SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Clare,* 2014 NSSC 388

Date: 20141001
Docket: CRH 407705
Registry: Halifax

Between:

Her Majesty the Queen

v.

Stephen Patrick Clare

Judge: The Honourable Justice Patrick J. Duncan

Heard: July 30, 2014 and October 1, 2014, in Halifax, Nova Scotia

Written Decision: October 28, 2014

Counsel: Alex Keaveny, for the Crown
Peter Planetta, for the Defence

By the Court:

Introduction

[1] On October 10, 2010 an Information was sworn accusing Stephen Patrick Clare of committing six offences contrary to **Criminal Code of Canada**. This Information was replaced by one sworn on October 14, 2010.

[2] A third Information was sworn on September 19, 2012. The accused was committed to stand trial on the four counts set out in that Information and it is those charges which are before this Court in an Indictment dated October 10, 2012.

[3] Those charges are as follows:

> 1) That between the 29th day of March 2010 and the 1st day of October 2010 at or near Halifax in the County of Halifax and Province of Nova Scotia he did knowing that Federica Mengual is harassed or being reckless as to whether Federica Mengual is harassed, did without lawful authority repeatedly communicate directly or indirectly with Federica Mengual, thereby causing Federica Mengual to reasonably, in all the circumstances, fear for her safety contrary to section 264(2)(b) of the **Criminal Code**;
>
> 2) And at the same time and place he did willfully attempt to obstruct, pervert, or defeat the course of justice by making threats, contrary to section 139(2) of the **Criminal Code**;
>
> 3) And further at the same place, on or about the 1st day of October 2010 did being at large on his Recognizance entered into before a Justice on the 22nd day of July 2010, and being bound to comply with a condition of the Recognizance directed by the said Justice fail without lawful excuse to comply with that condition, to wit: "Keep the peace and be of good behavior" contrary to section 145(3) of the **Criminal Code**;

> 4) And at the same place aforesaid, on or about the 1st day of October 2010, did being in at large on his Recognizance entered into before a Justice on the 22nd day of July 2010, and being bound to comply with A condition of the recognizance directed by the said Justice fail without lawful excuse to comply with that condition, to wit: "have no direct or indirect contact or communication with Federica Mengual except through a lawyer; in accordance with the written separation agreement or court order for access to a child or children or through either of Federica Mengual's parents for the purpose of access to a child or children.", contrary to section 145(3) of the **Criminal Code**.

[4] The unproven allegations that give rise to these charges are that the accused sent approximately 717 e-mails to the complainant at her home e-mail address as well as to other e-mail addresses and cell phones. While it is suggested that the e-mails were made in attempts to discuss childcare issues arising between the accused and the complainant, many of the e-mails are alleged to have contained harassing and threatening language.

[5] During the course of the dispute between the parties, the accused was subject to an Order that required that he have no contact with the complainant except in certain permitted ways, which condition he is alleged to have breached by sending e-mails to the complainant and members of her family.

[6] The trial of these charges is scheduled to take place with a jury commencing December 8, 2014, and concluding on or about December 16, 2014.

Application

[7] From the date of being charged on October 10, 2010, until the commencement of the trial on December 8, 2014, 4 years and 2 months will have elapsed. The accused alleges that this delay constitutes a breach of his right to have his trial held in a reasonable time as guaranteed by section 11(b) of the **Canadian Charter of Rights and Freedoms.**

[8] The accused applies for an Order made pursuant to s. 24(1) of the **Charter** to stay proceedings against him. The Crown is opposed.

Law

[9] Section 11(b) of the **Charter** guarantees that any person charged with an offence has the right "to be tried within a reasonable time". The time used in measuring whether a "trial has taken place within a reasonable time" runs from the date the Information is sworn to the end of the trial. *See*, *R v. Morin* (1992), 71 C.C.C. (3d) 1, [1992] 1 S.C.R. 771 at para 35.

