NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Gabriel*, 2018 NSCA 60

Date: 20180710
Docket: CAC No. 449076
Registry: Halifax

Between:

Kale Leonard Gabriel

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	May 30, 2018, in Halifax, Nova Scotia
Subject:	Criminal law – self-defence – jury charges – *Baxter* instruction – *Vetrovec* warning
Summary:	On the evening of July 22, 2010, the Appellant Mr. Kale Gabriel and Mr. Ryan White were in a fight. Mr. Gabriel had a gun which fired, killing White. A jury convicted Mr. Gabriel of second degree murder. Mr. Gabriel appealed his conviction.
Issues:	Mr. Gabriel submits that the Crown's closing address misled the jury on two aspects of self-defence, and the trial judge's failure to point out those errors constituted mis-directions. Mr. Gabriel also submits that the jury charge wrongly failed to include a *Baxter* instruction respecting Mr. Gabriel's reactions, and a sharp *Vetrovec* warning respecting the Crown's key witness, Mr. Randall Sampson.
Result:	The Court of Appeal dismissed the appeal. The draft jury charge had been vetted by counsel before the judge delivered

it. The defence had not raised the concerns that appeared in the grounds of appeal.

The jury charge did not transmit to the jury any mistaken impression left by the Crown's closing address respecting self-defence. To the contrary, the jury charge properly instructed the jury on self-defence, and directed the jury to consider Mr. Gabriel's testimony on how and why he acted.

The propriety of a *Baxter* instruction – that the accused "cannot be expected to weigh to a nicety, the exact measure of necessary defensive action" – depends on the facts. In the circumstances of this case, the charge did not err by omitting a specific *Baxter* instruction. Mr. Gabriel testified, and the charge directed the jury to consider his explanations of what he did and why.

The jury charge told the jury to be "very cautious about accepting" the evidence of the Crown witness. In the circumstances, and given the trial judge's discretion on the scope of a *Vetrovec* warning, this was a satisfactory caution.

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Judges: MacDonald, C.J.N.S., Saunders and Fichaud, JJ.A.

Appeal Heard: May 30, 2018 in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Fichaud, J.A., MacDonald, C.J.N.S. and Saunders, J.A. concurring

Counsel: Philip Campbell for the Appellant
James A. Gumpert, Q.C., for the Respondent

Reasons for judgment:

[1] On the evening of July 22, 2010, the Appellant Kale Gabriel and Ryan White were in a fight. It happened in Mulgrave Park, Halifax, at a spot known locally as "Blaze Up". Gabriel had a revolver that discharged, killing White. The witnesses differed as to how the gun came to fire. According to a Crown witness, Gabriel pulled it out and aimed. Gabriel denied this, said the gun accidentally went off in the scuffle, and his conduct was in self-defence.

[2] The jury found Mr. Gabriel guilty of second degree murder. He appealed the conviction.

[3] On the appeal, Mr. Gabriel says that the Crown's closing address misled the jury on two aspects of self-defence, and the trial judge's failure to point out the Crown's errors constituted material mis-directions. Mr. Gabriel also submits that the jury charge wrongly failed to include a *Baxter* instruction and a sharp *Vetrovec* warning.

Background

[4] The Crown's witnesses included Messrs. Randall Sampson and Derelle Bundy, who saw the fight. The Crown also called Mr. Marcus Verrault, who was uncooperative in Court. The Crown's other witnesses were police officers and experts. Mr. Gabriel was the sole defence witness. Only Sampson, Bundy and Gabriel gave material eyewitness testimony of the fatal altercation.

[5] Mr. Gabriel testified that he met the victim, Ryan White, and Randall Sampson in 2005 when the three were inmates at the Waterville Youth Facility. Sampson and White had been friends with another inmate, Shaun Beals, whose uncle was Michael Smith. At age sixteen, Gabriel had been the victim of a home invasion robbery, committed by Smith earlier in 2005, and had given a statement to police that implicated Smith. His statement led to Smith's conviction and a penitentiary sentence. At the Waterville institution, Beals, Sampson and White labelled Gabriel a "rat" and threatened his life.

[6] After leaving Waterville, Gabriel moved to Mulgrave Park in Halifax. He testified to other incidents in Mulgrave Park that, in his view, represented threatening behaviour from either Smith, who had been released from penitentiary, or Smith's cohorts.

[7] Gabriel testified that, in May 2010, White told him that Smith had put a "hit" on Gabriel:

> [H]e told me if I knew that there was money on my head, that there was a hit. I asked him who supposedly put this hit on my head. He laughed at me and told me Michael Smith and walked away.

[8] According to Gabriel, several days later, Gabriel again encountered White, who lifted his shirt to reveal a handgun in his pant-waist.

[9] Gabriel testified that, on July 21, 2010, another individual, Mr. Stacey Adams, visited Gabriel's apartment, showed a handgun and warned that "they might be back to collect the money that's on my [Gabriel's] head". At the time of trial, Adams was deceased, having been shot.

[10] July 22, 2010 was the day Ryan White was killed.

[11] At around 10:00 a.m. on the morning of July 22, according to Gabriel, White and two others threatened Gabriel with an extendable baton and bear mace.

[12] Mr. Gabriel said these menacing events prompted him to obtain a gun from an acquaintance, Donald Stevenson, at about 10:30 a.m. on July 22. By the time of trial, Stevenson was deceased from a gunshot.

[13] Around noon on July 22, Gabriel and others went to a hang-out in Mulgrave Park, called "Blaze Up". They smoked marijuana and listened to music. Gabriel testified that, at 2:30 to 3:00 p.m., he saw Ryan White "with mask, hoodie, scarf, gloves, all dressed in black with a big shotgun hanging down by the side of his leg". Gabriel held the revolver in his right hand. Gabriel testified:

> So I held my gun, I asked Ryan, "What do you want to do? Mine holds six, what does yours hold," giving him the opportunity to know my gun is loaded, and he doesn't say anything to me at all. I think he's more shocked that I had a gun.

[14] According to Gabriel, Ryan White's brother said "Ryan, shoot him, Ryan, shoot him, if you ain't going to shoot him, pass me the fucking gun, I'll shoot him." Then Ryan White's mother came out and told him to get into the house. White and Gabriel parted ways. Gabriel returned to his apartment with the gun on his right hip.

[15] Gabriel said that, around 11:00 p.m. in the evening of July 22, Marcus Verrault came to Gabriel's apartment, and told Gabriel that White and Sampson

were at Blaze Up dressed in black and putting on masks. Gabriel testified that, after hearing this:

> At that time I told all the guys that were in my house, which was me, Jakeel Tynes, Tristan Last, Derelle Bundy, also Marcus Verrault who just showed up, to come down to Blaze Up with me. As we're exiting the house, nobody knows I have the gun, I have the – I do have the gun on my right hip.

