SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Melvin, 2015 NSSC 13

Date: 20150115
Docket: CRH No. 399220
Registry: Halifax

Between:

Her Majesty the Queen

v.

Corey Patrick Melvin

Judge: The Honourable Justice James L. Chipman

Heard: January 9, 2015, in Halifax, Nova Scotia

Counsel: Eric R. Woodburn, for the Crown
Patrick K. MacEwen, for Corey Patrick Melvin

By the Court:

Introduction

[1] The accused applies for a Stay of Proceedings pursuant to ss. 11(b) and 24 of the *Canadian Charter of Rights and Freedoms*. Mr. Melvin asserts there has been excessive delay between the laying of the charge (September 7, 2011) and the now anticipated conclusion of the trial (February 23, 2015). I say "now" because there was an earlier trial which was declared a mistrial on the ninth day (December 5, 2013).

[2] Mr. Melvin was charged with three counts of assault contrary to s. 266, three counts of assault with a weapon contrary to s. 267(a), possession of a weapon dangerous to the public peace contrary to s. 88(1) and aggravated assault, contrary to s. 268. The time between the laying of the charges and the anticipated conclusion of the trial next month will be three years and 5.5 months.

[3] The substance of the allegations relate to an altercation which occurred in downtown Halifax in the early morning hours of August 16, 2011. Mr. Melvin was arrested shortly after the incident and held in custody at that time. Following the accused's first appearance in Provincial Court on September 7, 2011, he was remanded into custody. While in custody, Mr. Melvin retained criminal defence lawyer Elizabeth Buckle. Ms. Buckle first appeared with Mr. Melvin in Halifax Provincial Court on September 26, 2011 to set the matter down for a show-cause hearing and a revocation hearing.

[4] Prior to this application Mr. Melvin's last time in court in relation to scheduling this matter was in the Supreme Court of Nova Scotia on February 6, 2014. During this Crownside appearance, his new criminal defence lawyer, Patrick MacEwen, first appeared with him and the new trial dates were set. By this time, Ms. Buckle no longer represented Mr. Melvin as the December 5, 2013 mistrial had been declared on account of Ms. Buckle determining she was in a conflict of interest.

[5] The Crown acknowledges the overall time period of close to three and one half years requires the Court's scrutiny. Nevertheless, they take the position that when the reasons for the delays are accounted for, the overall time period shrinks such that it fits well within the bounds of what is acceptable; i.e., 14 to 18 months. As part of their argument, the Crown notes that this is not a case of 11th hour

disclosure or the like. Rather, they assert this was a relatively routine prosecution that was in trial (without any delay allegations) in the late fall of 2013. The Crown notes the matter was subsequently rescheduled for early this year and there were no further indications of delay until the May 2, 2014 pre-trial conference when the defence raised for the first time the possibility of making the within application.

[6] The Notice of *Charter* Application was filed August 12, 2014 and the parties thereafter provided extensive briefs addressing the relevant law and applicable authorities. Further, the Crown submitted a four page chart summarizing all of the Court appearances ("Appendix "A"") and both sides provided their analysis of how the Court should consider and count the various court appearances. Oral argument was heard January 9, 2015. No *viva voce* evidence was led concerning prejudice to the accused in respect of the delay.

Law

[7] The authorities concerning s. 11(b) were extensively canvassed by counsel in their written and oral submissions. By correspondence dated January 7, 2015, Mr. MacEwen provided a copy of the (unofficial) transcript in respect of Justice Murphy's November 18, 2014 oral decision in *R. v. Hartlen*, noting the defence would be relying on the decision. In the time since the hearing the decision has been released, *R. v. Hartlen*, 2014 NSSC 456. I find Murphy J's statement of law to be a helpful summary, which I will now reproduce:

> [3] The authorities with respect to *s.11(b)* have been thoroughly canvassed by counsel, and include three leading Supreme Court of Canada decisions: *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.FR. 771; *R. v. Godin* 2009 SCC 26. Those cases direct that the Court address the rights of the accused protected by *s.11(b)* of the *Charter*, and also society's interest in bringing cases to trial. The authorities indicate that the Court must also consider:
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> 1) the circumstances of the delay including
>
> a) length of the delay,
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> b) any waiver by an accused,
>
> c) the reasons for the delay, which are categorized by the courts into

i) inherent time requirements of the case,

ii) the actions of the accused,

iii) the actions of the crown,

iv) limits on institutional resources,

v) other reasons; and

2) prejudice to the accused.