[10] Cory J., writing at paragraph 69 of the decision in *R. v. Askov* [1990] 2 S.C.R. 1199 summarized "….the factors which should be taken into account in considering whether the length of the delay of a trial has been unreasonable":

> 69 …
>
> (i) The Length of the Delay
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> The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.
>
> (ii) Explanation for the Delay
>
> (a) Delays Attributable to the Crown
>
> Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused. The cases of *Rahey* and *Smith* provide examples of such delays.
>
> Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers, and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.

(b) Systemic or Institutional Delays

Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.

(c) Delays Attributable to the Accused

Certain actions of the accused will justify delays. For example, a request for adjournment or delays to retain different counsel

There may as well be instances where it can be demonstrated by the Crown that the actions of the accused were undertaken for the purposes of delaying the trial.

(iii) Waiver

If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.

(iv) Prejudice to the Accused.

There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.

> ...It bears repeating that the balance between the explicit, individual protection and the implicit, societal aspect of s. 11(b) is addressed by placing the onus on the Crown to demonstrate that any action of the accused deliberately caused the delay or constituted waiver, or that the delay caused no prejudice to the accused.

[11] R.E. Salhany, *Canadian Criminal Procedure*, 6th ed., looseleaf (Aurora, Ontario Canada Law Book, 2014), at para. 6.3410 summarizes the effect of Justice Sopinka's decision in *R. v. Morin*, *supra*, as follows:

> 6.3410 …the Supreme Court reaffirmed that the proper approach to a s. 11(b) application was a judicial balancing of the interests which the section is designed to protect against those factors (referred to in **Askov**) which inevitably lead to delay. It reaffirmed the evidentiary burden on the Crown with respect to the issues of institutional delay and prejudice. But it recognized that another factor for consideration may be the limit on institutional resources. It was held, however, that the courts cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. There is a point in time at which the courts can no longer tolerate delay based on inadequate funding. This period of time may be referred to as an administrative guideline but it is not a limitation period on delay. The guideline is based on the exercise of judicial discretion, taking into account evidence of the limitation on resources, the strain imposed on them, statistics from other comparable jurisdictions and the opinion of other courts and experts.

[12] At 6.3490 Salhany says:

> 6.3490 The Court suggested a guideline of between eight to ten months for institutional delay in provincial courts and a guideline of six to eight months after committal for trial. The provincial appellate courts are to play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions of different regions in the province.

[13] Salhany, at paragraph 6.3500, then considers the more recent decision of the Supreme Court in *R. v Godin* 2009 SCC 26:

> …the Supreme Court has reaffirmed that the *Morin* guidelines continue to apply. The Court also said that while scheduling requires reasonable availability and reasonable cooperation, it does not require defence counsel to hold themselves in a state of perpetual availability for s. 11(b) purposes. Moreover, even in the absence of specific evidence of prejudice, "[p]rejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference

will be drawn."

Facts

[14] I will begin at this point by providing a summary of the details of each the court appearances in this case beginning first with those appearances before the Nova Scotia Provincial Court.

Nova Scotia Provincial Court Appearances:

October 10, 2010

- An Information was sworn alleging that Stephan Patrick Clare did between March 29, 2010 and October 1, 2010, commit 6 offences that are listed in Information #618801;

- Mr. Clare was in custody at that time and he was arraigned on the same date;

- The Crown requested an adjournment in order to prepare for a Show Cause Hearing; and

- Mr. Clare was remanded into custody until October 12, 2010.

October 12, 2010

- The Crown requested a further adjournment for two days to prepare for Show Cause hearing, citing (1) the volume of disclosure material that needed to be reviewed prior to the hearing commencing; and (2) that the accused was pending trial November 23, 2010, for offences relating to the same complainant, and that the Crown was seeking to revoke his judicial interim release in that matter;

- The defence counsel, who was duty counsel John Black, consented to the adjournment saying "with some reluctance".

October 14, 2010

- A new Information #619071 that contained 9 counts was presented to court;

- Mr. Clare was arraigned on the new Information; and again, he was assisted by duty counsel, Mr. Black;

- On this occasion the Accused requested an adjournment of election for 6 weeks;

- He was released on a Recognizance with the consent of the Crown;

- The matter was adjourned for election to November 22, 2010, at 9 a.m.

