raises the negative public perception in regards to the apprehension of bias within and around this case at bar. This fiasco constitutes a miscarriage of justice."*

[123] Before Mr. Finck resumed his testimony on the third day of his evidence, defence counsel for Mrs. VandenElsen informed the trial judge that he received information, indirectly, purporting to be from a sister of one of the jurors, a Mr. P, that:

(1) the juror was speaking with others about the case, and expressed the opinion that Mr. Finck was guilty; and

(2) the juror and his wife went to view the appellants' home on Shirley Street to check out the physical scene and attempt to look in the windows.

[124] The trial judge heard submissions from both parties, brought juror P into the courtroom and, in the absence of the other jurors, questioned him on the allegations. All participants had agreed that if the allegations appeared true, he should be discharged pursuant to s. 644 of the **Criminal Code**.

[125] Juror P categorically denied the allegations and explained why his sister might fabricate them, in an act of revenge. The judge then solicited the views of the Crown and defence. In view of the juror's denials, the Crown urged the judge to continue the trial with the jury in tact. Neither counsel for Ms. VandenElsen nor Mr. Finck, acting on his own behalf, had definitive positions at that time. After recessing for a period of time the judge solicited further comments from the Crown and defence.

[126] The judge considered their submissions and issued his ruling. He believed the juror's denial of the allegations and, consequently, did not discharge him (s. 644(1) of the **Criminal Code**).

[127] Upon calling the jury back into the courtroom, the judge instructed them as follows:

> Ladies and Gentlemen, first of all, I apologize again for having to keep you waiting so long this morning. There have been a number of matters we have had to deal with in your absence.
>
> The only one I am going to touch upon is simply to say to you that Mr. [P] will continue to serve as a juror. There is really nothing in the way of inferences that you should draw from any of that.
>
> Perhaps I might just use the opportunity, though, as a reminder to you of something that I told you in my opening instructions. That your role as jurors are not to form any opinions about the guilt or innocence of either of the accused until after all of the evidence has been heard. Just something worth remembering as we go through all of this. ...

[128] The appellants say the trial judge erred in law by not declaring a mistrial or dismissing juror P.

[129] An issue here is whether the appellants' right to a fair and impartial trial, or the appearance of one, was compromised because the judge did not segregate juror P from the other jurors pending his decision on the possibility of discharging him. The appellants say, as well, that the judge did not make an adequate inquiry into the allegations and that the juror should have been discharged.

[130] In **R. v. Hanna** (1993), 80 C.C.C. (3d) 289, at 312, leave to appeal dismissed [1994] S.C.C.A. No. 246, the British Columbia Court of Appeal recommended a procedure for an inquiry into the fitness of a juror which generally accords with that followed here.

[131] In dealing with such jury issues a trial judge is acting in the exercise of a discretion which is entitled to some deference. On this issue, the court said in **R. v. MacKay** (1980), 53 C.C.C. (2d) 366, at 376 (B.C.C.A.):

> In circumstances like those in the case at bar the choice of the course to be followed lies in the discretion of the trial Judge who must have regard for the statements made to him by counsel and such evidence as there may be which indicates what occurred. It is highly unlikely that any two cases will ever be even closely similar to each other and consequently what is done in one case is of limited assistance as a guide for what ought to be done in another. An appellate Court should not lightly interfere with the exercise of the Judge's discretion since the trial Judge has the benefit of hearing the statements of counsel and hearing

> evidence with a full appreciation of the atmosphere in which the trial takes place. He is clearly best able to Judge the effect on the jury of events such as those which occurred in this case. I think, however, a trial Judge must consider the circumstances of the case before him and decide on a course of action, having regard for the fundamental necessity to avoid any significant risk of his decision resulting in a trial which is unfair or prejudicial to the accused or to the Crown. (Emphasis added)

[132] We would agree that it would have been prudent for the trial judge to have kept juror P separate from the other jurors pending his decision on discharge. In these circumstances we cannot conclude that the failure to segregate juror P impaired the appellants' right to a fair trial. The judge having accepted the juror's denials of the misdoing, he could not have contaminated the other jurors.