[16] Gabriel testified that he went back to Blaze Up to deal with the problem:

> Q. Right. So your thought is you're going to protect your wife and kids by going down and meeting this head on?
>
> A. Yes, I couldn't wait for the problem to come to my house.
>
> Q. And, of course, as you already said yesterday, you brought that gun in case it escalated, right?
>
> A. Yes.

[17] According to Sampson's testimony, at that time he and Ryan White were engaged in a drug deal at Mulgrave Park. Sampson had a loaded sawed-off shotgun to facilitate the transaction. White entered the building with the drugs to make the sale. After White emerged, Sampson and White walked together to Blaze Up, where Sampson hid the shotgun under some stairs nearby. He returned to White, who was rolling a joint. Then Sampson saw an approaching group that included Gabriel.

[18] Sampson said he was leaning on a wall in front of the seated White. Gabriel came up and told Sampson "move out of the way". Sampson said Gabriel's right hand was in his pocket. Gabriel kicked White in the face. Gabriel backed up. White threw some punches. Gabriel punched with his left hand. Gabriel's right hand pulled the gun out of his pocket. White was shot and fell. Gabriel walked away.

[19] Sampson described the moment of the gunshot:

> Q. … go ahead, tell us what happens.
>
> A. Ryan was exchanging punches with Kale. Kale was throwing his left hand punching back, and then, like, basically, you know, when boxers get too close, they hug. So basically, when Kale threw that left hand, it extended past Ryan and, like, almost look like as if he was getting Ryan in a headlock and, like, Ryan went to, like, slip out, like duck and slip out, and that's when Kale pulled his hand out of his right pocket, lifted it straight up and the gun went off.

[20] Bundy testified that the altercation began when Gabriel kicked White in the head. Then White grabbed Gabriel around the waist. They exchanged blows. Gabriel's left hand swung around White's head and grabbed White. Then there was a shot, White fell and Bundy saw Gabriel with the gun in his right hand.

[21] Bundy's description of the gunshot was less depictive than Sampson's:

> Q. So how does it play out? Tell us what leads up to the shot that you heard.
>
> A. Well, to what I recall, they were fighting, and then on the last swing of the left hand, it went around his – it went around his head and then, before you know it, everyone heard a bang and then Ryan fell on the ground, so everybody turned around and started walking.

[22] Gabriel's version differed from those of Sampson and Bundy. Gabriel said he heard White speak to someone on the phone and ask the person to bring his "thing", which Gabriel interpreted to mean a gun. Gabriel asked White, "So what do you want to do?" White replied, "Fuck off, I'm not worried about you." Gabriel asked, "So why did you just call someone for a gun?" White said he did not call for a gun because he had a gun. Then, according to Gabriel, White reached to his waist for what Gabriel believed to be a gun, and that was when he kicked White in the head. White charged at him, they threw punches and Gabriel said he felt White reaching for the gun at Gabriel's waist. When he pulled away, the gun went off. Gabriel denied pulling the trigger.

[23] Gabriel's testimony on the gunshot included:

> I give him two shots to the side, to the back of his head hoping to knock him out. At this time I feel Ryan going for the right side of where my gun is. I feel the gun come from my waist. I grab him like this to hold him in so he can't back up with it. This comes from around into here. I don't know if he touched the gun with his second hand, but it didn't go off till he decided to pull away. I had a hold of the gun. My hand was on the handle. I know 100 percent I didn't pull that trigger that night.

[24] Mr. Gabriel was tried on an indictment for second degree murder contrary to s. 235 of the *Criminal Code*. The jury trial in the Supreme Court of Nova Scotia began February 1, 2016, lasted 13 days and ended on February 18, 2016. Justice Jamie Campbell presided. Mr. Gabriel was represented by counsel. Mr. Gabriel's theory was that the shooting was accidental and in self-defence.

[25] On February 18, 2016, the jury returned a guilty verdict of second degree murder, as charged.

[26] On March 7, 2016, Mr. Gabriel filed a prisoner notice of appeal. After retaining appeal counsel, Mr. Gabriel filed an amended notice of appeal on July 7, 2017.

[27] This Court heard the appeal on May 30, 2018.

Issues

[28] Mr. Gabriel makes four submissions that I quote from his factum:

1. The trial judge erred, in light of the Crown's closing address, in his instruction to the jury on the effect of a finding that the Appellant had alternatives to meeting the deceased.
2. The trial judge erred, in light of the Crown's closing address, in failing to instruct the jury on the effect of a finding that the Appellant intended to shoot the deceased on the defence of self-defence.
3. The trial judge erred in failing to provide the "*Baxter* instruction" that a person acting in self-defence cannot be expected to judge with precision the amount of defensive force required.
4. The trial judge erred in failing to give a *Vetrovec* warning concerning Crown witness Randall Sampson.

First Issue – Relevance to Self-Defence of Events at Blaze Up

[29] At the trial, Mr. Gabriel relied on self-defence under ss. 34 and 35 of the *Criminal Code*, as those provisions existed in 2010 (*i.e.* before the 2012 amendments – S.C. 2012, c. 9, s. 2). Section 34 dealt with self-defence to an unprovoked assault, and s. 35 with self-defence after the accused initiated the altercation. The judge put both options to the jury and let the jury assess whether or not Mr. Gabriel had been the initiator.

[30] Under the former s. 34(2), objective reasonableness was a criterion, as stated by McLachlin C.J.C. and Bastarache J., for the majority, in *R. v. Cinous*, [2002] 2 S.C.R. 3:

> [93] In *Pétel*, ([1994] 1 S.C.R. 3), *supra*, at p. 12, Lamer C.J. stated the three constitutive elements of self-defence under s. 34(2): "(1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary". All three of these elements must be established in order for the defence to succeed. …
>
> [94] Each of the elements under s. 34(2) has both a subjective and an objective component. The accused's perception of the situation is the "subjective" part of the test. However, the accused's belief must also be reasonable on the basis of the situation he perceives. This is the objective part of the test. Section 34(2) makes the reasonableness requirement explicit in relation to the second and third conditions. *Pétel* held that the same standard applies to the first component of the defence, namely, the existence of an assault. With respect to each of the three elements, the approach is first to inquire about the subjective perceptions of the accused, and then to ask whether those perceptions were objectively reasonable in the circumstances.

