SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Marshall*, 2026 NSSC 332

Date: 2026-10-29
Docket: CRT, No. 542693
Registry: Truro

Between:

Darren Marshall Jr.

Appellant

v.

His Majesty the King

Respondent

SUMMARY CONVICTION APPEAL

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	September 28, 2026, in Halifax, Nova Scotia
Counsel:	Jack Lloyd, for Darren Marshall Jr. (Appellant) Marian Fortune-Stone and Maile Graham-Laidlaw, for the Federal Crown (Respondent)

OVERVIEW

[1] Darren Marshall Jr. appeals his convictions and sentence on multiple charges under the *Cannabis Act* and the *Excise Act.* Although his Notice of Appeal listed 14 grounds, his factum consolidated those into three, relating generally to: 1) Procedural Fairness/Judicial Bias/*Kienapple*/Continuity; 2) *Haevischer* application; and 3) Sentence. As I will explain, the appeal can be disposed of on the first ground. For the reasons that follow, I find that the trial judge breached procedural fairness by inadvertently not allowing the defence to make oral submissions about the *actus reus* of the offences. A new trial is ordered before a different Provincial Court judge. As a result, I decline to rule on the remaining grounds of appeal.

FACTS AND PROCEDURAL HISTORY

[2] On June 2, 2021, following a police investigation into certain cannabis dispensaries on reserve lands, RCMP members executed a *Cannabis Act*, S.C. 2018, c. 16, search warrant at the business known as The Flower Barn in Millbrook, Nova Scotia. Two other cannabis dispensaries, belonging to Jason and Alicia Brooks, and Matthew Cope, were also searched that day. Officers seized numerous cannabis products at each location, including dried flower, oil, hash, and edibles. None of the seized products bore excise stamps. The items seized were photographed, catalogued, and transported to the RCMP detachment. The items were then sent to the Canada Border Services Agency lab for testing.

[3] Mr. Marshall, Mr. Brooks, Ms. Brooks, and Mr. Cope were each arrested and charged with offences under the *Cannabis Act* and the *Excise Act, 2001, S.C. 2002, c.22*. The parties consented to joinder.

[4] Mr. Marshall filed a Notice of Constitutional Question (NCQ) pursuant to s. 35(1) of the *Constitution Act, 1982*, asserting an aboriginal and/or treaty right to "trade" in cannabis by operating cannabis shops or dispensaries.

[5] Trial was scheduled to begin on November 29, 2022. Before that date, the Crown advised that there was an agreed statement of facts in the Brooks and Cope matters, reducing the time required for trial. On the morning of November 29, the court learned that Mr. Marshall's counsel could no longer represent him due to illness, and that Jack Lloyd would take over his defence. The trial was rescheduled for February 3, 2023, with a pre-trial conference set for January 11, 2023.

[6] On January 11, 2023, Mr. Lloyd confirmed that he would adopt the previously filed NCQ, and indicated that he had begun organizing his witnesses. Although Mr. Lloyd believed that he had found two experts, he declined to provide the Crown with their names at that time. During the same pre-trial conference, Mr. Cope's counsel advised that his client no longer wanted to proceed by way of agreed statement of facts.

[7] The trial began on February 3, 2023, before van der Hoek, Prov. Ct. ACJ. Six officers testified in the Marshall and Cope matters. The evidence was not completed, and the trial was adjourned to February 7, 2023, to schedule a date for trial continuation. On that day, the judge set dates for the trial continuation, written submissions, and oral submissions.

[8] On April 28, 2023, the Supreme Court of Canada issued its decision in *R. v. Haevischer*, 2023 SCC 11.

[9] The trial evidence concluded as scheduled on June 9, 2023. On that date it was confirmed that the Crown's written trial submissions were to be filed by June 19, 2023, and Mr. Lloyd's written submissions by July 3. Oral submissions were scheduled for July 6.

[10] Although due on July 3, Mr. Lloyd's written submissions were not received until July 5. The following exchanges occurred during the July 6 hearing:

> **THE COURT:** …Okay, so everyone is here. I see Mr. Lloyd, Mr. Taylor for the Crown, Mr. Lederman, and, Counsel, the first thing we should discuss of course is that the Court just received Mr. Lloyd's submissions last night and had a chance to read them but not until this morning when they ... when I opened my emails.
>
> I'm not sure, because I wasn't clear on whether things were cc'ed or not, but did the Crown received Mr. Lloyd's closing submissions?
>
> **MR. TAYLOR:** I did, Your Honour, but I have to confess just because of the timing I was dealing with some other time-sensitive matters and I have had a chance to skim them only. I haven't had a chance to really give much thought to those submissions.
>
> **THE COURT:** The reason I bring that up is because obviously Mr. Lloyd put some work into those submissions and has raised a number of issues that I think the Crown would like to be able to respond to and for the Court to consider.
>
> So is the request to adjourn the closing submissions to another day when folks have had an opportunity to read them?

> **MR. TAYLOR:** I think that would be helpful, Your Honour. I do that somewhat reluctantly, but I kind of expected that the Court might be in a similar position because of the timing.
>
> I would appreciate an opportunity to look at them in some detail because there are some specific allegations there.
>
> …
>
> **MR. LLOYD:** So I was about to flag that I'm in a trial on the 26th, but I realize actually that it ... I got good news about it. So I no longer have a trial on the 26th. So the 26th is perfect.
>
> So that's great. The afternoon is fine. My submissions, Your Honour, will be ... will effectively crack the issues I've done in writing. So I won't be long on my feet so to speak. You may have questions for me. Totally fine.
>
> **THE COURT:** Okay.
>
> **MR. LLOYD:** And then my friend ... you know, I may need to respond a bit to my friend. I expect my friend will have some comments on the *Kienapple* issue I've raised, but I don't know what my friend's responding submissions will be. But I think we can get it done if we start at 3:30.

[11] The trial judge adjourned the matter to July 26 to enable Crown counsel to respond to the substantive issues raised. On July 26, 2023, court commenced at 3:40 PM. It quickly became apparent that the Crown's three-page reply submissions had not been received by the court or Mr. Lloyd. Following the Crown's oral submissions, the trial judge suggested that another date be set for defence counsel's submissions and for scheduling the next hearing. Mr. Lloyd confirmed that he would be ready to respond to the Crown's submissions and provide his plan for the constitutional challenge on August 30, 2023. The exchange included the following:

> **MR. LLOYD:** ... I am making efforts to respond a little bit off my back foot on the Crown's reply submission. I think what I'll do is I'll address my friend's three main points and then I'll see if I am more organized to respond to some of the written submissions as well, because I take issue with some of it.
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> So number one in my friend's ...
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> **THE COURT:** Mr. Lloyd. Before you ...
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> **MR. LLOYD:** Yes.
>
> **THE COURT:** ... you begin, Mr. Lloyd, could I perhaps offer you this? Obviously, what I could do is I could allow you to respond to this on another day, but what I would do is I would like to set some dates for the next stage. So if you wanted to have an opportunity to do that I'm happy to do that, and I know it sort

of sounds like I prejudged the issue when I say that I would go ahead and set some dates.

But I am thinking that it's very important that we do move on to the next stage here, which means we'd have to have some dates set.

MR. LLOYD: Right. I hear you. Like I'm in your hands. Like, I think that we have a significantly more complicated issue here on *Kienapple* than my friend is suggesting. So like, certainly, like, Your Honour knows better than anybody about, like, whether we got to set dates, and there's already been admissions by other parties.

So like, we got to (inaudible) but like, I don't think my friend is (inaudible) on proceeding on both *Cannabis Act* and *Excise Act* matters. Like, so I'm in your hands, Your Honour.

THE COURT: All right, so what I'm going to suggest as a possibility is, presuming there's convictions and we have to move to the next stage ... remind me, Mr. Taylor, the next stage is the stage where Mr. Lloyd would be letting us know who his witnesses will be, who his expert witnesses will be.

MR. TAYLOR: I think there should probably be a pre-trial conference to get that kind of information, yes, so Mr. Lloyd can indicate if he has a number of witnesses, when he will be able to provide the names and qualifications of those witnesses, and in what areas they will be called as expert witnesses on.

Then we can commence the ... I guess the chore of setting some actual dates. Obviously, we wouldn't want to wait too long, because the more time we take before we get to that point, the farther off into the future any subsequent dates for the notice of constitutional question are going to be set.