[133] Nor are we persuaded that the trial judge should have dismissed the juror, having accepted his denial of wrongdoing.

[134] The nature of the inquiry was within the discretion of the trial judge. The way in which the allegations against the juror came before the Court was relevant to the necessary extent of the inquiry. Here the suggestion of wrongdoing came from counsel for Ms. VandenElsen who advised the Court:

> Thank you My Lord. Prior to bringing the jury in, I wanted to raise, in particular, one point. When I went back to my office last night, my staff had left me a message that there had been a phone call. At this point, I won't say the name until it's relevant -- the sister of one of the jurors. And she told my staff that on a daily basis, basically, the jurist [juror?] has been coming back and talking about the case and telling everything about it. And at one point, the jurist, with his wife, went to Shirley Street to check out the physical scene and to see if they could look in the windows, et cetera. She also relayed to my staff that this particular jurist has already stated that Larry Finck is guilty. ...
>
> Again, as I say, I purposely have not returned this call or spoken to the jurist myself because I did not want to get any more deeply involved than getting the message through my staff.

[135] The allegation was second hand, purportedly from the sister of the juror and advanced only through a message to defence counsel. The juror offered an immediate plausible explanation as to his sister's motive to fabricate the complaint. The judge found him credible.

[136] In summary, we are not persuaded that the inquiry conducted by the judge was inadequate nor that the judge erred in accepting the juror's denials of wrongdoing. Accordingly, he did not err in declining to dismiss the juror. Having found no wrongdoing by the juror, there was no cause for a mistrial. This ground of appeal is without merit.

Ineffective Assistance of Counsel:

> *". . . the Appellants herein were prejudiced by their representation received by counsel who were protecting the administration of justice at the negative expense of their clients and their children"*

[137] Both appellants were self-represented until December 13, 2004 when Mr. Jones became Ms. VandenElsen's counsel. He continued as such until April 25, 2005 when he withdrew at Ms. VandenElsen's request, before the end of the trial but after she had closed her case.

[138] Mr. Kuszelewski commenced representing Mr. Finck on February 2, 2005. Mr. Finck discharged him on March 17, 2005. In both cases the trial judge cautioned the parties against discharging their counsel.

[139] In **R. v. G.D.B.**, [2000] 1 S.C.R. 520, S.C.J. No. 22 (Q.L.), the Supreme Court of Canada outlined the general approach on appeal to an allegation to incompetent trial counsel:

> 26 The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), *per* O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> 27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

> 28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> 29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland, supra*, at p.697).

[140] A review of the record reveals no acts or omissions of either counsel that were not the result of reasonable professional judgment. We can discern no procedural unfairness to have occurred as a result of counsels' performance. Nor did their performance compromise the reliability of the trial result.

[141] The appellants, in particular Mr. Finck, wished to control every aspect of the trial. Both appellants refused to accept counsels' advice on issues of importance. The appellants were fixated on putting the child welfare and policing systems on trial, although the judge repeatedly explained to them that such would not be permitted and was not relevant to the issues before the court. They were intent on collaterally attacking the validity of the apprehension orders. When counsel refused to continue to advance such futile efforts, the appellants chose to self-represent, as is their right.

[142] Nothing in the record substantiates either appellant's claim of prejudice to their fair trial rights.

Ambiguous Verdict:

> *"That the miscarriage of justice became apparent and complete with the jury returning an ambiguous verdict of no decision on 5 of the 16 counts in the indictment. However these 5 counts were factually and legally identical to the other 9 counts which only further raises a reasonable doubt;"*

[143] Where there is an allegation of a miscarriage of justice on account of inconsistent verdicts the test is whether the verdicts are irreconcilable such that no

reasonable, properly instructed jury could possibly have rendered them on the evidence (**Pittiman v. R.**, [2006] 1 S.C.R. 381; S.C.J. No. 9 per Charron, J. for the Court at para. 10).

[144] The jury rendered no verdict in relation to both appellants on the s.244 charge - discharging a firearm with intent to injure or endanger the life of a person or to prevent arrest or detention. There was no verdict on an additional three offences with which Mr. Finck was charged: s.85(1)(a) - using a firearm while committing an indictable offence; s.267(a) - assault with a weapon; and s.86(1) - careless handling of a firearm.