[4] The authorities have established guidelines with respect to time passage; however, I emphasize and caution that courts should not "lose sight of the forest for the trees." Assessing delay is not just a mathematical calculation; nevertheless, time which passes is attributed to either that which "counts", if I can put it that way, in calculating whether there has been a delay which affects the accused's rights, or time which does not activate *Charter s.11(b)* and *s.24*. Those calculations and attributions must be made, although there is leeway to assess particular circumstances and the situation overall.

[5] The Guidelines from the Supreme Court in *Morin* and *Godin* indicate a court should become concerned about delay when limits on institutional resources and crown actions, and in some cases other events, result in passages of time exceeding 8 to 10 months in Provincial Court up to the preliminary hearing stage before committal for trial, and 6 to 8 months in Supreme Court after committal. When delay extends beyond that range, when time lapses which "count" exceed a total of 14 to 18 months, a flag is raised, and delay becomes a factor which the court should examine to determine if an accused's *s.11(b)* rights are infringed.

[6] Nova Scotia Courts have considered *s.11(b)* and the Supreme Court of Canada decisions, and follow that Court's analysis. Our Court of Appeal in 2011 *R. v. REW* 2011 NSCA 18, upholding a trial court decision, confirmed that systemic or institutional time lapses from charge to trial should not be in a range greater than about 18 months; after that 18-month period, some investigation is warranted.

> No one disputes that inquiry is warranted in this case, where the total "charge to trial" time is almost 3.5 years.
>
> [7] This Court has recently addressed the issue, assessed time periods, and considered in particular circumstances prejudice to an accused and society's interest in bringing persons to trial. Three decisions which I find particularly helpful examine delay in context, and provide much more than a mathematical calculation: *R. v. Kazi* 2013 NSS 96; *R. v. Burns* 2014 NSSC 317, and *R. v. Clare* 2014 NSSC 388.
>
> [8] Some lapses of time as a case proceeds are inevitable; reasonable periods must be allowed for normal progression in the system – these reasonable time requirements are deemed "inherent", are treated as "neutral", and do not "count" when addressing *Charter s.11(b)* rights.

[8] With the above legal principles in mind, I will address the categorization of delay in this case.

Provincial Court

[9] The case spent a total of 9 months and 20 days in Provincial Court. This amount of time fits within the guideline of 8 to 10 months proscribed for Nova Scotia Provincial Court matters as set out by Beveridge JA in *R. v. W. (R.E.)* 2011 NSCA 18 at para 48. Below, I am reproducing a summary of the nine Provincial Court appearances, as adapted from "Appendix A".

Appearance Date (D/M/Y)	Note	Time to next Appearance
7/9/2011	**Charges are laid.**	**19 days**
26/09/2011	Ms. Buckle appearing. Crown seeking to revoke bail on new information. Matter is set over for a bail hearing on October 13th, 2011. Matter may or may not proceed depending on other matters set for that date.	**17 days**
13/10/2011	Scheduled for show cause hearing (no transcript provided).	**11 days**

24/10/2011	Show cause decision hearing	**1 month, 11 days**
5/12/2011	Ms. Buckle appearing. Seeks an adjournment for election. Waiting on disclosure and continuing discussion with the Crown. Asks to set over to 19/12/2011.	**14 days**
19/12/2011	Ms. Buckle appearing. Waiting on disclosure before making election and setting PI dates. Defence proposes a date in January in hopes that DNA evidence is ready by that time. Crown consents to a variation in Mr. Melvin's recognizance conditions with respect to the address Mr. Melvin must reside at. Also removes no contact conditions for Robert Cox & Natalie Digiotino. Also removes the condition that Mr. Melvin not associate with anyone with a criminal record. House arrest is also changed to curfew of 10:00pm to 6:00am with an exception for medical emergencies. Election set over to January 23, 2012.	**1 month, 4 days**
23/01/2012	Ms. Buckle appearing. Informs the court that she recently received disclosure and needs time to review it with her client. Asks for an adjournment to February 28, 2012.	**1 month, 5 days**
28/02/2012	Ms. Buckle appearing. Defence elects Supreme Court with Judge & Jury. Also request a preliminary inquiry of 1/2 to 1 full day. There is some discussion on the available dates for the prelim. The first date proposed is June 15, 2012. The Crown is unavailable for this date. Both sides are agreeable to June 26, 2012. On whether the date is suitable, Ms. Buckle states "That's fine".	**4 months**
27/06/2012	Preliminary Inquiry held (no transcript provided).	**8 days**

[10] I will now review the passages of time between each of the Provincial Court appearances and categorize them as being either inherent (or neutral) or being the responsibility of the Crown or Defence.