So yes, we would need to get some more information from Mr. Lloyd on how many experts and what kinds of experts he intends to call and how soon he can have the information on who those people are so that we can start looking at whether or not they are indeed experts that are in a position to provide the evidence, the opinion evidence, that he wants to call.

THE COURT: Mr. Lloyd, is there any chance that you could both respond to the Crown's submissions and also engage the pre-trial for that purpose on the same day if I were to give you a day at the end of August?

MR. LLOYD: Yes, yeah. No, I would be in a position to do that. I ... and I appreciate that, Your Honour. I just want to make sure that I'm making myself clear on some of these distinctions between *Cannabis Act* and *Excise Act*, and so I really appreciate that.

And I can have, basically, a (inaudible) plan in place for the constitutional challenge if it's needed at that time as well.

[12] The trial judge proposed a return date of August 30, to which counsel agreed. In the interim, the trial judge underwent unexpected surgery, and on August 30, another judge adjourned to October 10, 2023.

[13] On October 10, the trial judge appears to have forgotten that she had not yet heard Mr. Lloyd's oral submissions. Court commenced and the trial judge promptly made her ruling in relation to the *actus reus*:

> **THE COURT:** Thank you very much. I see I have Mr. Taylor for the Crown, Jack Lloyd for the ... some of the defendants, and Mr. Lederman ... or Lederman, sorry, for the others.
>
> All right, so today we're here because we've completed the *actus reus* portion of the trial, the guilty act as it were, and the next step of course is for me to tell you if I've decided that there is sufficient evidence that I've heard that satisfies me that the Crown has established the *actus reus* on the various charges that are before the Court.
>
> Obviously, Mr. Lederman's clients have agreed that the *actus reus* is proven because of the agreed statement of facts that was filed, Mr. Lloyd took issue with some of the evidence that the Crown called, and I had asked counsel to prepare more detailed written submissions. They did, and at the end of the day, Counsel, I have ... I'm just getting over Covid right now. I'm not coughing for dramatic effect, but I've been unwell for the last few weeks. So I've not been sitting in court other than a very brief appearance that was necessary last week.
>
> I will not be giving my written decision today. I will be giving my written decision on another day, but suffice it to say that the Crown has proven its case on some of ... if not all of the charges that are before the Court, and you'll receive my reasons in due course.
>
> The trial of course is not over because the trial is proceeding. This is just one of the very few first steps in moving the matter along. Mr. Lloyd has filed a notice of attention [sic] to bring a constitutional challenge to presumably all of the legislation under which the charges arose?
>
> **MR. LLOYD:** Yes, Your Honour.
>
> [Emphasis added]

[14] Following the trial judge's ruling on October 10, with respect to next steps, Mr. Lloyd suggested pre-empting a *Vukelich* (*Haevischer)* application by providing an outline of his argument, the proposed scope of his experts' qualifications, and a short brief of the law.

[15] The parties agreed to return on Monday, October 16, when Mr. Lloyd would provide the names of his expert witnesses.

[16] For reasons not disclosed by the transcripts, the parties did not return until December 4, 2023. On that date, Mr. Lloyd advised that he had given the Crown an expert report prepared by Konstantia Koutouki, but that a second report was not ready as the expert was dealing with a family member's illness. The matter was adjourned to December 15, 2023. On that day, the second expert report still had not been provided to the Crown because it needed to be reformatted. The Crown advised that its potential expert would not be able to provide a report until well into 2024. The matter was adjourned until February 23, 2024.

[17] Mr. Taylor received the second expert report from Mr. Lloyd about 15 minutes before court commenced on February 23, 2024. He had skimmed the report and noted that it did not address the use of cannabis, that it attached source excerpts in French and what appeared to be Latin, and also that no CV was provided. After expressing concern about delay, the court proposed a *Haevischer* application. The matter was adjourned to May 10, 2024, for the *Haevischer* hearing.

[18] The *Haevischer* Decision was given on June 7, 2024, along with the Trial Decision finding Mr. Marshall guilty on all counts. The trial judge stated, in her Trial Decision:

> [59] Mr. Marshall says because of the particularized requirements for conviction under the *Excise Act* the Crown cannot meet its burden for those counts, and as a consequence of a lack of continuity of the exhibits, the Crown cannot meet its burden of proof for the *Cannabis Act* offences.
>
> [60] It is not exactly clear what that argument is meant to address, but as previously stated, the Court is satisfied continuity is not an issue.
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> …
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> [83] While the evidence was at times jumbled and unclear, after a careful review of my notes and listening to the court record of testimony, I conclude the Crown has established by admissible evidence from credible and reliable historians, the execution of all four warrants resulted in the seizure of cannabis product exhibited therein was made available for sale. Samples of the seized product required *Excise Act* stamps confirming the payment of duties, both federally and provincially, there were no such stamps.
>
> [Emphasis added]

[19] The matter was set over to June 24, then July 8, to schedule a sentencing date. Sentencing was eventually scheduled for October 11, 2024, then set over to January 16, 2025, because Mr. Lloyd was ill.

[20] Mr. Lloyd did not file written sentencing submissions. Instead, at 4:00 PM on January 15, 2025, he provided cases to the court in a format that the court could not access. Crown counsel received the cases on the same day and learned for the first time that Mr. Lloyd was seeking a conditional discharge.

[21] The parties made oral submissions on sentence on January 16. The Crown requested a conditional sentence order while Mr. Lloyd argued for a conditional discharge. On March 31, the trial judge imposed a conditional sentence, including house arrest, and ancillary orders.

SUPPLEMENTARY SUBMISSIONS

[22] After reviewing counsel's submissions and the Appeal Book in advance of the appeal hearing, on August 31, 2026, the court sent the following correspondence to counsel:

> Justice Arnold is scheduled to hear this summary conviction appeal on September 28 and 29, 2026. He has reviewed the filed materials and is seeking further written submissions on one issue raised in the appellant's factum.
>
> Although it does not seem to be included in the grounds of appeal contained in the Notice of Summary Conviction Appeal, the first ground identified at page 2 of the appellant's factum is that
>
> > [t]he judge erred by not hearing submissions by the Applicant regarding his defence position on the trial including the Kienapple principle, continuity, the definition of hemp, and other issues resulting in legal errors and a denial of natural justice and procedural fairness and an apprehension of bias;
> >
> > [As appears in original]
>
> The transcripts filed in Volume 2 of the Appeal Book appear to establish the following:
>
> - The "*actus reus* portion" of the trial concluded on June 9, 2023 (p. 755, line 20);
> - The Crown's post-trial written submissions were to be filed on June 19, 2023 (p. 760, line 17);
> - Mr. Marshall's written submissions were to be filed on July 3, 2023 (p. 760, line 18);
> - Oral submissions were scheduled for July 6, 2023 (p. 760, line 16);
> - Mr. Marshall's submissions were not received by the court until July 5, 2023 (p. 763, lines 15-19);

- On July 6, 2023, the trial judge adjourned the matter to July 26 to enable Crown counsel to respond to substantive issues raised by Mr. Marshall (p. 770, lines 18-19);
- On July 26, 2023, it was determined that the Crown's three-page reply submissions were not received by the Court or defence counsel (p. 774, lines 3-16);
- The Crown proceeded with oral submissions on July 26 (pp. 778-780);
- Before defence counsel could begin his oral submissions on July 26, the trial judge proposed that the matter be adjourned to August 30, 2023, to allow defence counsel to respond fully to the Crown's reply submissions and to set a date for the next hearing (p. 782, lines 13-21; p. 785, lines 8-9);
- On August 30, 2023, the parties were informed that the trial judge had undergone an unexpected surgery and was not available. The matter was adjourned to October 10, 2023 (p. 787, lines 6-9; p. 789, lines 1-5);
- On October 10, 2023, the trial judge opened court by noting that "…we've completed the actus reus portion of the trial, the guilty act as it were, and the next step of course is for me to tell you if I've decided that there is sufficient evidence that I've heard that satisfies me that the Crown has established the *actus reus* on the various charges that are before the Court" (p. 790, lines 8-13).