November 22, 2010

- Mr. Clare was then represented by private counsel, Alfred Seaman, who requested an adjournment prior to entering election in order to review ongoing disclosure. He says, at one point: "my friend [referring to the Crown] has just passed me some disclosure, a search warrant that's expected to generate a lot of disclosure";

- The case adjourned to December 9, 2010, at 9 a.m.

December 9, 2010 **(**This would be one of the dates for which the transcript had previously been unavailable or was incorrect.)

- Mr. Seaman again appeared and requested adjournment until March 2011, a period of 3 months: 1) because of defence counsel's schedule; and 2) that he was expecting to receive a forensic report of computer records;

- The Crown agreed, but stated: "as well (sic) as the defence realizes that that's you know part of the section 11;

- The defence responded: "that would be on the defence. I understand that";

- The Court agreed to an adjournment in order that defence counsel can “thoroughly review the disclosure and also with his client";

- The case was then adjourned to March 15, 2011, at 9 a.m. for election and plea.

March 15, 2011

- Mr. Seaman again appeared and again requested an adjournment "for one last chance to get a few more pieces of disclosure" and to have further opportunity for discussions with the Crown;

- The Crown agreed to adjournment; and

- It was adjourned to April 14, 2011, at 9 a.m. for election and plea.

April 14, 2011 (Again, another one of the dates that I referred to as having a transcript that was previously inadequate)

- Mr. Seaman appeared and requested an adjournment because "there is some disclosure that is outstanding";

- It was adjourned to May 17, 2011, at 9 a.m. for election and plea.

May 17, 2011 (Date of Election)

- Mr. Seaman appeared and stated that he understood that disclosure was now complete;

- He told the Court that he previously understood that there were outstanding warrants to be executed in the case, but the Crown had advised him that this was not going to take place. These warrants that he was referring to were, I assume, the same search warrants that the Crown had provided to him on November 22, 2010, and which were expected to generate disclosure which contributed to the apparent delay; but it is on May 17th that he is informing the Court that the Crown has told him they are not going to execute the search warrants;

- The accused, by counsel, entered his election of trial by judge alone;

- The Court indicated that a Preliminary Inquiry would take place in the "fall". The Crown and defence indicated that they would be prepared to proceed in September and the Court accommodated that date setting the Preliminary Inquiry for a full day on September 28, 2011 commencing at 9 a.m.;

- A Focus Hearing was scheduled for June 28, 2011, at 9 a.m.

June 28, 2011

- The Focus Hearing was conducted and Crown counsel advised the Court that it still needed to identify a forensic computer expert, but that otherwise the Crown was ready to proceed with the Preliminary Inquiry;

- Mr. Seaman attended on behalf of the accused.

September 14, 2011

- Mr. Clare appeared in court in person, and without counsel and requested an adjournment of the Preliminary Inquiry that was set for September 28, just two weeks away;

- The stated reason for the request was that the accused was unable to pay the legal fees of Mr. Seaman. The accused had, apparently, already made an appointment with Legal Aid for October 13, 2011;

- The Crown agreed to the adjournment to obtain legal counsel stating that they would be opposed to the accused conducting a cross-examination in person of two of the Crown witnesses and if that were to happen then the Crown intended to apply to the court to appoint counsel to conduct the examinations;

- An adjournment was granted to October 17, 2011, to set a new date for Preliminary Inquiry. That date was just four days after Mr. Clare’s

anticipated appointment with legal aid.

October 17, 2011

- Mr. Luke Merriman appeared as the new defence counsel. He sought an adjournment indicating that he had only just completed the intake interview so was unprepared to do anything that day;

- The adjournment was granted to November 30, 2011, for setting of a new Preliminary Inquiry date.