[11] First, there is the 19 days between the time the charges are laid (September 7, 2011) and the next court appearance on September 26. The Crown and Defence generally agree that such a passage of time should be considered inherent. In this case, however, Mr. Melvin argues that because too much time passed from the altercation (August 16, 2011) until the charges were laid, the 19 day delay should fall to the Crown. While I agree the passage of time of nearly three weeks is on the high side, I do not think it is so lengthy such that I should ascribe Crown delay.

[12] Next, I will consider the 17 days between the appearances of September 26 and October 13. The Crown and Defence agree, as I find, this delay should be classified as inherent/neutral.

[13] The next time in question is 11 days; i.e., between October 13 and 24. The Crown submits that this time period is part of the intake process and falls to inherent/neutral. The Defence agrees that this part of the intake process should generally be considered neutral. Nevertheless, in these circumstances, Mr. Melvin says 11 days is "somewhat excessive" such that it is institutional delay which should be held against the Crown. In my view, holding the bail decision over for 11 days is not an inordinate amount of time and the time period should therefore be classified as inherent/neutral.

[14] For the next period of time in question – the one month and 11 days between October 24 and December 5 – the Crown submits that bail proceedings are clearly part of the intake process and thus the time following this appearance should continue to be considered inherent/neutral. The accused takes issue with this characterization, noting Mr. Melvin is ultimately granted bail. Considering the context of this being part of the intake process and the time in question being just over 40 days, I see no reason why this time period should be classified as anything other than inherent/neutral.

[15] When Ms. Buckle appears on December 5, she seeks an adjournment before making an election on behalf of her client because she does not have disclosure. The Defence argues, and I agree, that the 14 days delay until the next appearance should be ascribed to the Crown. Although the Crown attempts to argue that Ms. Buckle's words amount to waiver, I respectfully disagree. Having reviewed the transcript, it is clear that Defence counsel makes it clear, "… there's some important disclosure that remains outstanding." Ms. Buckle then agrees with the next day offered by the Court; i.e., December 19.

[16] I have also reviewed the transcript for December 19 and find the dialogue consistent with what took place on December 5. Once again, the Defence is still waiting on disclosure. Accordingly, I find the delay of slightly in excess of one month until the next court appearance to fall to the Crown.

[17] Next, I must consider the delay between January 23, 2012 and February 28, which comprises one month and four days. The Crown argues this period of time should be attributable to another Defence waiver. The accused takes a contrary position; albeit acknowledging that time should be split. In my view, dividing the time in half (i.e., 18 of 36 days for Crown delay and the same amount of time for Defence delay) is reasonable. In this regard, Defence counsel has just received the

disclosure and given what it consists of (a DNA report) a period of 2.5 weeks would seem appropriate to view the disclosure.

[18] On February 28 Defence counsel appears and elects trial by judge and jury with a preliminary inquiry. The first date the Court offers is June 15, 2012 for the preliminary inquiry. When the prosecutor states he is unavailable for that date, the Court proposes June 26. Both Crown and Defence agree the date is "fine". The Crown acknowledges that because they did not agree to the first offered date, they should "wear" 11 days of the delay. As for the rest of the time (3 months and 18 days), the Crown characterizes this as inherent/neutral because they maintain the Defence has consented to the delay with waiver.

[19] The Defence agrees with the 11 days ascribed to the Crown but it adds that the remaining time should also fall to the Crown as the delay should be characterized as institutional without a Defence waiver.

[20] The transcript in question comprises two pages. Once the Crown says he is unavailable for June 15, Judge Digby offers June 26. This is met with the reply from the prosecutor, "That's fine with the Crown." The next and final words on the transcript are from Ms. Buckle who states, "That's fine."