[31] Under the former s. 35, self-defence required that the accused had used force "under reasonable apprehension of death or grievous bodily harm", and "in the belief, on reasonable grounds," that the force was necessary to avoid death or grievous bodily harm. This imported an objective standard of reasonableness: *e.g.*, *R. v. Chamberland*, [1988] A.J. No. 1149 (C.A.), per Laycraft C.J.A. for the Court.

[32] Consequently, the reasonableness of Mr. Gabriel's conduct was the subject of the closing addresses to the jury from the defence and the Crown.

[33] Mr. Gabriel's counsel addressed the jury first. He submitted that, in Mr. Gabriel's circumstances, his decision to go to Blaze Up with a weapon was reasonable:

> There's this other problem, he can't just pick up and move to the $2,500 apartment on Larry Uteck where no one's going to find him. They're in Housing. They tell you where to live. You can't just go wherever you want to. He's got no money. If you had money, you wouldn't qualify to live in Mulgrave Park. They're telling you where to live.
>
> What's his other option? The logical one, which I suspect most of us would do, call the police. Think that's a real option for Kale? As he said, "That's what got me in this mess in the first place."
>
> We all heard evidence that the police can't even drive in there, they have to park and then walk inside. Is there even enough time? Bear in mind that these guys are 167 feet away from your house putting on masks. Some of our yards are

bigger than 167 feet. This isn't some fiction that may or may not happen. They're right there. You going to call the police? They may not even get there in time, that's the reality, if they even care. You heard what Randall said, "Cops don't go in there, they don't care what goes on in there." We know that they showed up after the shooting. We know that they got there relatively quickly.

The other thing he said was, "I wasn't calling the police because I was hoping that they would realize I'm not a rat." That's why he didn't call the police on those other occasions. Maybe they'll back off. That's all he wanted, just back off.

Pack up and move. I kind of touched on that a bit. Just pack up right there. These guys are 167 feet from your house putting on masks. "Come on kids, 11:00 at night, wake up, pack your stuff, time to go now, let's jump in the van," walk them right in front of them, "Come on, guys." That's a reasonable option for Kale?

The other possibility, just stay in your house. Don't go out, just stay there. Bearing in mind you got your two kids sleeping upstairs, there's one way in and one way out. Just stay there, hope, pray, "Don't come, guys, please don't come, please don't come, please don't come." Is that a reasonable option? Bearing in mind what we knew happened at 3:00 that afternoon? What if Kale didn't have a gun at 3:00 that afternoon? All these other occasions where they came to the house with a gun. He knows they got a gun, and they're 167 feet from his house putting on masks. Go hide in the bathroom?

Or how about this? This is the only other option he's got. Go down and confront them, but don't bring the gun. "Oh, oh, bad things can happen if I bring the gun, I'm keeping the gun at home, please guys, stop, don't do this any more, let's talk it out, let's all work this out like friends." They weren't interested in working this out. They wanted to work it out their own way.

So to expect him to go down there and try and cut this off without a gun, is that reasonable? He didn't walk down there, gun out, "What are you guys doing?" He didn't bring it out. He didn't even bring it out when he called for a gun. He didn't even bring it out when he was attacked. He didn't bring it out until he absolutely had to. But to expect him to go down there without the gun, that's not reasonable.

He took all reasonable measures that he could, given the options he was given. …

[34] Next the jury heard the Crown's reply. Crown counsel disagreed that Mr. Gabriel's decision to bring a gun to Blaze Up was reasonable. On that point, his address included the following:

But what could he have done – what could he have done, that still doesn't make sense, to preserve himself? What else? Our submission is this goes back to

> his house, probably days before. But let's just start at the house. Days before he should have been out of there, if he wanted to preserve himself. A reasonable person, you're reasonable people, a reasonable person would pick up the phone and call the police. He says, "Oh, I can't do that." Unfortunately, Mr. Kale Gabriel, that's his subjective belief.
>
> …
>
> But back to the reasonable person, you can call the police. A reasonable person would call the police. It ends there, don't go any further, in the Crown's submission. That's what you're supposed to do. In our society, you're not allowed to go hunting for other human beings. We don't have the (*sic*) walk out on your front lawn and wait till somebody crosses the precipice of your doorstep to shoot them, because the law is different in Canada. You're not allowed to strap on an iron and walk down the street and pick a fight with somebody, because you have to call the police. Other than that, there'd be armed conflict in the streets all the time. It would be mayhem.
>
> So it starts back in that house. And he doesn't really give you any reason why he leaves.
>
> …
>
> Did he have to protect himself from grievous bodily harm? No, because he didn't have to go down there. He fails self-defence before he even arrives. …
>
> Could have gone to his mom's, could have moved out, took $800 worth of crack, took his kids, whatever. There's lots more things he could have done.
>
> …
>
> The other one is he must believe on reasonable grounds that the force is necessary to prevent his own death or grievous bodily harm and otherwise couldn't preserve himself. Otherwise preserve himself. So we have the Kale Gabriel version of events, couldn't move out, "everyone thinks I'm a rat," all – you know, "I went down there anyways." And then the reasonable person, is a reasonable person going to leave the house with a gun and head for the OK Corral?

[35] In this Court, Mr. Gabriel acknowledges that the Crown was entitled to rebut the defence's submission that Gabriel's conduct was "reasonable". But, says Mr. Gabriel, the Crown may not misstate the law to the jury. The Crown's address said that the jury's analysis of reasonableness should end before Mr. Gabriel arrived at Blaze Up. That, in Mr. Gabriel's submission, was wrong in law. His counsel submits that the jury was entitled to consider the threat to Mr. Gabriel at Blaze Up immediately before the shooting. His appeal factum puts it this way:

> 69. … the primary thrust of its argument was that if the decision the Appellant made not to flee or call the police was not reasonable – not the act of a "reasonable person" – then his claim to self-defence failed at the very outset, before he even encountered the threat to his life at Blaze Up. The Crown's argument was, in essence, that this amounted to a legal defect in the claim of self-defence, not merely an item of evidence about the Appellant's attitude or state of mind as he confronted White.
>
> 70. The Crown's suggestion, if accepted, would doom self-defence before the jury could ever work through the required analysis. …
>
> 71. There is, however, no authority for the approach taken by the Crown to this question, either in the *Criminal Code* or the authorities on self-defence. The law on "retreat" under the pre-amendment ss. 34 and 35 of the *Code* does not suggest any requirement to have made a reasonable decision *before* [italics in factum] a threat arises. The analysis of whether the use of force was reasonable begins, in law, at the moment that an assault commences or is immediately apprehended. …

[36] Mr. Gabriel says that the trial judge's jury charge failed to correct the mistaken impression of law left by the Crown's closing address. He submits that is an appealable error.