[145] Ms. VandenElsen was found guilty of offences under s. 129 (obstructing a peace officer engaged in lawful execution of his duty); s. 282(1)(a) (abduction in contravention of a custody order); s. 88 (possession of a weapon for a dangerous purpose); s. 85(1)(a) (using a firearm in the commission of an offence); s. 91(3) (unauthorized possession of a firearm); s. 267(1)(a) (assault with a weapon) and s. 86(1) (careless use of a firearm).

[146] A "verdict" in a criminal case requires the unanimous conclusion of all jurors. "No verdict" means the jurors could not agree that the accused was either guilty or not guilty of the charge in question. We express reservation but will accept, for the purposes of this analysis, without so deciding, that "no verdict", as distinct from a finding of "not guilty", can create an inconsistency with a "guilty" verdict.

[147] The appellants seem to be alleging both that the "no verdict" result on some counts, creates an inconsistency as between the two appellants, and that the "no verdict" result on some counts for a single appellant creates an inconsistency with the guilty verdicts on other counts in relation to the same appellant. We will consider both submissions.

[148] The onus is upon an appellant to show that the allegedly inconsistent verdicts are not supportable on any theory of the evidence consistent with the legal instructions given by the trial judge (**Pittiman**, **supra** at para.7).

[149] As Charron, J. noted (at paras. 7 and 10):

> 7 The onus of establishing that a verdict is unreasonable on the basis of inconsistency with other verdicts is a difficult one to meet because the jury, as the sole judge of the facts, has a very wide latitude in its assessment of the evidence. ...
>
> 10 As a practical matter, it will often prove to be more difficult for an appellant to meet the test in the case of multiple accused charged with the same offence, not because the test is different, but because there is often a wider scope for differing verdicts in the case of multiple accused. ...

[150] Considering first the charge of discharging a firearm with intent (s. 244) and the fact that "no verdict" was rendered for either appellant, it may be that the jury was not convinced beyond a reasonable doubt that the discharge of the firearm was "with intent to prevent the arrest or detention of Lawrence Finck and Carline VandenElsen" as was charged. Some of the jurors may have concluded that the purpose of the discharge was to prevent the police from taking custody of the child. There is, therefore, no inconsistency on this finding as between the two appellants - since it was the same for each. Nor does it create an inconsistency with the other offences for which the appellants were found guilty - because the purpose for discharging the firearm does not form a part of any other charge.

[151] In finding Ms. VandenElsen guilty of using a firearm in the commission of an offence (s. 85(1)(a)); assault with a weapon (s. 267(1)(a)) and careless use of a firearm (s. 86(1)), the jury must have been satisfied that Ms. VandenElsen discharged the weapon. However, in rendering no verdict in relation to Mr. Finck on the same counts (ss. 85(1)(a); s. 267(1)(a) and s. 86(1)), the jury may have been unable to agree on whether or not the Crown had proved that Mr. Finck aided or abetted Ms. VandenElsen in the discharge of the gun. This is not an inconsistency.

[152] Both were found guilty of unauthorized possession of a firearm (s. 91(3)) and the possession of a weapon for a dangerous purpose (s. 88). In relation to Ms. VandenElsen, that finding of guilt is not inconsistent with the other charges of which she was found guilty. As regards Mr. Finck, the fact that the jury was satisfied that he “possessed” the weapon is not inconsistent with their lack of unanimity on the above counts related to use of the weapon (s. 85(1)(a); s. 267(1)(a) and s. 86(1)).

[153] Finally, the additional two counts of which they were each found guilty s. 129 (obstructing a peace officer engaged in lawful execution of his duty) and s.

282(1)(a) (abduction in contravention of a custody order) stand alone. They do not share common elements with the charges upon which no verdict was rendered.

[154] This ground of appeal is without merit.