> According to the record, it appears that Mr. Marshall was not given the opportunity to make his closing arguments prior to the trial judge's decision on October 10. If that is accurate, neither party has properly briefed the court on the impact, if any, of this omission on trial fairness.
>
> Justice Arnold would ask the appellant to please file supplementary written submissions and copies of relevant authorities on this issue by September 11, 2026; the respondent to file supplementary reply submissions on this issue by September 18, 2026; and any rebuttal from the appellant is to be filed by September 23, 2026.
>
> Please confirm receipt of this email by 12:00 PM tomorrow (September 1, 2026).

[23] Both parties filed supplementary submissions and the appeal proceeded as scheduled on September 28, 2026.

[24] With respect to the appellant's failure to raise the lack of oral submissions in his Notice of Appeal, the Nova Scotia Court of Appeal clarified the law on this point in *MacGillivary v. Brown*, 2024 NSCA 31:

> [49] The Court will consider an issue not explicitly claimed in a Notice of Appeal if it arises from the appealed issues and if the respondents are not thereby prejudiced or an injustice could otherwise result … In this case, the respondents have fully argued all issues raised by Mr. MacGillivary as well as the issue raised

> by Justice Murray. They do not say they are prejudiced because they cannot adequately respond. There is no evidence that they have been so prejudiced.

[25] It was plain from the appellant's factum that he was raising the trial judge's failure to hear his oral submissions, and the Crown's ability to respond has not been prejudiced.

[26] On the issue of the lack of defence oral submissions regarding the *actus reus*, I have considered the authorities provided by counsel, as well as several other cases on point located by the court. The parties had every opportunity to make supplementary submissions and cite the cases they considered relevant. The additional authorities do not espouse any new principle of law, were readily available, and my reliance on them does not require further submissions (see *Gough v. Leslie Estate*, 2022 NSCA 25, at para. 60; *R. v. Sowell*, 2023 ONCA 398, at paras. 13-20; *R. v. Rhyno*, 2026 BCSC 360, at paras. 43-51; *R. v. Rhyason*, 2006 ABCA 367, at para. 28, affirmed, 2007 SCC 39).

STANDARD OF REVIEW

[27] In *R. v. Pottie*, 2013 NSCA 68, the Nova Scotia Court of Appeal set out the standard of review to be applied by a summary conviction appeal court judge:

> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

[28] The Court of Appeal reaffirmed *Pottie* in *R. v. Stanton*, 2021 NSCA 57, and *R. v. Young*, 2025 NSCA 41.

ISSUE 1 – PROCEDURAL FAIRNESS/JUDICIAL BIAS/*KIENAPPLE*/ CONTINUITY;

[29] As noted, the appellant originally alleged 14 grounds of appeal. And, although the appellant now includes three sub-issues under one heading, I will address only one, as it is dispositive of the appeal. The appellant stated in his factum:

> 7. The grounds of appeal are as follows:

I) TRIAL AND PROCEDURAL ISSUES

a. The judge erred by not hearing submissions by the Applicant regarding his defence position on the trial including the *Kienapple* principle, continuity, the definition of hemp, and other issues resulting in legal errors and a denial of natural justice and procedural fairness and an apprehension of bias;

[30] In the grounds under this heading, the appellant alleges a denial of natural justice and procedural fairness, and an apprehension of bias on the part of the trial judge.

[31] Whether a trial is fair is a question of law reviewable on a standard of correctness (*R. v. LaPierre*, 2022 NSCA 12, at para. 53). An unfair trial, or one with an appearance of unfairness that is sufficiently serious, results in a miscarriage of justice (*R. v. Kahsai*, 2023 SCC 20, para. 5).

[32] The Nova Scotia Court of Appeal recently restated the law on reasonable apprehension of bias in *Stronach v. Stronach*, 2026 NSCA 47:

> [10] There are well established principles that govern the analysis of an allegation of bias.
>
> [11] The allegation is assessed through the lens of whether a reasonable and informed person would think the judge's conduct demonstrated a pre-judgment of an issue or a bias resulting in an unfair hearing. In *Wewaykum Indian Band v. Canada,* 2003 SCC 45 the Supreme Court of Canada said:
>
> > 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [[1978] 1 S.C.R. 369], at p. 394, is the reasonable apprehension of bias:
> >
> > . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> [12] Concerns with reasonable apprehension of bias and procedural fairness can overlap. The Alberta Court of Appeal stated in *Todd v Perlau*, 2008 ABCA 17:
>
> > [9] Issues of procedural fairness and reasonable apprehension of bias sometimes overlap. If a judge conducts a hearing in a procedurally unfair manner, reasonable observers may well perceive or apprehend the judge to be biassed. The Supreme Court of Canada has recently reiterated that

> "public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.": [*Wewaykum* 57.]

[13] Mr. Stronach carries the burden of establishing a reasonable apprehension of bias. The evidentiary threshold is high, as there is a strong presumption of judicial impartiality.

[14] For bias claims based on a culmination of circumstances, a contextualized approach is required. In *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 91, the Ontario Court of Appeal explained:

> [230] A determination of whether a trial judge's interventions give rise to a reasonable apprehension of unfairness is a fact-specific inquiry and must be assessed in relation to the facts and circumstances of a particular trial. The test is an objective one. Thus, the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial:
>
> [citations omitted]

[33] The trial proceeded on a series of non-consecutive days, between February 3, 2023, and January 16, 2025.

[34] The *actus reus* aspect of the trial concluded on June 9, 2023. The matter was adjourned to July 6, 2023, for oral submissions. Filing dates were confirmed; the Crown's written submissions were due June 19; the defence written reply was due by July 3. This is where things started to go off the rails.

[35] According to the record, the Crown filed its submissions as scheduled, on June 19. However, the defence did not file its submissions until the evening of July 5. On July 6, the matter was adjourned to July 26, to give the Crown a fair opportunity to respond to the defence submissions.

[36] On July 26, things went further astray: the Crown's reply on issues raised in defence counsel's submissions about identity and continuity of exhibits were not sent to the court or to Mr. Lloyd. As a result, the Crown made its oral submissions on July 26, but again in order to be fair, the trial was adjourned for defence oral submissions to August 30, 2023, so the defence could consider, and respond to, the Crown's late-filed submissions.

[37] The downhill run of confusion continued on August 30, when the parties were advised that the trial judge had undergone unexpected surgery and was

unavailable. Defence oral submissions were implicitly adjourned to October 10, 2023.

[38] The series of unfortunate events culminated on October 10, when without giving the defence any opportunity to make oral submissions, the trial judge gave her decision on the *actus reus* portion of the trial, and as previously noted, stated:

> **THE COURT:** … All right, so today we're here because we've completed the *actus reus* portion of the trial, the guilty act as it were, and the next step of course is for me to tell you if I've decided that there is sufficient evidence that I've heard that satisfies me that the Crown has established the *actus reus* on the various charges that are before the Court.
>
> Obviously, Mr. Lederman's clients have agreed that the *actus reus* is proven because of the agreed statement of facts that was filed, Mr. Lloyd took issue with some of the evidence that the Crown called, and I had asked counsel to prepare more detailed written submissions. They did, and at the end of the day, Counsel, I have ... I'm just getting over Covid right now. I'm not coughing for dramatic effect, but I've been unwell for the last few weeks. So I've not been sitting in court other than a very brief appearance that was necessary last week.
>
> I will not be giving my written decision today. I will be giving my written decision on another day, but suffice it to say that the Crown has proven its case on some of ... if not all of the charges that are before the Court, and you'll receive my reasons in due course.
>
> The trial of course is not over because the trial is proceeding. This is just one of the very few first steps in moving the matter along. Mr. Lloyd has filed a notice of attention to bring a constitutional challenge to presumably all of the legislation under which the charges arose?
>
> **MR. LLOYD:** Yes, Your Honour.
>
> **THE COURT:** All right. Next steps, Counsel. Ask Mr. Lloyd what is your next envisioned step?
>
> **MR. LLOYD:** So now that the *actus reus* portion is complete, in my view, we need to schedule time for the provision of expert witness reports, lay witness affidavit statements, and then schedule time ... well, the Crown's going to have to respond of course as well, and we're going to need to make time for cross-examination and qualification.
>
> Once that's complete, then we'll need to make time for submissions on the constitutional challenge proper.
>
> [Emphasis added]

[39] The first ground of appeal is that the trial judge erred by failing to hear the appellant's oral submissions, including his arguments on the *Kienapple* principle,

the continuity of exhibits, the definition of hemp, and other issues. The appellant alleges that this error gave rise to further legal errors (which he does not identify), a denial of natural justice and procedural fairness, and a reasonable apprehension of bias. He further says the trial judge failed to explain her conclusion on *Kienapple* and appears to have simply applied the Crown's submission on the point.