[37] I respectfully disagree with Mr. Gabriel's characterization of the judge's jury charge.

[38] The judge instructed the jury to apply only the law contained in the judge's charge, notwithstanding any inconsistent suggestions in the addresses of counsel:

> … So you need to know that the only law that applies and that you should apply is what I tell you the law is. Counsel may have given you some sense of what the law is. The purpose of that was only to give you context for the argument that was being made. My instructions on the law are the only law that you should apply.

[39] On self-defence, the charge instructed that: (1) the Crown had the onus to disprove self-defence, and Mr. Gabriel did not have to prove anything; (2) it was not a credibility contest, and the issue was whether the jury was left with a reasonable doubt, in which event the defence of self-defence would succeed; and (3) the jury should consider both aspects of self-defence under the former ss. 34-35, depending on whether the jury found that Gabriel was, or was not the aggressor in the altercation with White at Blaze Up.

[40] On the issue in Mr. Gabriel's ground of appeal, the charge did not adopt the Crown's submission that Gabriel's conduct was unreasonable from the moment of his decision to bring a gun to Blaze Up. Rather, the charge explicitly instructed the

jury to consider the events immediately preceding, and up to the instant of the shooting in its assessment of the reasonableness of Gabriel's conduct. In particular, the judge recited and directed the jury to consider those events at Blaze Up that Mr. Gabriel's testimony had related as pertinent to his conduct. In these respects, the charge included:

> So you've heard now days of evidence, and it's my duty to review what I consider to be the important parts of the evidence and relate them to the issues which are yours to decide. …
>
> Decide whether here Kale Gabriel was or was not the aggressor. That tells you the questions you'll have to ask to determine self-defence. Consider all of the evidence. Mr. Gabriel said he wasn't looking for trouble. He just wanted to resolve the situation with a fist fight. Mr. Bundy and Mr. Sampson said that Kale Gabriel kicked Ryan White without provocation at all. Mr. Gabriel says he saw Mr. White reach to his side and, given his previous involvement with him and his comments seconds before about having a gun, he presumed reasonably that Ryan White had a gun. Once again, it isn't a contest between versions. It's about whether there's a reasonable doubt on the evidence.
>
> …
>
> Once you've decided which kind of self-defence you're dealing with, you should go through the various things that the Crown can prove to negative the defence of self-defence. Consider whether Kale Gabriel used force or further force against Ryan White because he reasonably feared that Ryan White would kill or seriously injure him. You'd have to consider Kale Gabriel's state of mind, and also, using your own common sense and experience, consider what a reasonable person would believe. You should consider what Kale Gabriel and Ryan White did or did not do, how they did it or did not do it, and what they said or did not say. You should look at their words and conduct before, at the time and after Kale Gabriel used the force against Ryan White.
>
> …
>
> Kale Gabriel's fear of death or serious injury must also be reasonable in the circumstances as he knew or honestly believed them to be. Would a reasonable person in those circumstances fear death or similar harm from Ryan White? …
>
> The evidence of the people who said they were there that night has to be considered. Again, it's not a credibility contest. The issue isn't whether you believe one version more than the other. It's whether the evidence raises a reasonable doubt. That reasonable doubt can come from Mr. Gabriel's evidence, from the evidence of any of the other witnesses or the exhibits, or maybe the product of all of them considered together.

On the question of whether Kale Gabriel reasonably feared that Ryan White would kill or seriously injure him, you heard what Mr. Gabriel had to say. You should consider their history and the more immediate circumstances. Kale Gabriel had a number of interactions with Ryan White which he said caused him to fear for his life enough to get a handgun.

…

Once he arrived at Blaze Up, the versions become quite different. Once again, it's not a question of which version you believe more. It's whether, after considering each version, there remains a reasonable doubt.

Mr. Gabriel testified that he got to the bottom of the – when he got to the bottom of the ramp, he could hear Ryan White on the phone with someone saying words to the effect of, "Come outside to Blaze Up, bring your thing." Mr. Gabriel said he believed that Ryan White was talking with his brother and asking him to come out with a gun. He testified that he asked why they were putting on masks. He said that Randall Sampson said something like, "Why don't you just fight?"

Someone moved and there was a clear path between Gabriel and White. Kale Gabriel testified that Ryan White was looking at him all the time. White said something like, "I'm not worried about you." Kale Gabriel says that he asked, if that was the case, why did Ryan White just call for a gun. He said that Ryan White told him that he wasn't calling for a gun, he had a gun. He said that he saw Ryan White reach for something and that's when he kicked him in the face to attempt to knock him out. Mr. Gabriel did not say that he saw a gun at that time or at any other point at Blaze Up.

…

You should consider how much or how little of what either Randall Sampson or Derelle Bundy had to say that you believe. At that point, consider whether Kale Gabriel was reasonably in fear of his life from Ryan White. Consider all of the evidence. Kale Gabriel says that Ryan White's reach to his side meant that he had to take some action because he believed he was reaching for a gun. He didn't reach for his own gun at the time.

…

Mr. Gabriel's evidence was that he felt Ryan White prying the gun loose from the waistband of his, Kale Gabriel's, jeans. As he felt it coming loose, he grabbed for it with his right hand to stop Ryan White from getting it. He got his hand on most of the handle. While they're struggling for the gun, it goes off. He says he never intended for it to go off.

…

So, once again, you should consider whether, in the course of this event, Kale Gabriel was in reasonable fear for his life. Consider his evidence and that of the other witnesses. Remember that the Crown has to prove beyond a reasonable

> doubt that he did not reasonably fear Ryan White would either kill or seriously injure him. …
>
> Consider whether Kale Gabriel used further force against Ryan White because he honestly and reasonably believed that it was necessary to save himself from death or serious harm. This issue also requires you to consider not only Kale Gabriel's state of mind when he used further force against Ryan White, but also what a reasonable person would believe in the circumstances.
>
> …
>
> … Look at their words and conduct before, at the time and after Kale Gabriel used that force against Ryan White. …
>
> The danger that Kale Gabriel was in or honestly and reasonably believed himself to be in does not have to be immediate. The immediacy or otherwise of it, however, is a factor for you to consider in assessing the honesty and the reasonableness of Kale Gabriel's belief. …
>
> Once again, if you decided that Kale Gabriel was the aggressor, then consider whether Kale Gabriel declined further conflict and retreated from it as much as feasible before he needed to save himself from death or serious harm. That requires you to consider what Kale Gabriel did to end the altercation before he needed to take action to save himself from being killed or seriously injured by Ryan White. …

[41] Before charging the jury, the judge provided counsel with a draft of the instructions. The judge invited and received comments from counsel. The defence made no complaint that the charge would leave the jury with the impression that self-defence would fail at the outset before the jury could consider the events at Blaze Up. After the Crown's summation, the defence neither objected to the Crown's submission on the point, nor requested a clarifying instruction from the judge.