Jury Charge and Exhortations:

> *"Wright J erred in law and fact in his charge to the jury, written instructions and in his jury exhortations. He was biased against and to the defence that (sic) all amounted to a miscarriage of Justice"*

[155] There is no substance to the allegation that the judge's charge was biased against the defence. The judge carefully put the defence positions which had any legal basis to the jury, drew the jury's attention to their evidence on relevant points and generally placed the case before the jury in a balanced manner.

[156] There is similarly no substance to the appellants' complaint about the judge's exhortation to the jury.

[157] The jury began its deliberations on the afternoon of May 10, 2005. After posing a number of questions and hearing certain portions of the evidence replayed, the jury informed the judge on the afternoon of May 12 that they had reached unanimous verdicts on some but not all counts. The judge delivered a brief exhortation which emphasized that each juror had to be consistent with his or conscience and oath and then asked them to retire once again. About two hours later, the jury advised the judge that "We are not able, after further debate and deliberation, to agree on all the charges. In our opinion, there is not a chance that we will be able to agree." The judge then took the verdicts. They were, with respect to Ms VandenElsen, guilty on all charges except that under s. 244 on which there was no verdict and with respect to Mr Finck, guilty on all but four charges.

[158] In **R. v. G.(R.M.)**, [1996] 3 S.C.R. 362; S.C.J. No. 96 (Q.L.) at para. 28, Cory, J., for the majority, set out the principles which apply to a jury exhortation. The final four of them are most relevant here. In summary, they are as follows. It is important to allow a jury to deliberate without imposing any form of pressure upon them; any exhortation should avoid introducing extraneous and irrelevant factors and should not encourage a juror to abandon an honestly held view; the

exhortation must not interfere with the right of jurors to deliberate uninfluenced by extraneous pressure; a juror should not be encouraged to change his or her mind simply for the sake of conformity and no deadline should be imposed for reaching a verdict. The judge's exhortation followed these principles exactly.

[159] The jury deliberated for a further two hours and did not reach verdicts on some of the counts. The jury was polled and each juror indicated his or her agreement with the verdict as recorded.

[160] Neither the content of the judge's exhortation nor the pattern of deliberations supports the view that the jury was in any way pressured to return a verdict or invited to put aside individual conscience in the interests of unanimity. In exhorting the jury as he did, the judge did not err.

[161] Apart from the issues about necessity and obstruction, which we have discussed earlier, the appellants have not advanced any other specific complaints about the judge's charge to the jury. We have reviewed the charge and the judge's answers to the various questions posed by the jury. We see no reversible error in either the charge or the answers to the questions.

[162] In our own review of the charge, we have some reservations with respect to the instructions relating to s. 282 (abduction). These concern the judge's explanation of the concept of "wilful blindness" in relation to Ms. VandenElsen's knowledge of the court orders: see, for example, **R. v. Jorgensen**, [1995] 4 S.C.R. 55; S.C.J. 92 (Q.L.) at paras. 102 - 103. However, in light of her own evidence respecting the knowledge she had, if there was any error in this regard, it was immaterial.

[163] At trial, Mr. Finck made two frivolous objections to the judge's charge. He first objected that the judge had wrongly told the jury that Sergeant Hernden had "come to the back of the house and yelled out and identified police" because there was no evidence to this effect. There was no foundation in fact for this objection. The judge said in his charge that "Sgt. Hernden voiced out, when the back window was smashed out, that it was the police and to come to the door to talk." The evidence amply supports this brief statement. Mr. Finck also objected to the judge's omission of any reference to s. 91(5) of the **Code**. Of course, as the judge

pointed out, this section deals with borrowing a firearm in order to hunt or trap and has no conceivable relevance to these proceedings.

[164] There were a number of questions from the jury. No objection could be taken to the judge's answers to the questions in relation to ss. 86 and 282. As regards the latter offence, the judge's instructions concerning the intent to deprive the guardian of possession of the child were based on the Ontario Court of Appeal's judgment in **R. v. McDougall** (1990), 1 O.R. (3d) 247 which was cited with approval by the Supreme Court of Canada in **R. v. Chartrand**, [1994] 2 S.C.R. 864; S.C.J. No. 67 (Q.L.). Mr Finck's submissions at trial to the contrary were simply incorrect. The judge's responses to questions concerning the s. 244 offence in relation to Ms. VandenElsen were entirely correct. In any event, the jury reached no verdict with respect to either appellant on this charge.