[40] Although the trial judge failed to hear Mr. Lloyd's oral submissions, he did address *Kienapple* in his post-trial brief, which stated in part:

> 26. The accused submits that the offences in sections 9 and 10 of the *Cannabis Act* and ss. 158.1 and 158.11 are, in fact, lesser and included offences of each other section and so the Appellant's conviction under any one provision precludes any convictions under any other provisions. For those reasons, there cannot be convictions under both the *Cannabis Act* and the *Excise Act* and, similarly, there cannot be multiple convictions under both pieces of legislation.
>
> 27. The *actus reus* of each of these offences is the same. An individual cannot violate ss. 9 or 10 of the *Cannabis Act* without committing the same action under the *Excise Act*.
>
> 28. Given that none of the officers provided evidence regarding the THC potency of the seized cannabis and the officers are unable to identify where/who possessed each cannabis item, the penal and exemption sanctions in sections 214 and 218.1(1) of the *Excise Act* must apply should the court find that an *Excise Act* conviction must flow on one of the counts before the court.
>
> 29. For the reasons above, the accused respectfully submits that a conviction under sections 9 and 10 of the *Cannabis Act* and ss. 158.1 and 158.11 of the *Excise Act* preclude the concomitant convictions because the convictions would all arise from the same facts. Subsidiarily, the accused submits the offences in sections 9 and 10 of the *Cannabis Act* are lesser and included offences – he cannot be convicted of both. Further, he cannot be convicted of both s.158.1 and 158.11 under the *Excise Act*. Finally, he cannot be convicted of section 9 or 10 *Cannabis Act* and section 158.1 or 158.11 of the *Excise Act*. In short, the Crown can only achieve one conviction in these circumstances.
>
> [Emphasis added]

[41] In her Trial Decision, the trial judge expressed confusion about the appellant's position on several issues, including *Kienapple*:

> [10] Mr. Lloyd, on behalf of Darren Marshall, argues the Crown has failed to prove the elements of the offences, or they are subject to the *Kineapple* [*sic*] principle. I will consider those arguments after setting out the law and my findings of facts, but first the law.
>
> …

> [59] Mr. Marshall says because of the particularized requirements for conviction under the *Excise Act* the Crown cannot meet its burden for those counts, and as a consequence of a lack of continuity of the exhibits, the Crown cannot meet its burden of proof for the *Cannabis Act* offences.
>
> [60] It is not exactly clear what that argument is meant to address, but as previously stated, the Court is satisfied continuity is not an issue.
>
> [61] Perhaps clarifying the foregoing, defence counsel argues Mr. Marshall cannot be convicted under both sections 9 and 10 of the *Cannabis Act*, because the elements of all these offences are subsumed within each other. That is a valid point, and the Court awaits argument, prior to sentencing, on the applicability of *Kineapple* [*sic*], as it was not particularly well explained in oral submissions of either party.
>
> …
>
> [64] Once again, I am prepared to hear a proper submission as to whether *Kineapple* [*sic*] applies to the distribution and sales charges since they appear to relate to putting the product in the dispensary on offer for sale. I await comment prior to sentence.
>
> [Emphasis added]

[42] In setting out her conclusions, the trial judge remarked that the trial evidence was "at times jumbled and unclear":

> *Conclusions:*
>
> [83] While the evidence was at times jumbled and unclear, after a careful review of my notes and listening to the court record of testimony, I conclude the Crown has established by admissible evidence from credible and reliable historians, the execution of all four warrants resulted in the seizure of cannabis product exhibited therein was made available for sale. Samples of the seized product required *Excise Act* stamps confirming the payment of duties, both federally and provincially, there were no such stamps.
>
> [84] Since all cannabis products in Canada require *Excise Act* stamps, the Court concludes their absence establishes the product did not come from a cannabis licensee and as a result the defendants received for sale a product that is required to be packaged and stamped under the *Act* that was not so packaged. The *Excise Act* offences have also been proven and convictions will also register on those counts.
>
> [85] So, subject to the submission on *Kineapple* [*sic*] regarding distributing and selling, convictions will enter for all the charges upon which the Crown sought same.
>
> [86] Judgment accordingly.
>
> [Emphasis added]

[43] It is apparent from paragraph 61 of the Trial Decision that the trial judge still did not realize that she had not heard any oral submissions from Mr. Lloyd. Nor is there any indication that she understood that Mr. Lloyd's *Kienapple* submissions in his post-trial brief included the proposition that the Crown could not obtain convictions under both the *Cannabis Act* and the *Excise Act*.

[44] Although the trial judge said that she expected further submissions on the proper application of *Kienapple* "regarding distribution and selling" before sentencing, Mr. Lloyd filed no written submissions. Moreover, despite Crown counsel addressing *Kienapple* in his submissions, which were heard first, Mr. Lloyd offered no reply to the Crown's position. He chose instead to focus his oral submissions on why a conditional discharge was an appropriate sentence. The trial judge did not raise *Kienapple* with Mr. Lloyd, either.

[45] In her Sentencing Decision, the trial judge summarized the Crown's position on *Kienapple* as follows:

> [6] The Crown proposed the following sentences:
>
> 1. *Cannabis Act* s. 10(2) - A conditional sentence order [CSO] and a mandatory s. 109 *Criminal Code* [*Code*] prohibition order; and
>
> 2. *Excise Act* s. 158.1(b) - A 12-month CSO, to run concurrently with the length of any CSO imposed for the s. 10(2) *Cannabis Act* offence;
>
> 3. *Excise Act* s. 158.11(1) - A mandatory minimum fine in the amount of $8,762.50.
>
> [7] The Crown also asked the Court to apply the *Kineapple* [*sic*] principle and stay the other three charges (that is, s. 9 of the *Cannabis Act* and ss. 158.1(a)(i) and 158.11(2) of the *Excise Act*).

[46] The Sentencing Decision contains no suggestion that the appellant's position differed from the Crown's, and there is no analysis of the elements of the specific offences. The judge appears to have simply adopted the Crown's position:

> [51] Recognizing that a conditional sentence should be longer than any period of incarceration, I impose a CSO of 6 months for the s. 10(2) *Cannabis Act* offence and a concurrent CSO of 12 months for the s. 158.1(b) *Excise Act* offence. I also impose the mandatory *Code* s. 109 *Prohibition Order*, and forfeiture orders for seized items, including the building, and the cannabis related-items, as agreed to by counsel, and for the s. 158.11(1) *Excise Act* offence, impose the fine as calculated by the Crown and not disputed by Defence counsel ($8,762.50).

> [52] For the first three months, Mr. Marshall will be on house arrest with limited opportunity to leave his dwelling. For the next three months he will be subject to a curfew from 10 PM till 6 AM.

[47] The appellant submits that the failure to hear his closing submissions on the *actus reus* resulted in a denial of natural justice and procedural fairness and gave rise to a reasonable apprehension of bias. The respondent acknowledges in its factum that appellant's counsel "did not make *additional* submissions as contemplated on the July 26th date" but says Mr. Marshall suffered no prejudice because his position on *Kienapple* was set out in his written submissions filed on July 5. The Crown's use of the word "additional" is misleading, as the defence was not given the opportunity to make any oral submissions.