[21] In considering waiver in this instance and throughout the matter, I have relied on Supreme Court of Canada authority. Waiver must be clear and unequivocal with full knowledge of the rights protected under s. 11(b) (see *R. v. Askov*, [1990] 2 S.C.R. 1199 at para 98). Consenting to a trial date can give rise to an inference of waiver as long as it does not amount to agreeing to the inevitable (see *R. v. Morin*, [1992] 1 S.C.R. 771 at para 65). The Supreme Court of Canada makes it clear that setting trial dates must not become a linguistic game of hide and seek and that any statement by counsel should be treated as having a meaning which a reasonable person would infer from that statement. It is also important to remember that it cannot be said that an accused is unaware of his rights under s. 11(b) of the *Charter* when represented by such competent and experienced criminal defence counsel as Ms. Buckle or Mr. MacEwen.

[22] Having regard to the authorities, I am of the view that the words "that's fine", in these circumstances, amount to a waiver by Mr. Melvin, through his lawyer. Accordingly, I ascribe 11 days delay to the Crown and the remaining three months and 18 days to waived institutional delay.

[23] The accused's last appearance in Provincial Court was for his June 27, 2012 preliminary inquiry. Mr. Melvin was committed on all counts and the matter was then scheduled for arraignment in Supreme Court. In my view, arraignment to set pretrial and trial dates are clearly inherent and should be classified as neutral. This is consistent with what the Ontario Court of Appeal held in *R. v. Khan*, [2011] O.J. No. 937 at para 42.

[24] In light of my findings, in Provincial Court there are 18 days of delay occasioned by the Defence and just over two and one half months ascribed to the Crown. In the result, the vast majority (nearly seven months) of the Melvin matter in the Provincial Court was on account of inherent or neutral delay.

Supreme Court Appearances Before the Mistrial

[25] Below I have adapted Appendix "A" in respect of parties' appearances in Nova Scotia Supreme Court. The total time spent in this court is well beyond the guidelines set out in *R. v. W. (R.E.), supra*. Of course, the delay periods must be examined in context and much more than a mathematical calculation is required. Recalling *R. v. Godin*, 2009 SCC 26 and Justice Cromwell's words, I must "not lose sight of the forest for the trees".

Appearance Date (D/M/Y)	Note	Time to next Appearance
5/7/2012	First Supreme Court appearance. Ms. Buckle appearing. Confirms that time is available for a pre-trial conference on July 20, 2012. The defence also requests that the matter come back on September 6, 2012 following pre-trial. The Court, Defence, and Crown all confirm these dates.	**15 days**
20/07/2012	Pre-Trial conference held. (no transcript available)	**1 month, 17 days**

6/9/2012	Ms. Buckle appearing. Pretrial Conference has been concluded. Defence is ready to set trial dates. Crown suggests ten days for trial. Court consults its schedule. Mr. Scott for the Crown states that he has Mr. Woodburn's schedule and that "We'll go with the earliest...". Ms. Buckle advises the court that she is not available until the end of March. In response, Mr. Scott advises that Mr. Woodburn is available after April 29. Ms. Buckle advises that she is not available the week of May 6. Mr. Scott advises that Mr. Woodburn's vacation starts on May 27 but that he would have been available on May 6 and the 29. Mr. Scott suggests squeezing the trial into May 13 to May 24 (9 days). Court suggests sticking to 10 days. Ms. Buckle advises that she is unavailable on the 11 and 12 of June. Crown says week of June 10 ok but not the week of June 17 or 24. Court advises that if two weeks are needed, the matter may have to be scheduled in September. Crown agrees. Ms. Buckle states "my client is not in custody. That's really all I can say about it". Matter is set for September 3 to 16. Crown and Ms. Buckle state "That's fine".	**4 months, 25 days**
31/01/2013	Ms. Buckle appearing. Crown agrees that there has been an agreement on varying Mr. Melvin's conditions. Clause C is changed. Clause D is varied. In clause E, which deals with people Mr. Melvin is not to contact, three names are deleted. Clause H, which deals with consuming alcohol and controlled drugs and substances, is varied. Clauses I, J and K are deleted. Clause G is varied from "not to carry a knife" to "not to carry a knife on his person while in a public place." Also, September 3 is no longer convenient for Mr. Woodburn. Confirms that Mr. Woodburn had discussions with Ms. Buckle who agreed to adjourn the matter. Mr. Scott advises that any time after November 25 is available. Court asks Ms. Buckle what her client's position on the adjournment is. She replies "He's not opposed to the request for the adjournment of the trial." Court suggest November 25 to December 6. Ms. Buckle advises that she has a trial ending on November 22 and would like a week buffer before starting this trial. Court advises there are no other dates in 2013. Ms. Buckle agrees. Ms. Buckle then advises the court that her client indicated that he's comfortable going into January. Court advises that the January schedule is not available. Both sides agree on November 25 to December 6.	**9 months, 25 days)**
25/11/2013	First day of trial	**1 day**
26/11/2013	Second day of trial	**1 day**
27/11/2013	Third day of trial)	**1 day**
28/11/2013	Fourth day of trial	**1 day**
29/11/2013	Fifth day of trial	**1 day**
2/12/2013	Sixth day of trial	**1 day**
3/12/2013	Seventh day of trail	**1 day**
4/12/2013	Eighth day of trial	**1 day**
5/12/2013	Date of Mistrial - Ninth day of trial	**7 Days**