[165] The jury asked questions in relation to aiding and abetting. These related to the Crown theory that Mr. Finck could be found guilty as a party to certain of the offences charged (s. 244 (discharging a firearm with intent); s. 85 (using a firearm while committing an indictable offence); s. 267(a) (use or threatened use of a firearm in committing an assault); and s. 86(1) (careless use of a firearm)). The questions were these:

> "To find Larry guilty of aiding, did he have to load the gun knowing that Carline would use it?"
>
> "In order for Larry to be guilty of aiding, did he have to know that Carline would use the gun or is it enough to know that Carline could have used the gun?"

[166] No verdicts were reached on any of these charges. Even if there had been any misdirection in relation to Mr. Finck's liability as a party to these counts, it could not have affected the jury's consideration of any other count. The basis of liability left to the jury with respect to the charges under s. 129 and s. 282(1)(a) was that they were co-principals as set out in s. 21(1)(a) of the **Code**. The judge's instructions in this regard followed Justice Watt's specimen charges: see David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Canada Ltd., 2005) Final 101-A and no exception may be taken to them. It follows that

even if there had been any misdirection in the answers to these questions, it would be immaterial to the outcome of the trial.

[167] In our view, the judge did not commit any reversible error in his instructions to the jury, in his answers to their questions or in exhorting them to reach a verdict if they could do so in a way consistent with their oaths and consciences.

Additional Arguments:

[168] At the hearing of the appeal Mr. Finck raised some additional issues. He objected that the indictment did not specify that he was charged as being a party to certain offences. This complaint is without merit, as an indictment alleging an offence is capable of supporting a conviction based on the accused's participation as an aider or abettor. There was no suggestion that Mr. Finck was misled by the form of the indictment (see **R. v. Hall** (1984), 12 C.C.C. (3d) 93 (C.A.) and **R. v. Harder**, [1956] S.C.R. 489).

[169] Mr. Finck complained that Ms. VandenElsen's cross-examination of Dr. Edgar had been improperly curtailed by the trial judge. There is no substance to this submission. Mr. Finck's impertinent behaviour at trial led the trial judge to have him removed from the court room. Ms. VandenElsen refused to continue with her cross-examination of Dr. Edgar, a witness called by Mr. Finck, in his absence. The trial judge gave her every opportunity to ask the questions she claimed to have but she refused and the judge considered her examination of Dr Edgar to be concluded. He made no error in doing so.

The Appeal Against Sentence:

[170] Without citing specific grounds, the appellants have appealed their sentences.

[171] On June 28, 2005 the proceedings resumed for sentencing. The decision is reported as **R. v. L.R.F.** (2005), 236 N.S.R. (2d) 62; N.S.J. No. 311 (Q.L.).

[172] For the four offences of which he was found guilty, Mr. Finck was sentenced to a total custodial sentence of 4.5 years. As between the offences it was calculated as follows: s. 282(1)(a) - 3.5 years; s. 88 - 1 year consecutive; s. 129(a) - 6 months, concurrent and s. 91(3) - 2 months, concurrent.

[173] Ms. VandenElsen was sentenced to a total of 3.5 years in custody, calculated as follows: s. 282(1)(a) - 1.5 years; s. 85(1)(a) - 2 years, consecutive; s. 267(a) - 1 year, concurrent; s. 129(a) - 1 year, concurrent; s. 91(3) - 2 months, concurrent.

[174] The mandatory s. 109 weapons prohibition order was imposed in relation to each offender. Ms. VandenElsen was ordered to provide a DNA sample pursuant to s. 487.051 of the **Code**.

[175] The judge reviewed the principles and purposes of sentencing. By way of aggravating factors in relation to Ms. VandenElsen, he recognized the planning and deliberation that characterized her flight with the child in the face of the court order; in firing the gun through the door of the Shirley Street residence, she had precipitated the standoff and placed the child in danger; exiting the residence with her husband carrying a loaded shotgun heightened the danger of the situation; finally, she refused to surrender peaceably and had to be restrained. These actions he rightly categorized as “extreme acts of defiance”.