November 30, 2011

- Mr. Planetta appeared in place of Mr. Merriman, and Mr. Planetta took over the case for Mr. Clare;

- He requested an adjournment to set a new date for Preliminary Inquiry date saying that he required more time to review disclosure and to take instructions, but that his schedule would not permit him to complete that before January 2012;

- The Court granted the adjournment to January 12, 2012, at 9 a.m. to set a new date for Preliminary Inquiry.

January 12, 2012

- Mr. Planetta appeared on behalf of the accused;

- A Preliminary Inquiry was set for July 19, 2012 (full day) and a Focus Hearing was set for February 15, 2012.

February 15, 2012

- Counsel jointly requested an adjournment of the Focus Hearing to narrow the issues for the hearing.

March 6, 2012 (This was another date for which the transcript has been corrected)

- The parties returned for the Focus Hearing;

- Defence counsel requested a new date for Preliminary Inquiry saying there was a personal matter that came up for the date that had been previously set in July;

- The Crown said that they would "leave it with the court";

- The Court said to Mr. Planetta: "…so your client consents to a later date for the Preliminary Inquiry? A. Yes your honor.".

- It was adjourned to a half day hearing (reduced amount of hearing time was at counsels' joint request) and so the matter was to return for a Preliminary on August 15, 2012.

August 14, 2012

- The day before Preliminary Inquiry the Crown appeared alone on the matter and advised the court that there would be a joint request to adjourn the Preliminary Inquiry on August 15;

- The reasons provided were: 1) Mr. Planetta does not have "2 essential pieces of disclosure" materials, which he discovered during preparation for hearing; and 2) that Resolution discussions are ongoing.

August 15, 2012

- There was a Joint Request for adjournment;

- The reasons were stated by Mr. Planetta: first, "There's some vital disclosure that I wasn't I guess aware that it existed until last week….But there is some wires crossed somewhere. Mr. Clare has had previous counsel, two other counsel. And I think the materials were at some point likely disclosed to one of the them and never made their way to me. And they're materials that I wouldn't be able to proceed with the Preliminary Inquiry today so we're requesting an adjournment of the matter"; and second, the Court was told by the

parties that there may be agreement to waive preliminary and consent to committal;

- It was adjourned to September 11, 2012, at which time it was anticipated the new date would be set for the Preliminary Inquiry.

September 11, 2012

- Both counsel represented that there would be a consent to committal of the accused on the basis of a new Information that was to be prepared by the Crown and to be presented to the Court at a later hearing date. The Information was expected to reduce the number of charges against the accused;

- The matter was further adjourned to September 19, 2012, at 9 a.m. for arraignment of the accused on the new Information.

September 19, 2012

- The Court adjourned to September 26, 2012, for arraignment of the accused on the new Information;

- The reason for the adjournment was that Crown did not have the new Information docketed as yet.

September 26, 2012 (Committal Date)

- New Information #663670 was presented to the court;

- The accused elected his trial by judge and jury;

- He waived his right to a Preliminary Inquiry and consented to committal on the new Information;

- The Court ordered the accused to appear in Supreme Court, that is this Court, on October 11, 2012, for the setting of trial dates;

- He was released, that is, his existing Recognizance was carried over to

the new Information and it continued from its original date of October 14, 2010.

[15] That concludes the appearances in Provincial Court.

Nova Scotia Supreme Court Appearances

October 11, 2012 (1st Appearance: Crownside)

- The accused appeared by counsel and a warrant was issued but to be held;
- As is the practice in this Court, trial dates are not assigned until after a pre-trial conference is held;
- Therefore the matter was adjourned to Crownside on November 15, 2012, for the setting of the trial date;
- The Pretrial Conference was scheduled for November 9, 2012.

November 29, 2012

- The Pretrial Conference took place and unfortunately I cannot find out why the matter did not return November 15. Instead it did appear in this Court November 29, 2012 at which time the trial was set for September 23-27, 2013 (5 days);

[16] At this point I would note that it was 11 months from the first appearance in this Court (Supreme Court) at Crownside to the scheduled trial dates, however, in saying that I note that the defence refused the following dates that were offered by the court:

- January 14-18, 2013, (less than 2 months from the date of setting of trials and only 3 months from 1st appearance in Crownside in Supreme Court);
- February 20, 21, 25 and 26 was offered and the Crown was available but at that point the defence rejected these dates and stated that

counsel was not available until after May 2013;

- The court offered the September dates which I just outlined and both parties accepted.