PROCEDURAL FAIRNESS AND THE IMPORTANCE OF CLOSING SUBMISSIONS

[48] In *R. v. McDonald*, 2018 ONCA 369, the Ontario Court of Appeal described fundamental justice and procedural fairness as follows:

> [37] Fundamental justice in Canadian law is the fairness underlying the administration of justice and its operation. The principles of fundamental justice are specific legal principles that command "significant societal consensus" as "fundamental to the way in which the legal system ought fairly to operate": *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113. The more a person's rights or interests are adversely affected, the more procedural or substantive protections must be afforded to that person in order to respect the principles of fundamental justice …
>
> [38] Procedural fairness speaks to the principle that persons affected by the proceedings should have the opportunity: (i) to present their case fully and fairly, and (ii) have any decision affecting their rights, interests, or privileges made using a fair, impartial and open process … As the Supreme Court emphasized in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 118, "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the Charter."
>
> [39] The greater procedural protections just referenced can include the right to an oral hearing, where questions can be answered and submissions made in open court, "with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": *Baker* at p. 837. In *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, at para. 58, Wilson J. commented that where physical liberty is at stake "it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral

> hearing". This view – that where the stakes are serious enough an opportunity for oral submissions must be given – is in keeping with recognition that there are cases where the demands of natural justice can require an oral hearing ...
>
> [Emphasis added]

[49] In *R. v. Sibbert*, 2018 ONSC 2731, the Ontario Superior Court of Justice concisely summarized the law on the right to be heard:

> [21] The obligation to ensure a fair trial is a basic tenet of the judicial system. A fair trial accrues not only to a person accused of an offence but also the Crown who is charged with prosecuting the offence …
>
> [22] As described in *R.D.S.*, at p. 364, the adversarial system forms the "bedrock" of Canadian jurisprudence. That system incorporates, at its core, the right to be heard, also known as the *audi alteram partem* rule: *J.V.*, at para. 97.
>
> [23] The right to be heard has been described as "one of the most fundamental components of natural justice": *R. v. Dodson* (2000), 142 C.C.C. (3d) 134 (Ont. C.A.), at p. 142. See also: *R. v. McDonald*, 2018 ONCA 369, at paras. 37-39; *Supremarchés Jean Larecque Inc v. Flamand*, [1987] 2 S.C.R. 219, at para 58.
>
> [24] In *J.V.*, at para. 107, Hill J. made the following observation about the *audi alteram partem* rule:
>
> While not every breach of the *audi alteram partem* rule during a proceeding will warrant intervention for excess of jurisdiction, a denial of the right to be heard on the ultimate issue in the hearing is a flagrant violation of natural justice. Of course, statement of a tentative position or tentative conclusion, with a clear opportunity afforded to make submissions prior to a final decision, does not breach a party's right to be heard
>
> [Emphasis added]

[50] In *R. v. Kahsai*, 2023 SCC 20, the Supreme Court of Canada declined to find that a miscarriage of justice occurred where the trial judge refused to allow the self-represented accused to complete his closing argument. Mr. Kahsai represented himself on two counts of first-degree murder, did not cooperate with the trial process or advance any coherent defence, and was repeatedly excluded from the trial because of his chronically disruptive behavior. Partway through the trial, the judge appointed *amicus curiae* to cross-examine Crown witnesses, with instructions not to advocate for the defence. Mr. Kahsai resisted the appointment and mostly refused to cooperate with the *amicus*. When he used his closing argument to repeat various conspiracy theories, the judge cut it short and did not solicit any supplementary closing arguments from *amicus*. The jury convicted on both counts. On appeal, Mr. Kahsai argued, among other grounds, that failure to appoint *amicus* with an adversarial role early in the proceedings tainted the

perceived fairness of the trial. The majority of the Court of Appeal dismissed the appeal, finding no miscarriage of justice.

[51] Although the Supreme Court of Canada in *Kahsai* found the lack of closing argument for the defence "particularly troubling", it concluded that in the "exceptional" circumstances of that case, there was no miscarriage of justice requiring a new trial:

> [73] There were many troubling aspects to this trial. Not only was Mr. Kahsai unrepresented in a double-murder trial, he could not fully participate in the trial process. When he did participate, he provided no effective cross-examination of Crown witnesses or coherent argument on his own behalf. Although *amicus* was appointed to redress some of the concerns arising from these circumstances, the help provided was limited in its scope. The record shows that trial *amicus* did not have time to fully prepare for his role and that he would have more actively participated if he understood that *amicus* can generally assume an adversarial role. It is particularly troubling that there was no closing argument for the defence. This omission contributed to an impression of imbalance in this adversarial proceeding. It also deprived Mr. Kahsai of the benefit of submissions that the *amicus* would have made about the Crown's failure to prove planning and deliberation on one of the two counts of murder. These considerations raise concerns about the appearance of fairness in his trial.
>
> [74] At the same time, these concerns must be considered in the context of the exceptional situation that confronted the trial judge…
>
> …
>
> [76] It is not clear that appointing *amicus* earlier or with a broader mandate would have provided much value for Mr. Kahsai, who forcefully resisted the appointment of *amicus* and sustained his objection to their participation throughout the trial. He refused to cooperate with trial *amicus*, was not interested in discussing strategy, and disclosed no potential defence. In this circumstance, it is hard to see how a different *amicus* appointment would have impacted the fairness or perceived fairness of his trial. While the appellant bears no burden to prove actual prejudice on this appeal, he needs to show that a well-informed and objective person would find an appearance of unfairness so serious that it would shake their confidence in the administration of justice — a high bar.
>
> [77] In my view, a reasonable member of the public, considering the circumstances of the trial as a whole, would not find that a miscarriage of justice occurred. Instead, they would find the trial fairness concerns were sufficiently addressed by the trial judge and the assistance of *amicus*, such that a new trial is not required.
>
> [Emphasis added]

In *R. v. Holder*, 2024 NBCA 61, leave to appeal refused, [2024] S.C.C.A. No. 214, the appellant argued on appeal that his trial involved a miscarriage of justice because his counsel had failed to provide any meaningful assistance. His chief complaints were that counsel failed to cross-examine the complainant on inconsistencies in her testimony, took away his choice whether to testify, and made no closing submissions. In a responding affidavit, trial counsel explained these were strategic decisions based on what Mr. Holder had told him and stated that there were no reasonable arguments that could have been made against conviction (see paras. 3-4). In dismissing the appeal, the New Brunswick Court of Appeal addressed the failure to make closing submissions as follows:

> 38 Mr. Holder's remaining factual assertion is apparent from the record and not dependent upon the admission of his affidavit. He contends the failure to make closing submissions establishes he did not receive meaningful assistance from his lawyer, and the result was a miscarriage of justice. The Crown maintains that the evidence at trial was overwhelming and oral submissions could not have changed the outcome.
>
> 39 In the recent decision of *R. v. Kahsai*, 2023 SCC 20, [2023] S.C.J. No. 20 (QL), the Supreme Court of Canada commented on the absence of closing submissions in deciding whether restrictions on the appointment of *amicus* led to a miscarriage of justice

[52] The court then quoted *Kahsai*, and went on to state:

> 40 The absence of defence submissions on the closing of a trial is always, at least at first blush, cause for concern; however, in the circumstances outlined in these reasons for decision, a miscarriage of justice did not occur and the prejudice component to the assertion of ineffectiveness of counsel is not established.

[53] In *R. v. Prior*, 2010 NLCA 61, the trial judge’s failure to allow defence submissions prior to making a finding of guilt was held to constitute a fundamental breach of an accused's right to make full answer and defence. Crown counsel conceded that there had been a breach of natural justice but argued that the conviction could be saved by application of the curative proviso in s. 686(1)(b)(iv) of the *Criminal Code*. The Newfoundland Court of Appeal disagreed. White J.A., writing for the majority, stated:

> 20 Crown counsel admits that while it is a serious error of law not to allow the right to sum up, the appellant, nevertheless, suffered no prejudice. The argument continues that the test for curing the error has been met as no substantial wrong or miscarriage of justice ensued since the evidence against the appellant was overwhelming.

21 I do not agree. There was no consideration of the fundamental issue - whether the appellant was guilty of the charge. The finding of "otherwise guilty" amounts to a disposition of the charge. The contest that is a trial involves not just the hearing of evidence and cross-examination but also an opportunity for the application of the arts of advocacy and persuasion. The granting of an opportunity to practice these arts is fundamental to a trial - without such opportunity there is, essentially, no complete trial.

22 The evidence as to whether the appellant was not criminally responsible should not have been considered. The trial judge should never have gotten to that point without submissions as to the guilt of the appellant on the charge that was before the court.

Conclusion

23 In the matter on appeal, it is impossible to say there is no prejudice. The appellant opposed a finding of "otherwise guilty". No opportunity was given to defence counsel to argue that the appellant should be found not guilty.

24 No curative provision can be available relative to a trial where there are no submissions invited before a decision. An opportunity to make submissions is so fundamental that a miscarriage of justice will result if a decision is rendered before submissions are made.