[42] The jury charge did not, as Mr. Gabriel's factum puts it, leave the jury with the impression that Mr. Gabriel's decision to go to Blaze Up, armed with a gun, meant that self-defence "failed at the very outset" or was "doomed" before the jury could "ever work through the required analysis". To the contrary, the judge painstakingly instructed the jury to consider the events up to the moment of the shooting, and particularly Mr. Gabriel's testimony on those events in their assessment of Mr. Gabriel's belief and the reasonableness of his belief.

[43] Mr. Gabriel cites *R. v. Hope*, 2016 ONCA 623. Justice Epstein for the Court said:

> [65] However, the claim of self-defence will be fairly put to the jury where the jury instructions, read as a whole, make it clear that the jury's task is to determine whether, **at the time the accused used force** against the victim, the accused reasonably believed he could not otherwise preserve himself from death or grievous bodily harm: *R. v. Stewart*, 2014 ONCA 70, 306 C.C.C. (3d) 269, at para. 48. [emphasis added]

[44] Also apt is the comment of Justice Epstein for the Court in *R. v. Stewart*, 2014 ONCA 70:

> [48] In my view, the jury charge, read as a whole, fairly put the appellant's claim of self-defence to the jury. The trial judge at no point instructed the jury that the appellant could not claim self-defence if he failed to take advantage of an opportunity to avoid the height of the confrontation at an earlier stage of his dealings with Mr. Taylor. The trial judge made it clear – the jury's task was to consider whether, **at the time the appellant pulled the trigger**, he had no choice but to shoot and kill Mr. Taylor. [emphasis added]

[45] In Mr. Gabriel's case, the judge instructed the jury to consider Mr. Gabriel's reasonable belief at the time of the shooting.

[46] In *Horne v. Queen Elizabeth II Health Sciences Centre*, 2018 NSCA 20, para. 62, this Court canvassed the authorities, criminal and civil, on appellate review of jury charges and summarized the governing principles. These principles, as they pertain to Mr. Gabriel's case, include: (1) the appeal court should assess whether the jury was equipped to understand fully the defence of self-defence; (2) the appeal court should review the charge as a whole to appraise the charge's general effect respecting self-defence, focusing on substance over form; and (3) the appeal court's approach should be functional, meaning the court is to consider how the instructions on self-defence responded to the trial's course of events that include the positions taken by counsel.

[47] In Mr. Gabriel's case, the judge's instructions on self-defence satisfied the standards and were not in error. I would dismiss this ground of appeal.

Second Issue – Effect on Self-Defence of Mr. Gabriel's Testimony

[48] Mr. Gabriel testified "I know 100 percent I didn't pull that trigger that night" (above, para. 23). On cross-examination, he said:

> Q. Okay. But, in the end, this is just an accident?
>
> A. Yes, it was an accident, sir.

> Q. Okay.
>
> A. But the reason why I possessed that gun was because I was afeared [*sic*] for my life.
>
> Q. I understand that. Let's get to the accident. So an accident's just an accident. You didn't mean for it to happen?
>
> A. No, I did not, sir.

[49] In *Cinous*, paras. 93-94, the majority said that self-defence required that the accused believe force was necessary to preserve himself from harm.

[50] The Crown's closing address asked the jury to find that, given Mr. Gabriel's testimony that he did not pull the trigger and the shooting was accidental, he did not shoot with the belief that force was necessary to protect himself from harm. So self-defence would fail. The Crown's summation included:

> Well, at least in our view, there is no evidence from Kale Gabriel, there's no evidence, because he says it's an accident, there's no evidence that he intended to kill Ryan White to preserve himself. …
>
> Once again, and I can't say it enough, in order to have self-defence, in our submission, you have to find he intentionally pulled the trigger in order to preserve himself and he had no other options available to him. That's the watered down version. His Lordship, of course, will direct specific instruction on that, and you should follow his instruction if it at all is different from what I am telling you.
>
> …
>
> There's no evidence from the accused that he needed to defend himself from grievous bodily harm. As a matter of fact, his evidence is, one, it was an accident, but, two, he never even got any shots in. You kind of need that in order to get into self-defence, even right up to the point of shooting.

[51] In this Court, Mr. Gabriel submits that the Crown's premise was legally flawed: *i.e.* the jury was entitled to reject Mr. Gabriel's version, find that Gabriel intended to shoot, but still accept that Gabriel believed the shooting was necessary for his preservation. Mr. Gabriel's appeal factum says:

> 81. This was not a fair or legally sound approach to the case. The jury was entitled to decide that the Appellant *was* fearful that White would shoot him and *did* respond with an intentional shot of his own, even though he had denied that the shot was intended [italics in factum]. It is a truism that they could believe all, some or none of any witness's testimony, including that of the accused. …
>
> 82. In the face of the Crown's suggestion that self-defence faced an insuperable legal hurdle at the outset, based on the absence of any testimony in support of its

> key element, the trial judge was under an obligation to clarify the route to acquittal, and correct the misimpression left by the Crown's strong language, which suggested that the defence was not only disproved but illegitimate. …

[52] Mr. Gabriel submits that the trial judge's charge failed to clarify the point, and the omission is an appealable mis-direction.

[53] I respectfully disagree that the jury charge was deficient.

[54] The charge did not suggest that Mr. Gabriel's denial of an intentional shooting meant that self-defence faced an "insuperable legal hurdle". To the contrary, the judge explicitly instructed the jury that, whether the shooting was intentional or unintentional, they should consider whether the Crown had satisfied its onus to disprove one of the essential elements of self-defence. In this respect, the charge, accompanied by a written decision tree for the jury, included:

> … So if you conclude that the Crown has proven that Kale Gabriel caused the death of Ryan White, you should then determine whether Kale Gabriel intended to fire the gun that killed Ryan White. If he did, if that's been proven beyond a reasonable doubt, you should consider whether he acted in self-defence in firing the gun. If, on the other hand, he didn't intend to fire the gun, then consider whether self-defence applies to the actions that were involved leading up to and including the struggle for the gun.
>
> …
>
> If the Crown does not disprove self-defence, Kale Gabriel is not guilty of anything. If you find that the Crown has not proven that Kale Gabriel intended to shoot Ryan White and that he didn't intend to fire the gun at all, you'll consider self-defence in that context. If the Crown has not disproven self-defence, he's not guilty. …
>
> If the Crown has proven beyond a reasonable doubt that the gun was fired intentionally, on the left-hand side of the decision tree, and has proven that it wasn't fired in self-defence, it then has to prove beyond a reasonable doubt that Kale Gabriel intended to kill Ryan White. …
>
> So to summarize all of that and to write out what those requirements are for self-defence, I've provided another document for you, and it's just headed "Questions," …. And this just follows along a sort of yes/no logic. Answer each one. …
>
> The next question, "Did Kale Gabriel intend to fire the gun that killed Ryan White?" As I mentioned before, that's the next part. If the answer is "No", you'd go to question 3.