August 1, 2013

- Next court appearance. Before I turn to that I note the following: the Court Scheduling officials determined in July that a new date would be required for the trial and on July 10, 2013, sent an email to both counsel advising that the September 2013 trial dates were not available due to a Judges' meeting;

- In the email, Scheduling offered the following replacement dates which in turn became the basis of the rescheduling discussion in Court on August 1, 2013. Those dates were:

    - September 6, 9, 10, 11, 12, 13 and 16, 2013,

    - October 15, 16, 17, 18 and 21 (Crown available),

    - November 4, 5, 6, 7, 8, (Crown available),

    - November 18, 19, 20, 21, 22 and 25,

    - December 16, 17, 18, 19, 20.

- When the matter returned to court on August 1, 2013 to review those dates the Crown indicated they would be available for the October dates and for the November 4-8 dates;

- In response to the offered dates defence counsel indicated that he could be available for the October dates but that he would "have to move a couple of things";

- After reviewing other dates, defence counsel stated that he preferred dates after December;

- The matter was then set for trial January 6 -10, 2013.

January 6-7, 2014 (transcript for the7th only)

- On January 7, 2014, being the second day of the trial, the presiding judge, Justice Heather Robertson, declared a mistrial. She concluded that there were serious disclosure issues that went to the fairness of the trial and in particular prejudiced the accused in his ability to prepare for and conduct his defence;

- It appears that from August 2013 to December 2013 there was no Crown Attorney assigned to the prosecution. In early December 2013 Crown Attorney, Carla Ball, provided some disclosure to the defence;

- Crown Attorney Alex Keaveney, who is present today, was assigned to the file in mid-December. As he became more familiar with file, he initiated ongoing further disclosure to the defence which continued intermittently through the latter part of December, leading up to and continuing during the first two days of the trial;

- It is unnecessary at this point to review in detail the specifics of the failure of disclosure as Justice Robertson has already ruled on the matter;

- In short, the Crown added 3 or 4 witnesses to their list of witnesses and disclosed documentary and audio evidence (including voicemails) to the defence as the trial was ongoing. Some of the evidence had been in the Crown file since August 2012 and had apparently not been disclosed. No witness statements or will say statements were available for some proposed Crown witnesses;

- There was one adjournment granted from January 6-7 to permit the defence time to review the new disclosure that came to them as of January 6th. When more new disclosure arose on the night of the 6th and over into the 7th it triggered the mistrial;

- It is uncontested that the Crown bears the responsibility for the resulting mistrial and the resulting delay before the trial could

proceed;

- The matter was adjourned to January 30, 2014, for the purpose of setting a new trial date;

- I will say, as Justice Roberston did, that the record shows that Mr. Keaveny bears no personal blame for the circumstances that caused the mistrial. It is reasonable to believe that had the Crown applied the same diligence to this file at an earlier stage of the proceedings the matter might have got to trial much sooner, or at the very least would have proceeded as scheduled in January 2014.

January 30, 2014

- On January 30, 2014, the parties appeared in court and new trial dates were set for December 8, 9, 10, 11, 15 and 16, 2014;

- The earliest dates that the court had been able to offer were November 12, 13, 17, 18 and 19, however the defence counsel was unavailable at that time;

- Counsel for the accused indicated on the record that he had the intent to present the current motion alleging the failure to provide a trial within a reasonable time.

Analysis

i) The Length of the Delay

[17] Turning to the analysis in this case I will start by dealing with the various factors I previously outlined, the first being the length of the delay.