[26] On July 5, 2012 Mr. Melvin made his first appearance in the Supreme Court of Nova Scotia. This was a Crownside appearance to schedule a pretrial conference and a return date for scheduling the trial. During the appearance,

Defence counsel says that she understands that July 20 is the first available date for a pretrial conference. She also asks that following the conference that the matter return to Crownside on September 6 for the setting of trial dates.

[27] The Defence argues that the 15 day delay between the time of the first Crownside and the pretrial conference should be classified as institutional delay borne by the Crown. On the other hand, the Crown takes the position that this amounts to inherent/neutral delay.

[28] I have reviewed the transcript. Given the discussion relating to the pretrial date, an inherent part of any case, I believe the delay between July 5 and 20 should be classified as inherent/neutral.

[29] Next, I will examine the passage of time between July 20 and September 6. This period of time of just over 1.5 months relates to another intake period. There is no transcript available for the pretrial conference. In any case, the transcript from the earlier Supreme Court proceeding (July 5) reveals nothing that would allow me to conclude that s. 11(b) rights were asserted such that this period of time should be ascribed to the Crown. In the result, I have classified the time period of one month and 17 days as inherent/neutral.

[30] Next, I will consider the Crownside of September 6, when initial trial dates were set for almost a year later. Throughout this appearance the Crown and accused go back and forth on available and unavailable dates. The Crown argues that taken as a whole, the Defence's words should be regarded as waiver. Conversely, the accused says that the 362 day delay should be regarded as institutional and borne by the Crown.

[31] I must say it is difficult to deal with classifying this period because the Court gives no indication of when the earliest available dates are for the trial.

[32] I do not regard Defence counsel's initial comments that she is not (then) available until the end of March to be unreasonable, nor do I believe they should be read in the context of delaying the matter. In any case, we know from the transcript that the Crown's response is that the prosecutor cannot be available until late April. Even then, the Crown does not realistically avail itself for the trial. For example, the prosecutor does not have enough available days in May and the weeks suggested in June do not run together. In the result, the jury term necessitates that the Court look to the early part of September and ultimately, the parties agree to September 3-16, 2012.

[33] Unfortunately, it turns out the prosecutor is not available for the trial commencing September 3. The January 21, 2013 Crownside then sees the matter rescheduled to a commencement date of November 25, 2013. During this appearance, Ms. Buckle not only readily consents to the later trial dates, she indicates that her client is comfortable with the matter going into January 2014. In my view, this is a rather critical statement because it reveals the Defence, at this point is clearly waiving his s. 11(b) rights. Accordingly, I attribute the nine months and 25 days from January 31 until November 25 to be waived. As for the previous four months and 25 days (between September 6, 2012 and January 31, 2013), I regard this as institutional/Crown delay.

[34] In my view, the nine days of trial prior to the mistrial must be regarded as inherent/neutral.

[35] The first Supreme Court appearance was July 5, 2012 and the mistrial was declared on December 5, 2013. Accordingly, we are dealing with a period of time of approximately one year and five months in the Nova Scotia Supreme Court. Given my findings for this period of time, the Crown is responsible for approximately five months' delay but the remainder of the time may be considered neutral.