> Question 3 corresponds with the right-hand side of the decision tree where the Crown hasn't proven beyond a reasonable doubt that he intended to pull the trigger, to shoot, to fire the gun. If that's the case, if the Crown has not proven beyond a reasonable doubt that he intended to fire the gun, then you have to deal with self-defence.
>
> But before you do that, there's another question you have to ask. "Did Kale Gabriel start the fight with Ryan White at Blaze Up?" Who's the one who started the fight? If the answer is yes, that he did, if the Crown has proven beyond a reasonable doubt that he did, then you have to ask yourself the questions for self-defence.
>
> "Has the Crown proven that Kale Gabriel did not reasonably fear that Ryan White would kill or seriously injure him, or" – and it's important to remember the "or", it can prove either one – "that Kale Gabriel did not have an honest and reasonable belief that the force used was necessary to save himself from serious death or injury?" If the Crown hasn't prove [*sic*] one of those things, self-defence applies and he's not guilty. …
>
> If the answer to the question "Did Kale Gabriel start the fight with Ryan White at Blaze Up?" is "No," Kale Gabriel didn't start it, then ask yourself the questions of whether the Crown has proven that he didn't reasonably fear Ryan White would kill or seriously injure him; that Kale Gabriel did not have an honest and reasonable belief that the force used was necessary to save himself from death or serious injury; or that Kale Gabriel killed Ryan White before he needed to save himself from death or serious injury; or that Kale Gabriel did not decline further conflict or retreat from it as soon as feasible before he needed to save himself from death or serious injury. If the Crown hasn't proven any of those things, he's not guilty. …
>
> Now, take a look at question number 4. "Did Kale Gabriel act in self-defence in killing Ryan White?" Go to that question if you answered "Yes" to "Did he intend to fire the gun? Question 4 corresponds to the left-hand side of the decision tree. So question 3 is the right-hand side of the decision tree, question 4 is the left-hand side of the decision tree. And you would go through essentially those same questions again. I'm not going to repeat them because they're written there, but it's the same process. …

[55] The judge's draft charge was given to counsel for review before the judge delivered it. Counsel for the defence said initially he was "happy" with the treatment of intent and accident in the draft instructions. After defence counsel had an opportunity for further review of the draft, he expressed no concern on the matter in the pre-charge discussion between counsel and the trial judge.

[56] The jury charge left the factual issues of accident and intent for the jury to assess from the evidence. The charge, with questions 3 and 4 of the written

decision tree, properly instructed that, whether the shooting was intentional or accidental, the jury should decide whether the Crown had disproven an essential element of self-defence and, if not, Mr. Gabriel should be acquitted. In their deliberations, the jury may, or may not have assessed how Mr. Gabriel's testimony squared with the prerequisites for self-defence. If they did, that was a factual task for the jury. Any finding on the point was not the outcome of a misdirection in the jury charge.

[57] The jury charge contains no error. I would dismiss this ground of appeal.

Third Issue – Baxter Instruction

[58] Mr. Gabriel submits that the jury charge was deficient by failing to direct that someone defending himself from attack "cannot be expected to weigh to a nicety, the exact measure of necessary defensive action": *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (O.C.A.), at page 111; see also *R. v. Hebert*, [1996] 2 S.C.R. 272, at para. 18, per Cory J. for the Court. Mr. Gabriel's factum puts it this way:

> 85. … The jury did not receive, directly or by implication, the crucial reminder that reflection on fast-moving and frightening events in a calm courtroom is not comparable to making life and death decisions in a matter of seconds during a fight.

[59] In *R. v. D.S.*, 2017 ONCA 38, Justice Watt for the Court summarized the law and its application:

> 117 The *Baxter* instruction relates to the reasonableness of an accused's belief of the necessity of killing or very seriously injuring a victim as the only means of self-preservation under former s. 34(2)(b).
>
> 118 Despite its humble origins, a *Baxter* instruction seems to have achieved near-canonical status as a component of a proper jury instruction under former s. 34(2). Our court has held it to be an error in law to omit the instruction: *R. v. Scotney*, 2011 ONCA 251, 277 C.C.C. (3d) 186, at para. 33.
>
> 119 Yet not every omission of a *Baxter* instruction is fatal to the validity of a conviction recorded without its inclusion. The authorities fail to reveal a single case in which the omission, on its own, has been held sufficient to warrant appellate reversal. Each case depends on its own facts: The absence of a request for the instruction or an objection to its omission: The thoroughness of the judge's review of the relevant evidence: The emphasis laid on the subjective component of the excessive force element in former s. 34(2)(b): *Scotney*, at paras. 34-36.

The Principles Applied

120 For several reasons, I am not persuaded that this omission warrants appellate reversal in this case.

121 First, the prevalent current authority resists appellate reversal on this ground alone. The industry of counsel yielded that no precedent where, standing alone, the absence of a *Baxter* instruction was fatal to the validity of a conviction.

122 Second, the omission occurred in connection with an instruction on an issue that was otherwise faultless, emphasized the subjective component and recited the material aspects of the evidence relevant to an informed decision on the issue.

123 Third, the subject matter of the *Baxter* instruction, as the Privy Council observed in *Palmer*, is something an untutored jury is likely to consider. If there has been an attack such that self-defence is reasonably necessary, a jury is likely to recognize that a person defending himself cannot be expected to weigh to a nicety the exact measure of his necessary defensive action. …

124 Fourth, it is worthy of reminder that the excessive force issue framed by former s. 34(2)(b) is not determined solely on the basis of subjective considerations. It involves objective considerations as well. Reasonableness depicts a range of responses, not a single right answer. This hybrid standard, coupled with not only the absence of any onus on the accused to establish the defence, but rather an obligation [on] the Crown to disprove beyond a reasonable doubt its availability, renders the omission of little moment in the final analysis.