[18] In *Morin, supra*, the Court approved of a suggested guideline of between 8 to 10 months for institutional delay in Provincial Courts and a guideline with respect to institutional delay after committal for trial in the range of 6 to 8 months. The Nova Scotia Court of Appeal, in *R. v. R.E.W.* 2011 NSCA 18 affirmed that a

period of between 14 and 18 months from charge to the conclusion of the trial following Preliminary Inquiry, remains the guideline for acceptable institutional delay in this Province.

[19] The time from the swearing of the charges in October 2010 until committal in September of 2012, being almost 2 years is in and of itself such a long delay as to trigger an inquiry into the reasonableness of the delay. Adding in excess of 2 years after committal and before the trial, thus bringing the total time from charge to the time when the trial will be held to over 4 years signals the need for inquiry under s. 11(b) and s. 24(1) of the **Charter**.

[20] My review of the materials, including the Crown and defence Pre-trial Conference Reports filed in this case, does not demonstrate good reason for such a long delay by reason of the complexity of the case nor possible demands on institutional resources.

[21] As of November 2012 both parties had advised the court that the trial was expected to last 3 days and that the Crown intended to call 5 witnesses. In a pre-trial conference held December 23, 2013, the Crown estimated 6 witnesses including 2 principal fact witnesses, 2 police officers and 2 witnesses who were expected to be "short". By the time of trial in January 2014 the Crown's list of witnesses had grown to 9 including 2 police officers. The principal fact testimony is intended to come from the complainant. Other witnesses include family members of the complainant. There was also a possibility that the court would hear from a forensic computer expert to speak to the electronic communication of harassing messages to the complainant directly or through third parties. This possibility was repeatedly floated by the Crown from the inception of the charges.

[22] While the amount of disclosure material was frequently described in transcripts before the Provincial Court as voluminous, it appears that at least until late 2013, it consisted mostly of copies of emails, some witness statements and voice message recordings. At one point early on it was suggested that disclosure

consisted of a banker's box full of materials.

[23] It was as the trial began in January 2014 that the Crown introduced, as being possibly material, excerpts from a lengthy Family Court proceeding. The entire transcript runs to some 600 pages or more. However, that information only became an issue on January 6 or 7, 2014. The problem on January 7 was that the Crown had not advised the defence of its intention to possibly use parts of that transcript. The accused was a party to that earlier proceeding and had the Crown disclosed to the defence earlier that it might rely on parts of the transcript then it would not have added to the complexity of the trial. It likely would have added to the necessary preparation time. In the end the failure to point the defence to that proceeding at an earlier time contributed to the mistrial and delay in trying the case. I should clarify that when I say that the Crown might rely on parts of the transcript the Crown felt that it was disclosable material, I am not in the position to assess how the Crown may or may not have used it but at this point we are talking about the timing of this disclosure. The Crown concluded it was obligated to disclose.

(ii) Waiver

[24] Applying the test provided by the Supreme Court of Canada in *Morin*, *supra*, at paragraph 38, I find that there is no evidence to support a conclusion that the accused waived his right to trial in a reasonable time by consenting to or concurring in a delay of his trial. Having said this it must be distinguished from the fact that there is evidence of actions of the accused which I will discuss at a later time in this decision that are relevant to the determination.

(iii) Explanation for the Delay

Delays Attributable to the Crown

October 10, 2010 (date of charge) to May 17, 2011(date of election)

[25] There were 8 court appearances from October 10, 2010, being the date of the

charge until May 17, 2011, when the accused made his election of court and a date was set for preliminary hearing.

[26] After the release of the accused from custody on October 14, 2010, the court appearances over the next seven months repeatedly resulted in adjournments at the defence request because counsel was seeking disclosure and did not have it.

[27] The appearance of December 9, 2010, is an interesting example of what was taking place. Defence counsel Alfred Seaman requested an adjournment until March 2011 because (1) of defence counsel's schedule; and (2) he was expecting to receive a forensic examiner's report of computer records. He stated that he would need more time to review the disclosure with his client. The Crown agreed, but stated that the defence should realize that "that's you know part of the section 11", to which defence counsel replied, "that would be on the defence. I understand that". It is instructive to note that the Court agreed to that December adjournment request in order that defence counsel "can thoroughly review the disclosure with his client".