[176] While recognizing that Ms. VandenElsen had no prior convictions, the judge referred to the fact that she had previously fled with her triplets to Mexico in the face of custody proceedings in Ontario, exhibiting a propensity to disregard court orders. He acknowledged that this past behaviour was not an aggravating factor but relevant to her character.

[177] He recognized the firearms charges, being crimes of violence, as the most serious of which she had been convicted. In relation to those offences he observed, as aggravating, the fact that the appellants had a shotgun and ammunition at the ready and the obvious fact that the blast could have killed Sgt. Hernden or another. He noted that Ms. VandenElsen laughed in the courtroom when the near fatal consequences of her actions were addressed by the Crown.

[178] Concluding that Ms. VandenElsen appeared to have no appreciation of the wrongfulness or gravity of her actions, he concluded there was little he could do to

further the objectives of s. 718(d) and (f) of the **Code**. Ms. VandenElsen, he observed, refuses to accept responsibility for her actions or express any remorse.

[179] He could identify no mitigating factors.

[180] The judge acknowledged that a first sentence of imprisonment, particularly for a first offender, should be as short as possible and individually tailored rather than emphasizing general deterrence. He said:

> [35] Nonetheless, the seriousness of the offences committed, involving the reckless use of a firearm with near fatal consequences, compounded with the other aggravating factors identified, warrant a meaningful sentence.

[181] Regarding the sentencing of Mr. Finck, he found the aggravating factors mentioned in relation to Ms. VandenElsen to have similar application, although he was not convicted of all of the firearms offences.

[182] The judge could reach no conclusion as to whether Mr. Finck went for his gun with the intention of using it upon exiting the house at the end of the standoff. He, therefore, did not take that allegation into account.

[183] Highly aggravating was the fact that in 2000 Mr. Finck was convicted in Ontario of abduction of a child from a prior marriage, contrary to a custody order. He was still on probation from that offence when the child here was abducted. The judge summarized the aggravating conduct:

> 42 Mr. L.R.F. obviously did not get the message. He deliberately, indeed contemptuously, disobeyed the three orders issued by the Supreme Court of Nova Scotia (Family Division) placing his child in the temporary care and custody of the Children's Aid Society in Halifax. He admitted having perjured himself in those other proceedings when he lied to the court about his knowledge of the whereabouts of Ms. C.V. and the child. When their whereabouts were eventually discovered by the police on May 18, 2004, Mr. L.R.F. refused to answer the police door knocks and telephone calls, broke out a window near a police officer and barricaded the house to prevent the police from enforcing the order. He put the child at risk during the ensuing stand-off which was exacerbated by bringing her out of a window onto the front porch roof, mocking the police, and later emerging from the house with the child and Ms. C.V. on the third day, complete with loaded shotgun, into a very tense and volatile situation. Even then, Mr. L.R.F. did not surrender peaceably and had to be forcibly detained.

. . .

> 44 Before addressing that further, more needs to be said about the other convictions, and particularly that under s. 88 for possession of a weapon for a purpose dangerous to the public peace. Again, the sentencing objectives to be emphasized for such a weapons offence are denunciation and deterrence, both general and specific. Protection of the public is the ultimate goal through the accomplishment of these objectives. Here, Mr. L.R.F. was expressly warned by the police not to exit the house carrying a weapon to which he replied, "I only get one shot; big thrill". In an act of self indulgence and outright recklessness, he soon after emerged with Ms. C.V. and the child and his deceased mother on a stretcher, toting a loaded shotgun over his shoulder into a dense neighbourhood surrounded by police. He thereby put not only his wife, his child, and himself at risk, but also members of the public and the police. Even when ordered to drop the gun, he did not do so and had to be tackled and forcibly detained. All of these factors aggravated an already tense and volatile situation where it is indeed fortunate that no one got hurt.

[184] The judge attached little weight to Mr. Finck's other prior convictions.

[185] As with Ms. VandenElsen, he could identify no mitigating factors. Neither did Mr. Finck accept responsibility or exhibit remorse.