125 Finally, we should not lose sight of the controverted issue that lay at the centre of this case. That issue did not involve the nature of the appellant's response. The fundamental controversy was whether Barton assaulted the appellant in the first place. In the absence of an unlawful assault, actual or reasonably apprehended, no measure of self-defence was warranted. On that threshold decision, the omitted *Baxter* instruction had nothing to say.

126 I would not give effect to this ground of appeal … .

[60] I will apply a similarly textured analysis to Mr. Gabriel's submission.

- The trial judge's charge repeatedly told the jury that it was not for Mr. Gabriel to prove self-defence, but for the Crown to disprove at least one of its essential elements beyond a reasonable doubt.

- In particular, the jury was told clearly that the Crown had to disprove beyond a reasonable doubt that Mr. Gabriel had an honest and reasonable belief that the force he used was necessary to save himself from death or serious injury.

- This was the hybrid standard – honest and reasonable belief – mentioned by Justice Watt, para. 124. The aspect of reasonableness involved a range of responses, to be assessed in the circumstances that faced Mr. Gabriel.

- For the jury's assessment of that range, the charge told the jury to apply their "common sense" to the evidence of what Gabriel did at the time of the shooting. The charge directed the jury to consider, in particular, Gabriel's explanations of what Gabriel did and why. These explanations, itemized by the charge, included: (1) Gabriel's version of White's threatening behaviour before the incident at Blaze Up, and his reaction to the threats; (2) Gabriel's testimony that he feared White had a gun at Blaze Up; (3) Gabriel's testimony that, before the kick to the head, he saw White reach for something that Gabriel thought was a gun; and (4) Gabriel's testimony that, during the scuffle, White was reaching for Gabriel's gun.

  These were the details that a responsive jury would be expected to weigh after a *Baxter* instruction. The charge took the jury to them directly.

- The pre-eminent issue for the jury was not whether, in the heat of the moment, Gabriel failed to weigh the niceties before he decided to fire the gun. Mr. Gabriel testified "I know 100 percent I didn't pull that trigger that night", that "[m]y hand was on the handle", and the gun fired by "accident" after White appeared to reach for it in the scuffle. Randall Sampson, on the other hand, testified that Gabriel "pulled his hand out of his right pocket, lifted it straight up and the gun went off". The critical issue was whether there was reasonable doubt that the shooting was Gabriel's calculated act.

  A *Baxter* instruction would not affect the jury's assessment of the divergent testimony of Gabriel and Sampson on whether Gabriel aimed and fired the gun.

- Neither party asked for a *Baxter* instruction. After receipt of the draft instructions, neither counsel complained about its absence or requested one.

[61] There is no error in the jury charge. I would dismiss this ground of appeal.

Fourth Issue – Vetrovec Warning

[62] Randall Sampson's testimony was the key evidence supporting the allegation that Gabriel had aimed and fired the gun.

[63] Mr. Gabriel submits the charge should have directed that reliance on Sampson's testimony was "dangerous" unless confirmed by other evidence, *i.e.* "a clear and sharp warning to attract the attention of the juror[s] to the risks of adopting, without more, the evidence of the witness": *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at p. 831.

[64] As Mr. Gabriel points out, Sampson had a criminal record, was a trafficking associate of the deceased and had displayed ill will toward Gabriel. Sampson's alliance with White and grudge toward Gabriel was evident from the testimony. Sampson even testified that, after White was shot, he briefly considered shooting Gabriel to vindicate his friend. Mr. Sampson had been paid relocation money, but had no reward agreement or payment contingent on Mr. Gabriel's conviction. Sampson was neither an accomplice to the murder, nor seeking to avoid prosecution.

[65] The jury charge, delivered on February 16, 2016, cautioned the jury about Sampson's testimony in the following terms:

> You heard from a number of witnesses who have criminal records. Mr. Bundy, Mr. Sampson and Mr. Gabriel each have criminal records. A criminal record is only one of many considerations in assessing the reliability or believability of evidence. You can consider that when deciding how much or how little of their testimony you believe. Some convictions, like those involving dishonesty, may be more significant than others. Just because a person has a criminal record doesn't mean he's not telling the truth. It is, once again, one of many factors you should consider.
>
> …
>
> Randall Sampson was also assisted financially with getting out of the Halifax area. He received payments of $20,000, in addition to having rent and other expenses paid for him. That's different from the reward program. He's not received money from the reward program, though he said he called about the reward after giving his first statement to police. The fact that he has received financial help in relocating is a fact you may consider in assessing his evidence. You can also consider the fact that he made a call to the reward program in considering how much or how little of his evidence you believe.
>
> …
>
> I'll comment briefly on the evidence of Derelle Bundy and Randall Sampson. I've already mentioned how you can consider their criminal records and Mr. Sampson's relocation assistance and his call about the reward program. **As both counsel have noted, you should be very cautious about accepting their evidence**. [bolding added] You should also consider the extent to which their

> evidence was consistent. Did they both say generally the same thing? And you should consider how their evidence was different. Were those differences important or just not significant or less significant? I'll outline some of the discrepancies. You can take those into account when you're determining how much or how little you rely on their evidence.
>
> …
>
> … The evidence of Randall Sampson was that Kale Gabriel took a gun from his pocket and shot Ryan White. The evidence of Derelle Bundy was that he saw the struggle but didn't see the gun until Kale Gabriel was putting it back in his pocket.
>
> Kale Gabriel testified that the two young men were involved in a struggle. He felt Ryan White reach for the gun that he had in the waistband of his pants. He reached for the gun with his hand to prevent Ryan White from getting it. He says at that point the gun went off.
>
> In assessing whether the firearm went off without Mr. Gabriel intending it to go off, you should consider all of the evidence. Consider how much or how little you believe of what each witness said, and remember, of course, that it's not a matter of deciding which version you believe more. Mr. Gabriel does not have to prove that it was an accident. He need only raise a reasonable doubt. It's not whether you believe his version or someone else's version more. It's whether any of that evidence raises a reasonable doubt.
>
> Mr. Gabriel said that his revolver was a .357 loaded with .38 special bullets. What was unusual about it was that it had no trigger guard. That's significant. There was nothing preventing the trigger from being pulled and the gun fired by someone or something bumping up against it. That would make it more likely for the gun to fire by having the trigger moved accidentally.

[66] Five days before he delivered the jury charge, the judge provided counsel with a draft and invited comment. The next day, counsel and the judge discussed it. Defence counsel offered no suggestion about a *Vetrovec* warning. The judge charged the jury four days later. With one exception, the charge generally repeated the passages from the draft respecting the testimony of Randall Sampson. The exception was that the actual charge, delivered with the benefit of counsel's closing addresses, added the warning, bolded above:

> As both counsel have noted, you should be very cautious about accepting their evidence.