Supreme Court Appearances After the Mistrial

[36] Once again, the mistrial was on account of Ms. Buckle's conflict. It was not the fault of the Crown or the accused and should be regarded as a neutral event. The mistrial was declared on the ninth day of trial which was December 5, 2013. At this point in time, it had been just under two and a half years since the incident giving rise to the charges. Ms. Buckle had not made a s. 11(b) application. This is perhaps not surprising in light of my earlier review of the court appearances.

[37] Below is a chart of all of the court appearances post the mistrial.

Appearance Date (D/M/Y)	Note	Time to next Appearance

12/12/2013	Mr. Melvin self represents. Court asks Mr. Melvin "Have you tried to obtain counsel?" Mr. Melvin replies "No, not yet." Mr. Melvin indicates that he would like a few more weeks to a month to get counsel. Mr. Woodburn reminds the court that this matter has been ongoing since 2011 and the Crown would like the matter resolved sooner than later. Suggests that Mr. Melvin make efforts to get counsel quicker than a couple of weeks to a month. Mr. Woodburn advises the Crown's concern that Mr. Melvin is not making serious efforts to move the matter forward. Points to the fact that Mr. Melvin expressed to the court that he has not yet made efforts to attain counsel and again reminds the court that the matter began in 2011. Further expresses concerns about delay. Court offers up January 16 for a return date. Both sides agree.	**1 month, 4 days**
16/01/2014	Mr. Melvin self represents. Mr. Melvin indicates that he does not yet have a lawyer. States that he has an appointment on February 3rd and believes that he will have a lawyer after that date. Crown agrees to set the matter over to February 6.	**21 days**
6/2/2014	Pat MacEwan appearing. States that he has just recently been retained. Mr. MacEwan states that he is looking for three weeks for trial. Informs the court that there were certain concessions made at the last trial that will not be made this time around. Mr. MacEwan understands that the earliest dates are in early February. Mr. Scott for the Crown indicates that he discussed the matter with Mr. Woodburn prior to appearing. Expresses Mr. Woodburn's interests in trying to fit the matter into an earlier date. Mr. MacEwan informs the court that disclosure is still making its way over from Ms. Buckle's office. Mr. MacEwan advises the court that after reviewing the transcript from the previous trial, he may be able to advise the court that less time will be needed for trial. Court advises that the earliest date is on February 2, 2015.	**24 days**
2/5/2014	Pre-Trial conference held. (no transcript available)	**3 months, 24 days**
26/06/2014	Hearing to set a date. (no transcript available)	**8 days**
3/7/2014	Hearing to set a date. (no transcript available)	**2 months, 9 days**
11/9/2014	Request to vary recognizance.	**4 months, 23 days**
2/2/2015	**First day set for trial.**	

[38] To properly analyze what is a fourteen month passage of time (the time between December 5, 2013 and February 2, 2015), the focus shifts to the three Crownsides set out on the above chart. Accordingly, I have carefully scrutinized the complete transcripts of these appearances.

[39] The first appearance is just seven days after the mistrial has been declared. Mr. Melvin self-represents and understandably, at this point, does not have new counsel. The prosecutor is emphatic about wanting to move the matter forward. The Court is cautious, particularly given Mr. Melvin's stated intention to retain new counsel. In the result, trial dates are not set.

[40] On the following Crownside appearance (January 16, 2014), Mr. Melvin indicates he still does not have a lawyer. He says that he has an appointment for February 3 and believes he will have new counsel after that date. The Crown agrees to set the matter over to the Crownside immediately following February 3; i.e., February 6. As at January 16, 2014, it has been approximately five weeks since the mistrial. Even allowing for the intervening holiday season, it is unfortunate that Mr. Melvin has yet to obtain new counsel.

[41] The day count from the mistrial until Mr. MacEwen's first appearance is 63 days. The Defence acknowledges this time of just over two months should not be the Crown's responsibility but that it is either Defence or inherent delay. For the reasons expanded upon below, I find that it should be divided between inherent delay/neutral and delay by the accused.

[42] In the interest of completeness, below I have reproduced the entirety of the February 6, 2014 appearance.