25 Accordingly, the appeal was allowed and a new trial ordered.

[Emphasis added]

[54] In a concurring judgment, Welsh J.A. wrote:

27 On appeal, Mr. Prior submitted that he was denied the right to make full answer and defence because he was not given the opportunity to make submissions on the evidence, and the law and its application. Counsel for the Crown conceded that the trial judge had erred, and that the finding of not criminally responsible by reason of mental disorder must be set aside. This is clearly correct. It is a fundamental right of the accused, upon completion of the evidence at trial, to make submissions setting out his position on the law and its application in the circumstances. Failure to provide the accused the opportunity to make such submissions results in a denial of the right to make full answer and defence and amounts to a denial of natural justice. On this basis, the decision of the trial judge was set aside.

28 The question then arose as to whether a new trial should be ordered as requested by Mr. Prior. Crown counsel submitted that the appeal should be dismissed on the basis that the trial judge's error was such that Mr. Prior suffered no prejudice and that no substantial wrong or miscarriage of justice occurred. Accordingly, she submitted section 686(1)(b) of the *Criminal Code* would apply.
…

> 29 The test to be applied in determining whether subparagraph (iii) is engaged is set out in *R. v. Khan*, [2001] 3 S.C.R. 823 (S.C.C.). Arbour J. concluded that the provision may apply even where errors by the trial judge "are not minor and cannot be said to have had only a minor effect on the trial, but only if it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible" (paragraph 31).
>
> 30 I am satisfied that neither subparagraph (iv) nor (iii) applies in this case.
>
> 31 Crown counsel's reliance on subparagraph (iv) must be rejected on the basis that it applies where there was a procedural irregularity from which the accused suffered no prejudice. Failure to provide an accused with the opportunity to make summations at the conclusion of the evidence cannot be said to be a procedural irregularity.
>
> 32 There is also doubt that the language of subparagraph (iii) would support application of that provision where there has been a denial of natural justice as a result of the failure to permit the accused to make submissions upon completion of the evidence. That provision applies where the judge has made a wrong decision on a question of law. However, even assuming the provision may be applied, the high standard established by the test set out in *Khan* is clearly not satisfied in this case. In the circumstances, it could not be said that any other verdict would be impossible.
>
> [Emphasis added]

[55] The New Brunswick Court of Appeal cited *Prior* in *R. v. Parenteau*, 2025 NBCA 42, leave to appeal refused, [2025] S.C.C.A. No. 198, in finding that an unfair hearing must always render a decision invalid:

> 39 While trial judges have broad management powers, in this instance, the trial judge exceeded the permissible scope of those powers. To be clear, broad trial management authority does not allow a judge to fundamentally compromise a party's right to be heard on a central issue. The trial judge provided no notice to the parties and no opportunity for them to be heard before proceeding with his s. 24(2) *Charter* analysis. He neither sought nor received submissions on s. 24(2). This constitutes a breach of natural justice and is a clear legal error.
>
> ...
>
> 42 While it is correct that in appealing an acquittal the Crown must demonstrate that the error had a material impact on the acquittal and present evidence that could have led to a different outcome, the legal error in this case constitutes a breach of natural justice. A finding that natural justice has been breached and that the right to a fair hearing has been compromised must always render a decision invalid. A Court cannot deny that right or dismiss the violation based on speculation about whether a different outcome might have occurred had the hearing been fair …

> 43 In my view, the appeal judge's conclusion is sound: the trial judge's ruling on his own motion - particularly the timing and manner of his s. 24(2) *Charter* analysis before the Crown closed its case - was manifestly unfair and would undermine public confidence in the administration of justice. I would dismiss Mr. Parenteau's appeal.

[56] In *R. v. McDonald*, the appellant sought a new dangerous offender hearing on the basis that the trial judge refused to allow him to present oral argument at the conclusion of the evidence. Although the trial judge understood that the appellant wanted the opportunity to make oral submissions, he ordered that the parties file written submissions only. In allowing this ground of appeal, the Ontario Court of Appeal held that procedural fairness, including the right to make oral submissions, must be strictly enforced in the context of a dangerous offender hearing due to the risk of indeterminate detention. After restating the general principles of procedural fairness and fundamental justice, the court said:

> [40] The *Criminal Code* provisions regarding dangerous offenders authorize the most extreme and clearest form of preventive sentence that can be imposed on an offender in Canada. They permit the imposition of indeterminate detention in order to protect the public from persistent criminals with a propensity for committing violent crimes against the person …
>
> [41] The indeterminate sentence allows for control of offenders found to be dangerous for the rest of their lives. This is a significant deprivation of liberty. As such, procedural fairness must be jealously guarded and strictly enforced in this context. Subject to the right of the parties to agree otherwise, the closing arguments must therefore include oral submissions, held in open court, in the presence of the accused, counsel, the trial judge and the court reporter.
>
> [Emphasis added]

[57] The court went on to explain that the failure to allow an accused to make oral submissions might violate the accused's right under s. 650 of the *Criminal Code* to be present during the whole of his trial:

> [42] Section 650 of the *Criminal Code* gives the appellant the right to be present in court during the whole of his trial subject to exceptions that do not apply in this case. Closing arguments are part of an accused's trial, and thus are subject to the requirement that the accused be present. This right gives effect to the principle of fairness and openness that are fundamental values in our criminal justice system. Presence gives the offender the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result. The denial of that opportunity may well leave the offender with a justifiable sense of injustice, which is the "implicit and overriding principle underlying" the right to be present: see *R. v. Hertrich* (1982), 67 CCC (2d) 510, at para. 81.

> [43] It is true that we can infer from the record that all counsel were satisfied with the contents of the written arguments filed. Furthermore, with the evidence complete, the content of the written argument could not have affected the conduct of the appellant's defence. Indeed, it could be argued that oral submissions of the appellant would have had no meaningful impact on the written submissions made by his counsel.
>
> [44] Nevertheless, the appellant's prohibition from the opportunity to make oral arguments at the close of his dangerous offender hearing limited the appellant's right to be present when the arguments were received by the trial judge. This fouled the appearance of fairness, compromised the transparency of the proceedings, and was at odds with the open court principle. This amounted to a miscarriage of justice. A review of written submissions in jail with his counsel through a plexi-glass barrier was no substitute for being present during oral argument.
>
> [Emphasis added]

[58] The court clarified that although it has become common practice in criminal courts for a trial judge to require written submissions as a "first step" in the argument process, those submissions are not a substitute for oral argument:

> [45] In holding that counsel for the appellant was entitled to make oral submissions in the presence of the appellant, I do not suggest that the trial judge could not require written submissions as a first step in the argument process. <u>It is now common practice in the criminal courts to require written submissions, not only at the end of the evidence in judge alone cases, but also in respect of various evidentiary motions, or pre-charge discussions held before or during trial. In those cases, written argument is used, not in lieu of oral argument, but in addition to and usually as a precursor to oral argument.</u>
>
> [46] If a trial judge requires written argument as a first step in the argument process, the trial judge must allow counsel, after a written argument has been exchanged, to make oral arguments in the presence of the accused to supplement, correct, or otherwise amplify the written argument. The trial judge, of course, controls oral argument as he does other facets of the trial. The right to make oral submissions is not the right to repeat what has already been said in written or oral submissions, or to otherwise waste valuable court time. Counsel may, of course, agree to waive oral argument either entirely or as a supplement to written argument.
>
> [47] In the normal course, when a trial judge requires written submissions and allows counsel the opportunity to make additional oral submissions in the presence of the accused, procedural fairness requirements and the accused's right to be present throughout his trial will be satisfied by the combination of written and oral argument. The trial judge is entitled to assume that counsel has taken the steps necessary to ensure that the accused, to the extent that he or she wishes to do so,

> has had the opportunity to review the submissions with counsel and participate in the formulation of defence submissions.
>
> [48] Circumstances may arise, however, in which the accused does not have the opportunity to review written submissions with counsel and participate in the preparation of oral submissions. When counsel for an accused brings those circumstances to the attention of the trial judge, the trial judge must take the appropriate procedural steps to ensure procedural fairness and to protect the accused's right to be present at trial. In some cases, it may even be necessary to require that the submissions be made orally and without regard to any prior written submissions that were filed.
>
> [49] The trial judge has discretion to decide how best to address the kinds of problems referred to above. This discretion, however, must be exercised in a manner that protects the fairness of the proceeding. Experience indicates that in the vast majority of cases there will be no problems. Written argument coupled with the opportunity to make additional oral submissions after written argument has been exchanged and filed will suffice.
>
> [Emphasis added]