[28] Notwithstanding the words that were spoken on the record I cannot agree that the defence shoulders this delay from December to March. In the Focus Hearing of June 28, 2011, the Crown advised the Court that it still had not identified the forensic computer expert that it intended to call at the Preliminary Inquiry. So it cannot be said that as of December 9, 2010, that disclosure as everyone understood it to be was indeed complete and in the hands of defence counsel.

[29] The defence chose to make its election on May 17, 2011, although it still did not know who the expert witness would be, let alone have their report. It is noteworthy that defence counsel stated that he was awaiting disclosure materials expected to be seized under search warrants that were disclosed to him in court November 22, 2010. Five (5) months had passed before he learned that the warrants would not be executed.

[30] Seven (7) months had passed from swearing of the Information on October 10, 2010, until the election was entered on May 17, 2011. Repeatedly**,** the stated reasons for delay were that the defence was waiting for disclosure, and to have an opportunity to review that disclosure with the accused. There was no statement by the Crown to contradict, I suppose other than that statement of December 8, 2010, that could be taken as a contradiction by the Crown to the suggestion that the defence was awaiting disclosure. Looking at the circumstances of disclosure as it unfolded, there is evidence that disclosure had not been completed, that expected disclosure was anticipated, whether or not it actually came, and that the Crown was not offering explanations or contradictions to the Court why it was taking so long to get the disclosure completed. The record does not explain what it was that the defence was seeking to have disclosed or what steps the Crown was taking to provide it.

[31] In my view, the defence cannot be held responsible for the Crown's failure to complete its disclosure obligations in a timely manner.

[32] The Preliminary Inquiry was scheduled to take only one day and involve perhaps only 2 witnesses.

[33] The "inherent delays" caused by such activities as arraignment, bail hearings, retention of counsel and disclosure that I would expect, having regard to the circumstances of this case, are not sufficient to account for the period that passed from charge to the date of election. The accused had duty counsel immediately and permanent counsel in place within a month of being charged.

[34] In this case a reasonable time to complete disclosure, to have counsel review it with his client and to be prepared to enter an election is in my view 3 months, not 7 months. If there was a contribution by the defence to the extra time required for the Crown to meet its disclosure obligations it is not indicated in the material that's been filed on this application. The hearing transcripts repeatedly refer to incomplete disclosure as the principal reason for delay.

[35] I conclude that 4 months of the delay from the time of charge to time of election is attributable to the Crown.

May 11, 2011 to September 26, 2012

[36] The initial Preliminary Inquiry date was set for September 28, 2011, just four months from the date of election. That hearing was adjourned for reasons I will discuss later. It was January 2012 before the Provincial Court was asked to set a new hearing date which it did, for July 19, 2012, a period of 6 months later. In March 2012 the Court was asked again to re-schedule the hearing and it did so to August 15, 2012, just five months away, and less than a month after the previously agreed to July date.

[37] The cause for the delay of the preliminary hearing originally scheduled for August 15, 2012, although couched in the record as relating to a problem with disclosure, appears not to have been a result of the Crown failing to disclose but rather with the defence counsel failing to confirm that all disclosure materials provided to previous defence counsel had been transmitted to him. I am not prepared to attribute that time to the Crown.

[38] When the matter returned to court on September 11, 2012, it was intended that a new date would be set for the Preliminary Inquiry. Instead counsel advised that there was an agreement to waive the hearing and consent to committal upon the Crown presenting a new Information with fewer charges, but arising from the same incidents. The arraignment of the accused on that new Information was delayed by a little over two weeks while the Crown prepared the new Information. When that occurred on September 26, 2012, the accused did consent to committal ending the path of this case in Provincial Court.

[39] I conclude that the delay from September 11 to September 26, 2012, used by

the Crown to prepare the new Information, was reasonable.

[40] The period from setting of the August Preliminary Inquiry date until the committal to trial was a little over six months of which approximately five weeks was attributable to Counsel.