> **Thursday, February 6th, 2014 – 9:13 a.m.**
>
> **[COURT OPEN]**
>
> **THE COURT:** The Queen and Corey Patrick Melvin?
>
> **MR. MacEWAN:** Oh, so you're on that matter, My Lord. Mr. Melvin is present before the Courts. I've just been recently retained. This is a matter which a trial had commenced, a mistrial was declared. It's set for judge and jury. That election will remain.
>
> We're going to be looking for three weeks. The matter was set for two last time, although there was concessions made in the last trial that I don't believe will be made this time through.
>
> **THE COURT:** All right.
>
> **MR. MacEWAN:** We had canvassed some dates with the Clerk of the Court, and I understand the earliest available dates for three weeks with a jury panel are in early February.

MR. SCOTT: My Lord, from what I understand, and I know Mr. Woodburn was here with Mr. MacEwan, and he indicated to me those February dates were, I guess, mutually convenient. He did want me to put on the record, though, that he heard that there were dates in September and October that were good, but I don't think they were good with Mr. MacEwan, et cetera, but ---

THE CLERK: Not anymore.

MR. SCOTT: Oh, I'm sorry.

THE CLERK: [Inaudible].

MR. SCOTT: Oh. Oh.

MR. MacEWAN: I, I don't recall that, but ---

MR. SCOTT: Oh, okay. I'm sorry. Then, if that's the case, I'm ---

THE CLERK: He might have been, but we didn't have those dates.

MR. SCOTT: Oh. Oh, I'm sorry. But I would say this. Mr. MacEwan would maybe know his case better than I would, so Mr. Woodburn was thinking ten days was going to be enough, but I don't know if that would have moved it up, but if--- it's required for three weeks.

MR. MacEWAN: And, and My ---

MR. SCOTT: So I just want to put that on the record.

MR. MacEWAN: My Lord, what I was going to suggest is that we could arrange a pre-trial. Where I've just been recently retained, I haven't reviewed the entirety of the evidence. Some of the evidence is still making its way over from Ms. Buckle's office. I'll also be reviewing the trial transcript once it becomes available.

So, if the matter was pre-trial, then we can come to a few agreements that may shorten up somewhat, but I think two weeks was very tight in the first instance, right?

THE COURT: I'll think we'll stick with the three weeks. We can set a pre-trial conference date, and if, as a result of that pre-trial conference, there are some admissions or agreements made that will reduce the time, the Scheduling Office could be advised that maybe one week of the three is not required, or ---

MR. MacEWAN: Precisely, My Lord.

THE COURT: All right. So let's just set the trial dates now because if we come back here in a couple of weeks, we're going to be looking at 2015, I'm sure.

MR. SCOTT: Well, yeah.

THE CLERK: Well, the – these dates are – the dates that – first dates that we have available that are agreeable to Counsel are February the 2nd to the 23rd of 2013(sic) for a jury trial.

THE COURT: February 2nd to?

THE CLERK: The 23rd of 2015.

MR. SCOTT: That's probably why Mr. Woodburn was hoping to go a shorter time period, and get it on quicker, if we could, I mean, really and truly.

THE COURT: Sure. Yeah. All right. So, Mr. Melvin, your trial is now scheduled for February 2nd, 2015 continuing through to the 23rd. You understand that, sir?

MR. MELVIN: Yeah, I do.

THE COURT: You'll be here?

MR. MELVIN: Yes, I'll be here.

THE COURT: Thank you.

MR. MELVIN: Thank you.

[43] The February 6, 2014 Crownside discussion must be considered in context. Given the discussion, it is fair to conclude that by the time the Melvin matter came up, the earlier available dates in September and October, 2014 were gone (used for other trials). In the result, the Court then offered the next available three weeks for a jury trial which commenced in early February, 2015. In the result, Mr. Melvin argues that the delay of approximately one year is institutional and must fall to the Crown. With respect, I do not believe the argument is so straight forward. In this regard, I have considered the context of the earlier Crownside appearances and Mr. Melvin's failure to obtain counsel until the eve of the February 6 Crownside. I have already characterized his delay as unfortunate; I will now expand upon the consequences of Mr. Melvin's delay in retaining counsel.