[59] In *Canada (Attorney General) v. MacLean*, 1991 CarswellNS 246 (C.A.), Mr. MacLean was tried for violating the terms of a fishing licence. The trial judge adjourned to allow counsel time to prepare closing arguments. On the day that the trial reconvened, the judge indicated that although he was not preventing counsel from making arguments, he had already written his decision. Mr. MacLean was convicted. The conviction was set aside and a new trial ordered by a decision of the County Court because, in the judge's view, Mr. MacLean was denied the right to make full answer and defence at his trial. The Crown appealed. The Nova Scotia Court of Appeal dismissed the appeal:

> 6 In our opinion, it is incumbent upon a trial judge to give a party appearing before him an opportunity to present argument before making a decision on any issue. In particular, a party must be allowed to make submissions at the close of the evidence … In the context of a criminal case, these rights are among those guaranteed to an accused as a component of fundamental justice under s. 7 of the *Charter*, and more particularly by s. 11(d) thereof, and by s. 802(1) of the *Criminal Code*.
>
> 7 The trial judge did not expressly deny either the Crown or the respondent the opportunity to present further argument. Indeed, it is clear from reading the portion quoted above that although he told counsel that he had already written his decision, such argument was not precluded. In reality however, reasonable counsel could conclude in the face of such a statement that any such argument could be a mere formality, could carry little or no weight with the judge and indeed might involve the risk of irritating the court. In our view, whatever way the judge had already

> written his decision, the appearance of injustice to the losing party was there. The respondent was effectively denied his right to make a meaningful closing submission.
>
> [Emphasis added]

[60] In *Whalen v. Whalen*, 2018 NSCA 37, the court considered whether the trial judge erred in failing to give the parties an opportunity to make final submissions before rendering her decision in a family law (not criminal law) matter. In finding that a miscarriage of justice had occurred due to the flawed trial process, Farrar J.A. referred to evidence that the trial judge was confused on one of the issues and the parties were not given an opportunity to address it (para. 51). He further stated that the appellant did not need to show that the outcome would have been different but for the error:

> [67] This was by no means a straightforward trial. The positions of the parties changed from the time of filing their pre-hearing briefs. Indeed, the positions changed from the beginning of the application to the evidentiary portion of the proceedings. There were live issues about whether agreements had been reached.
>
> [68] It was imperative that the parties be given an opportunity to present their positions and their theories of the case to the judge prior to a decision being rendered. Failure to do so was a miscarriage of justice.
>
> [69] It is not necessary for Mr. Whalen to show that the result would have been different had there been a chance for final submissions; but rather, it is the process of the trial and the failure to allow the parties to make their submissions that gives rise to the miscarriage of justice.

[61] In *R. v. Colley*, 1991 NSCA 1, Freeman J.A., for the court, set out the facts at p. 1:

> The appellant accused, successful in an application to quash the Provincial Court order committing him for trial, has appealed from the order of the Trial Division remitting the matter to the same Provincial Court judge to hear the submissions of defence counsel.
>
> The appellant, Cleveland Colley, was committed to stand trial on eight fraud-related counts and one of theft by His Honour Judge Hughes Randall of the Provincial Court. His application for an order in the nature of certiorari quashing the committal was heard before Mr. Justice David Gruchy of the Trial Division.
>
> The application was based on the allegation that at the preliminary inquiry "Counsel for Mr. Colley requested to make submissions with respect to the charges but was not allowed to do so by the learned Provincial Court Judge." The Crown accepts that statement.

> The transcript discloses that after defence counsel Castor Williams indicated in response to a statutory inquiry from the bench that the accused had nothing to say on his own behalf and informed the court that there would be no defence witnesses, there was discussion between the judge and counsel as to the wording of the various charges. At the conclusion of this Judge Randall announced that the accused would be ordered to stand trial on March 1, 1990, in County Court.
>
> Mr. Williams then said: "Your Honour, I would like to address the court, do you know what I mean with . . . "
>
> He was interrupted by the judge who said:
>
> > "Well as far as I'm concerned, there's evidence to commit and that's all there has to be as far as I'm concerned."
> >
> > "Okay," Mr. Williams replied. "Thank you, your Honour."
>
> Judge Randall concluded the exchange as follows:
>
> > "There's those changes that have to be, you know, that I've made. But there's evidence satisfactory, in my mind, to commit."

[62] In remitting the case back to Provincial Court in front of a different judge, Freeman J.A. stated at pp. 4-5:

> The appellant argues that it should not be remitted to the same Provincial Court Judge because of an apprehension of bias. Counsel urges that the words of Judge Randall quoted above show the "judge had foreclosed his mind to any arguments."
>
> A reasonable person might arrive at that conclusion. While the words of Judge Randall might be innocuous in another context, following as they did the denial of the right of counsel to address the court, they raise a reasonable apprehension that his mind was made up. In those circumstances, any decision Judge Randall might come to after hearing the submission of counsel would be tainted by that suspicion.
>
> We are satisfied the appellant has met the evidentiary burden for setting aside decisions in like circumstances as discussed in de Smith, Judicial Review of Administrative Action, 4th ed., 1980--Stevens & Sons Ltd. London, pp. 262-268.
>
> Mr. Justice Gruchy's order quashing the order of committal is confirmed. The appeal is allowed from that part of his order remitting the matter to the same Provincial Court Judge to hear submissions of counsel, and that part of the order is set aside.

[63] Numerous other cases have held that the failure to give one or both parties the opportunity to make argument is a denial of natural justice entitling them to a new trial or hearing (see, for example: *Felker v. Felker*, 1946 CarswellOnt 172 (C.A.); *Wilson v. Guthrie*, 1955 CarswellAlta 25 (S.C. (App. Div.)); *Aucoin v. R.*, [1979] 1 S.C.R. 554; *R. v. Jahn*, 1982 ABCA 97; *Berlock v. Bethune*, [1985] S.J.

No. 513 (Sask. C.A.); *R. v. Penton*, 2000 CarswellNfld 127 (S.C. (T.D.)); *R. v. Abdalla*, 2013 ONCA 233; *O'Keefe v. O'Keefe*, 2019 NLCA 70 (at para. 23)).

[64] However, there is some authority that in a civil trial (not a criminal trial, as in the present case) a new trial may not be necessary where all parties (not only the defence, as in the present case) were denied the opportunity to make oral argument but were permitted to file written submissions. In *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Ltd. Partnership*, 2008 ONCA 463, leave to appeal refused, [2008] S.C.C.A. No. 394, counsel and the trial judge agreed that the parties would file written argument and later appear before the trial judge for oral argument. The parties filed written submissions, but the trial judge released his judgment before they had an opportunity to make oral submissions. On appeal, the court declined to find that the omission resulted in a miscarriage of justice:

> [33] The appellants argue that the failure to give counsel an opportunity to make argument is a denial of natural justice and entitles them to a new trial. The appellants rely on this court's decision in *Felker v. Felker*, [1946] O.W.N. 368 (Ont. C.A.). The Ontario Weekly Notes summarized the court's decision in *Felker* as follows:
>
> > At the conclusion of the argument, the Court delivered judgment orally, allowing the appeal and directing a new trial, on the sole ground that the trial judge had pronounced judgment before according to counsel the right to present argument, and that the defendant had thus been deprived of her substantive right to have her case fully presented.
>
> [34] In the present case, the appellants had the opportunity to make written submissions but argue those were subject to a page limit and submitted on the understanding that there would be an opportunity for oral argument.
>
> [35] However, on the facts of this case, I am not convinced that the absence of oral argument has resulted in a substantial wrong or miscarriage of justice.
>
> [36] The cases relied on by the appellant all involve factual situations where the right to present argument — in either oral or written format — was denied entirely. However, this is not a situation where the appellants were denied entirely their right to present argument. In this case, the appellants were afforded the opportunity to file thirty pages of written argument. Also, the affidavit material filed on the mistrial application following receipt of the reasons for judgment does not disclose anything the appellants would have done differently or in addition had they been afforded the opportunity for oral argument.
>
> [37] In my view, while it might have been preferable had the trial judge followed the original plan, on the particular facts of this case his failure to do so has not resulted in any substantial wrong or miscarriage of justice. The interchange