[186] Both Ms. VandenElsen and Mr. Finck refused to co-operate with the preparation of a pre-sentence report.

[187] In seeking consecutive sentences in relation to both offenders, it was relevant, the Crown submitted, that the abduction offence occurred four months before the armed standoff.

[188] By final comment the judge noted:

> 56 Lastly, I want to record my recommendation that both offenders be offered psychiatric counselling programs while incarcerated. Their cooperation in engaging in such programs may appear to be a dim prospect at the moment, but it is still worth the try for me to make this recommendation.
>
> 57 I want to add, lest there be any doubt about it, that in imposing these sentences against Mr. L.R.F. and Ms. C.V., I have not factored in their

> contemptuous conduct at trial, which ranged from the belligerent to the bizarre once they became self-represented. It is well established that that is not an appropriate consideration for a sentencing judge to take into account. . . .

[189] The judge credited each offender with double time for the pre-trial custody served, including remand time while awaiting sentence.

[190] The standard of review on an appeal of sentence is a deferential one. Absent an error in principle, the failure to consider a relevant factor or an overemphasis of the appropriate factors, we may only intervene to vary a sentence if it is demonstrably unfit (**R. v. C.A.M.**, [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.)).

[191] The two offences committed by Ms. VandenElsen which attracted the longest of her sentences are the abduction of the child (s. 282(1)(a)), which carries a maximum sentence of ten years imprisonment and using a firearm in the commission of an offence (s. 85(1)(a)), which carries a maximum of fourteen years imprisonment with a minimum sentence of one year.

[192] The range for abduction of a child in the face of a custody order seems to run from six months to two years (see, for example, **R. v. P.M.** (1997), 113 C.C.C. (3d) 304; O.J. No. 13 (Q.L.)(Ont.C.A.), leave to appeal dismissed [1997] S.C.C.A. No. 679 and **R. v. Finck**, [2000] O.J. No. 3457 (Q.L.) CarswellOnt 6024 (Sup. Ct. J.), aff'd. 2003 CarswellOnt 2578 (Ont.C.A.)).

[193] In view of the number of aggravating factors and the absence of any in mitigation, we are not persuaded that sentencing Ms. VandenElsen to 1.5 years for this offence was demonstrably unfit. There was no error in principle or failure to consider a relevant factor.

[194] In relation to the use of the firearm, sentences in standoff cases appear to range from one to ten years. (see **R. v. Whitten** (1993), 112 Nfld. & P.E.I.R. 144; N.J. No. 322 (Q.L.)(Nfld. S.C.) and **R. v. Rocuant** [1995] A.J. No. 118 (Q.L.) (Alta.C.A.)). Once again, there is the collection of aggravating factors coupled with the absence of those in mitigation and, most importantly, the fact that the gun was actually discharged, with potentially fatal consequences. We are not persuaded in these circumstances that the 2 year sentence is demonstrably unfit.

[195] Nor adding the individual sentences together and considering the totality is the sentence excessive.

[196] The two sentences which comprise the total for Mr. Finck are that for the abduction (3.5 years) and the consecutive year for the possession of the shotgun. This was Mr. Finck's second conviction for abduction of a child, and he did so while on probation for the first offence. He had received a two year custodial sentence on the first conviction. In the circumstances, we are not persuaded that the jump to 3.5 years for this second offence results in a sentence that is demonstrably unfit.

[197] The maximum sentence for possession of a weapon for a dangerous purpose is ten years. Referring again to the sentencing judge's remarks in para 44 of his decision (para 177 above) we are not persuaded that the one year sentence for this offence was demonstrably unfit nor that the total period of incarceration is excessive.

[198] We would dismiss the appeal against sentence.

DISPOSITION:

[199] Notwithstanding the inappropriate, insulting and, by times, outrageous conduct of the appellants, the trial judge exhibited extraordinary patience. In the face of these most trying circumstances he worked scrupulously to maintain the integrity of the process and to assure a fair trial and succeeded in doing so. The appeal is dismissed.

MacDonald, C.J.N.S.

Bateman, J.A.

Cromwell, J.A.