[44] In my view, had Mr. Melvin returned to Crownside on January 16, 2014 with a lawyer, the September and October, 2014 dates would have been available (they were obviously available earlier in the morning of February 6) and, it is conceivable there would also have been available dates for the spring term of 2014. When one considers Mr. Scott's words at the February 6 Crownside ("…Mr. Woodburn was hoping to go to a shorter time period, and get it on quicker, if we could, I mean, really and truly.") and the prosecutor's comments at the earlier Crownsides (about the urgency of getting the matter set down for trial), it is clear the Crown was cognizant of the delay and wanted to have the trial rescheduled as quickly as possible.

[45] What can be said about Mr. Melvin and his regard for moving the trial forward? In answer, we have Ms. Buckle's earlier comments (January 31, 2013 Crownside) where she indicated her client was (then) comfortable setting a trial date "into January" (as opposed to the then available November and December dates). Following the mistrial, we have Mr. Melvin self-representing at the two Crownsides before Mr. MacEwan's appearance. From his words, I can infer nothing which leads me to conclude he wanted to have the matter expeditiously set down for trial.

[46] When Mr. MacEwan first appears, he indicates that disclosure is still making its way over from Mr. Buckle's office. This obviously has nothing to do with Crown disclosure. Whereas Mr. MacEwan is in no way part of the delay (he

agrees to the February, 2015 dates when they are offered), given the earlier comments of Mr. Melvin and Ms. Buckle, I am not prepared to ascribe the delay of approximately one year to the Crown. Rather, I characterize this delay as inherent and neutral, waived by the Defence.

[47] In so finding, I am mindful of Justice Cromwell's analysis of delay in *Morin, supra*. In particular, at para 23 Cromwell J puts scheduling delay in context:

> … Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability. Here, there is no suggestion that defence counsel was unreasonable in rejecting the earlier date. Indeed, his prior conduct in seeking earlier dates for the preliminary inquiry – efforts which were ignored – suggests that he wished to proceed expeditiously. I respectfully agree with Glithero R.S.J., dissenting in the Court of Appeal, at para. 53, that: "To hold that the delay clock stops as soon as a single available date is offered to the defence and not accepted, in circumstances where the Crown is responsible for the case having to be rescheduled, is not reasonable." (emphasis added)

[48] I find no evidence in this case that Mr. Melvin or his counsel exhibited prior conduct that suggested they wished to proceed expeditiously. To the contrary, I find evidence that Mr. Melvin acting alone, or through counsel, did not say anything to indicate he wished to proceed expeditiously. Rather there are words spoken to suggest otherwise.

[49] In the result, I have determined the time in Supreme Court since the mistrial should be considered inherent delay for approximately one month, one month attributable to the accused and one year institutional delay, waived by the Defence such that it is to be considered neutral.

[50] To recapitulate, my overall findings are that the Crown is responsible for approximately 7.5 months delay and the Defence is ascribed about 1.5 months delay. The remaining approximate 32.5 months are to be classified as neutral as they are inherent or institutional / Crown but waived by the Defence.

Conclusion

[51] The primary purpose of s. 11(b) of the *Charter* is the protection of the individual rights to security of the person, liberty, and a fair trial. Section 11(b) also protects the secondary interest of society in seeing that those individuals accused of crimes are treated humanely and fairly, and are brought to trial and dealt with according to the law. As the seriousness of an offence increases, so does the societal demand that the accused be brought to trial.

[52] In order to assess whether s. 11(b) of the *Charter* has been violated, the Court must engage in a balancing exercise, weighing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. I previously set out the relevant factors when referencing the *Hartlen* decision.

[53] In the circumstances of this case, I have determined the delay of nearly three and one half years warrants inquiry. Having reviewed the totality of the appearances in Provincial Court and Supreme Court, I have found Mr. Melvin and his counsel made clear and unequivocal waivers such that the counted time of delay amounts to approximately 7.5 months; i.e., well within the outer limits of 14-18 months, as articulated by the Supreme Court of Canada and our Court of Appeal.

[54] Given my finding on delay, I need not consider prejudice to Mr. Melvin. In this regard, prejudice may be inferred from the length of the delay; however, the delay here is well within the appropriate limits. No evidence was led on the accused's wishes in respect of moving the matter forward and/or obtaining new counsel; this may be inferred from the transcripts.

[55] In the result, I conclude that the delay in this case was reasonable such that Mr. Melvin's right to a trial within a reasonable period of time under s. 11(b) of the Charter has not been breached. Therefore, I affirm the jury trial will commence February 2, 2015.

Chipman, J.