> between the trial judge and counsel indicates that in this case the purpose of oral argument was to address any questions of the trial judge. It was not primarily to give the parties an opportunity to make submissions as they had already been given that opportunity through their written submissions.
>
> [38] As this court recently noted in *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.* (2007), 85 O.R. (3d) 561 (Ont. C.A.) at paras. 17 and 22:
>
> > [17] Not every error by a trial judge entitles an aggrieved party to a new trial. Section 134(6) of the *Courts of Justice Act* stipulates that this court should order a new trial only where "some substantial wrong or miscarriage of justice has occurred". This stringent standard reflects the underlying policy that new trials ordinarily are contrary to the public interest.
> >
> > . . . . .
> >
> > [22] Second, and critically important, Robert Laba [the appellant] has not shown that if he had been given an opportunity to make closing argument, the result would have been different.
>
> [39] If given the opportunity to present additional oral argument, I am not satisfied the result would have been different. I would dismiss this ground of appeal.
>
> [Emphasis added]

APPLYING THE CASE LAW TO THE APPELLANT

[65] The circumstances of the present case are unique. The parties filed written submissions on the understanding that they would also make oral argument. Through inadvertence, the Crown's three-page reply was not sent to defence counsel before the date for oral submissions. The Crown made its oral argument, but the defence's oral submissions were postponed specifically to allow them to respond fully to the Crown's submissions. In the interim, the trial judge required unexpected surgery, and the matter was adjourned to October 10, 2023. However, on October 10, the trial judge advised the parties that she had decided that the *actus reus* had been proven in relation to some, if not all, of the charges. She did not appear to realize that she had not heard defence counsel's oral submissions.

[66] This is not a case where the omission can be characterized as a harmless procedural irregularity because the defence's arguments were nevertheless before the judge and she clearly understood and considered them in reaching her decision. The trial judge *appears* to have found that the defence's written submissions were unclear and incomplete, and her Trial Decision reflects her stated confusion about the defence's arguments on certain issues. She also found that "the evidence was at times jumbled and unclear". In these circumstances, the written submissions cannot be said to have been an effective substitute for oral

argument, which would have allowed defence counsel to clarify Mr. Marshall's arguments and answer any questions from the trial judge about the evidence.

[67] Even if Mr. Marshall's arguments had been exhaustively laid out in his written submissions and properly understood by the trial judge, it would remain difficult to ignore the appearance of unfairness that flows from the imbalance in the treatment of the parties. It simply cannot be said that Mr. Marshall was given the same opportunity as the Crown to have his case considered and answered by the trial judge. Oral submissions are not merely a formality. As the court observed in Prior, a trial involves not just the hearing of evidence and cross-examination but also an opportunity to apply the arts of advocacy and persuasion. The granting of an opportunity to practice these arts through oral submissions is fundamental to a trial - without such opportunity there is, essentially, no complete trial. In the present case, the Crown was given a full opportunity to advocate and persuade. The defence was not given an equal opportunity, and Mr. Marshall was convicted. Adapting Farrar J.A.'s words in *Whalen*: *It is not necessary for Mr. Marshall to show that the result would have been different had there been a chance for oral submissions on or prior to the trial judge's decision on the actus reus on October 10; but rather, it is the process of the trial and the failure to allow Mr. Lloyd to make his oral submissions on behalf of Mr. Marshall that gives rise to the miscarriage of justice*.

[68] In my view, the trial judge's failure to hear Mr. Lloyd's oral argument after hearing the Crown's, although inadvertent, was sufficiently serious that a well-informed, reasonable person considering the circumstances as a whole would perceive the trial as unfair or appearing to be unfair.

[69] That said, the appellant's original allegation that the unequal treatment of the parties gave rise to a reasonable apprehension of bias on the part of the trial judge has no merit. While procedural fairness and reasonable apprehension of bias can overlap, a finding that a judge conducted a hearing in a procedurally unfair manner does not necessarily mean that reasonable observers would perceive the judge as biased.

[70] The threshold for a reasonable apprehension of bias is high, given the strong presumption of judicial impartiality, and absolutely nothing in the transcripts or the Trial Decision supports the claim. Ironically, the trial judge initially adjourned the defence's oral submissions to ensure trial fairness. The appellant's supplementary submissions rightly abandon the claim and now exclusively characterize the failure to hear the defence's oral argument as a miscarriage of

justice that rendered the trial unfair in fact or appearance. In my view, this is the proper approach. The appellant acknowledges that the trial judge's omission may have been a mistake but says his right to make full answer and defence was nonetheless compromised. I agree.

[71] The unequal treatment of the parties, together with the trial judge's evident confusion about several of the appellant's arguments, and her assessment of the evidence as "at times jumbled and unclear", establishes that "a well-informed and objective person would find an appearance of unfairness so serious that it would shake their confidence in the administration of justice — a high bar" (*Kahsai*, at para. 76). A miscarriage of justice is usually, by its very nature, prejudicial to the accused. Moreover, as Farrar J.A. stated in *Whalen*, the appellant is not required to show that the result would have been different if he had been given the opportunity for oral argument.

[72] I do not accept the respondent's submission that Mr. Lloyd's failure to make a timely objection on October 10 - or at some other time during the trial - amounts to a waiver of Mr. Marshall's right to argue that the omission rendered the trial unfair. The situation is analogous to *MacLean*, where the trial judge told the parties that he had already written his decision, but he was not precluding further argument. As in *MacLean*, "the appearance of injustice to the losing party was there" once the judge indicated that a decision had been made, and it could not be cured by an objection and oral submissions after the fact. Additionally, as noted in *MacLean,* reasonable counsel could conclude that any such objection or argument could be a mere formality, could carry little or no weight with the judge, and indeed might involve the risk of irritating the court.

REMEDY

[73] Section 686 of the *Criminal Code* states:

> Powers of the Court of Appeal
>
> **Powers**
>
> **686 (1)** On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> **(a)** may allow the appeal where it is of the opinion that
>
> **(i)** the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

> **(ii)** the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> **(iii)** on any ground there was a miscarriage of justice;
>
> …
>
> **Order to be made**
>
> **(2)** Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
>
> **(a)** direct a judgment or verdict of acquittal to be entered; or
>
> **(b)** order a new trial.
>
> …
>
> **New trial under Part XIX**
>
> **(5)** Subject to subsection (5.01), if an appeal is taken in respect of proceedings under Part XIX and the court of appeal orders a new trial under this Part, the following provisions apply:
>
> **…**
>
> **(d)** notwithstanding paragraph (a), if the conviction against which the accused appealed was for an offence mentioned in section 553 and was made by a provincial court judge, the new trial shall be held before a provincial court judge acting under Part XIX, other than the provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the provincial court judge who tried the accused in the first instance.

[74] Section 822 of the *Criminal Code* states:

> **Certain sections applicable to appeals**
>
> **822 (1)** Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require.
>
> **New trial**
>
> **(2)** Where an appeal court orders a new trial, it shall be held before a summary conviction court other than the court that tried the defendant in the first instance, unless the appeal court directs that the new trial be held before the summary conviction court that tried the accused in the first instance.
>
> **Order of detention or release**
>
> **(3)** Where an appeal court orders a new trial, it may make such order for the release or detention of the appellant pending the trial as may be made by a justice pursuant to section 515 and the order may be enforced in the same manner as if it had been

> made by a justice under that section, and the provisions of Part XVI apply with such modifications as the circumstances require to the order.

[75] Because there has been a miscarriage of justice due to a violation of the appellant's right to a procedurally fair trial, the appeal is allowed, the convictions are quashed, and a new trial is ordered in the Provincial Court before a judge other than the judge who tried the appellant.

CONCLUSION

[76] The appellant suffered a miscarriage of justice because he was denied the opportunity to make oral submissions. The appeal is allowed, the convictions are quashed, and a new trial is ordered in the Provincial Court before a judge other than the judge who tried the appellant. Because the appeal succeeds on this issue, I decline to address the remaining grounds of appeal.

Arnold, J.