"[T]heir evidence" referred to the testimony of Derelle Bundy and Randall Sampson.

[67] The principles that govern appellate review of a *Vetrovec* caution, its content or its absence, appear from the following authorities.

[68] In *R. v. Brass*, 2007 SKCA 94, Justice Jackson for the Court said:

> 44 As will be seen from the comments in *Brooks* (*R. v. Brooks*, [2000] 1 S.C.R. 237), there is no particular magic in the use of the words "danger" or "dangerous". Indeed, the courts appear to be unanimous that the form of the *Vetrovec* warning is left to the discretion of the trial judge, subject to appellate oversight in the determination of the appropriate limits. [citations omitted]

[69] In *R. v. Khela*, [2009] 1 S.C.R. 104, Justice Fish for the majority said:

> [13] The crafting of a caution appropriate to the circumstances of the case is best left to the judge who has conducted the trial. No particular set of words is mandatory. In evaluating its adequacy, appellate courts will focus on the content of the instruction and not on its form. Intervention on appeal will not be warranted unless a cautionary instruction should have been given but was not, or the cautionary instruction that was given failed to serve its intended purpose.

[70] In *R. v. G.G.T.*, 2009 BCCA 98, Justice Frankel for the Court said:

> [34] There is nothing in *Khela* that makes it mandatory for trial judges to use the word "dangerous", or any particular expression, in giving a *Vetrovec* warning. Indeed, as already mentioned, *Khela* says quite the opposite; paras. 13, 14. Further, it is noteworthy that *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 (Ont. C.A.), is one of the cases cited with approval in *Khela*. In that case, the Court of Appeal for Ontario stated, "there is, however, no particular magic in the use of the words 'danger' or 'dangerous' ": para. 86. See also: *R. v. Brown* (2005), 196 C.C.C. (3d) 140 (Ont. C.A.) at para. 11.

[71] In *R. v. Rafferty*, 2016 ONCA 816, Justice Huscroft for the Court said:

> [30] The appellant submits that responsibility to give a *Vetrovec* warning lies with the trial judge regardless of the position of the parties, and so it does. However, the decision to give the warning is discretionary in nature, as is the content of the warning itself, and a trial judge's exercise of this discretion is entitled to deference: *R. v. Brooks*, 2000 SCC 11, [2000] 1 S.C.R. 237, at paras. 2 and 18; *R. v. A.W.B.*, 2015 ONCA 185; [2015] O.J. No. 1407, at para. 40.

[72] In *R. v. Moore*, 2017 ONCA 947, Justice Trotter for the Court said:

> 20 Whether the evidence of a Crown witness should be the subject of a *Vetrovec* caution is in the discretion of the trial judge: see *R. v. Carroll*, 2014 ONCA 2, 304

> C.C.C. (3d) 252, at para. 60, leave to appeal refused, [2014] S.C.C.A. No. 193. The trial judge is best positioned to balance the need for a caution, having regard to the evidence, the manner in which it has unfolded in the course of the trial, and the ability of the jury to assess the credibility of the witnesses and the reliability of their evidence. For this reason, Watt J.A. observed in *Carroll*, at para. 67: "[A]s a general rule, a trial judge's discretion whether to include a *Vetrovec* caution in final instructions is to be accorded wide latitude and substantial deference on appellate review".

[73] In *Khela*, para. 56, Justice Fish said that a proper *Vetrovec* caution would include a direction on "the types of evidence in which [the jury] might find confirmation" of the cautioned evidence. Consequently, "*Vetrovec* cautions do not always enure to the benefit of an accused": *R. v. Carroll*, 2014 ONCA 2, para. 79, per Watt J.A. for the Court, leave denied [2014] S.C.C.A. No. 193 (QL). In Mr. Gabriel's case, a fuller *Vetrovec* warning would have been accompanied by a recitation to the jury of evidence that tended to confirm Sampson's version.

[74] Having read the draft jury charge, Mr. Gabriel's counsel did not request a fuller *Vetrovec* caution. That fact, coupled with the risk to the accused from a recitation of confirmatory evidence, assists the appeal court to infer that the trial judge's approach was appropriate from the perspective of the accused: *Moore*, paras. 21-26 and authorities cited; *Rafferty*, para. 29; *R. v. Willier*, 2013 BCCA 214, paras. 25-27; *R. v. Harriott* (2002), 161 C.C.C. (3d) 481 (O.C.A.), paras. 39-41, appeal dismissed [2003] 1 S.C.R. 39, para. 1. Similarly, in *R. v. Rajbhandari*, 2017 ABCA 251, the *per curiam* reasons said:

> 47 Speaking generally, the Supreme Court held that "[t]he failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation": *R. v. Daley*, [2007] 3 S.C.R. 523 at para. 58; see also *R. v. Jacquard*, [1977] 1 S.C.R. 314 at para. 38. To this, the Ontario Court of Appeal recently has observed that this "is all the more so when counsel have received a copy of the proposed charge in advance of delivery and make no complaint about the completeness of the instruction": *R. v. Salah*, 2015 ONCA 23 at para 112, 319 CCC (3d) 373.

[75] Mr. Gabriel had the benefit of the judge's warning that the jury should be "very cautious about accepting" Sampson's evidence. Then the judge pointed out that the absence of a trigger guard "would make it more likely for the gun to fire by having the trigger moved accidentally", *i.e.* tending to confirm Gabriel's version. But the judge did not label items of evidence that tended to confirm Sampson's version. The comments of Justice Moldaver for the Court in *R. v. Lewis*, 2009 ONCA 874, are apt:

> [102] In the circumstances, it is apparent that defence counsel made a conscious, and in my view, reasonable decision not to ask for a *Vetrovec* instruction. He effectively got the best of both worlds. The jury was alerted to the pitfalls in Mazur's evidence and warned of the need to proceed with care and caution. They were not alerted to the many items of evidence that were capable of confirming Mazur's evidence, which would have been the case had a *Vetrovec* warning been given.

[76] Mr. Gabriel's defence counsel was in the position to assess the pros and cons of a *Vetrovec* warning. He chose not to request one. The trial judge nonetheless added a caution about Sampson's evidence. The jury charge was balanced and fair to Mr. Gabriel. The omission of a fuller *Vetrovec* warning was not an error. I would dismiss this ground of appeal.

Conclusion

[77] I would dismiss the appeal.

Fichaud, J.A.

Concurred: MacDonald, C.J.N.S.

Saunders, J.A.