September 26, 2012 to January 6, 2014

[41] I find no delays attributable to the Crown for the period of September 26, 2012 (which is the date of committal to the Supreme Court) to January 6, 2014, being the date upon which the trial began.

[42] When the case was before the Supreme Court on November 29, 2012, for setting of a trial date the Crown accepted dates offered in February 2013. The later trial date set in September 2013 was given to accommodate defence counsel's schedule.

[43] When the parties returned to court on August 1, 2013 to set a new trial date (due to the Court's scheduling problem) the Crown accepted offers of trial dates in October and November 2013. Again it was the defence that was unavailable and the trial date was set for January 6, 2014, with the agreement of Crown and defence.

January 6, 2014 to December 16, 2014

[44] I find that the delay from January 6, 2014, being the opening day of the trial in this Court to December 16, 2014, (being the date upon which the trial is now expected to be complete) and being a period of in excess of eleven months is attributable to the Crown, by reason of the mistrial generated because of

incomplete and late disclosure.

Conclusion

[45] In summary, in dealing with delays attributable to the Crown, I find that the total time of unreasonable delay attributable to the Crown from its own actions is fifteen (15) months consisting of four (4) months between charge and the accused's election of trial court; and eleven (11) months from the commencement of the trial in January until the scheduled new trial date.

Systemic or Institutional Delays

[46] In this case the Provincial Court was asked to set a Preliminary Inquiy to take one full day. On the first setting down date counsel asked for a hearing in the fall of 2011. The Court scheduled the matter four months and ten days after election (that is May 17, 2011 to September 28, 2011). This was reasonable and responsive to counsel's request.

[47] When asked to set a new Preliminary Inquiry date the Court set it for six months later (January 12 to July 19, 2012). Again this was a reasonable time frame having regard to the court dockets in the Halifax Provincial Court.

[48] In March 2012, when again asked to re-schedule the Preliminary Inquiry date, the Court was able to provide and did schedule it for August 15, less than a month after the original date and just five (5) months after the rescheduling request was presented to the Court.

[49] The Court sat on three different dates in September 2012 that culminated in the committal to Supreme Court for trial.

[50] But for the issues of disclosure and counsel's schedule this case would have gone to Preliminary Inquiry within eight months from the date of charge. In my view there was no systemic delay prior to the committal of the accused to trial.

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[51] The Indictment was presented to the Supreme Court on October 11, 2012, just 2 weeks after the committal.

[52] After the pretrial conference, the parties appeared at Crownside on November 29, 2012, for setting of trial dates. The Court offered dates in January and February 2013, which if accepted would have resulted in a trial in less than four months from the first appearance in Supreme Court. The Crown accepted the February dates.

[53] Defence counsel advised that he was unavailable until after May 2013. This Court does not schedule jury trials in July or August due to the difficulties that vacations cause in empanelling jurors and securing witnesses and counsel. The next available dates after the summer, began on September 23, 2013, eleven months after the first appearance in the Supreme Court and within seven weeks of the available sitting dates, having regard to the limitations of defence counsel's schedule. I find that to this point in time there was no institutional delay.

[54] On July 10, 2013, the Court initiated a request to re-schedule the trial date due to a conflict with a judges' meeting. New trial dates totaling twenty-seven different days in the months of September through December 2013 were offered to counsel. Crown counsel indicated they were available for ten of those days in October and November, but defence counsel was previously scheduled and unavailable. I note that he did suggest that he could move some things to be available in October but that he preferred a date after December 2013.

[55] The Court assigned January 6, 2014, as the new trial date.

[56] The scheduling conflict of the court caused a delay of just over three months. Although the court was able to offer numerous dates that would have, if acceptable to counsel, resulted in a much shorter delay, it was not unreasonable that counsel was not available on two months' notice to rebook a five day jury trial within 5-6 months. It is reasonable to expect that counsel would be previously scheduled for such a period in advance and their other clients should not be expected to have their matters delayed as a result of the Court's error in scheduling. I will re-visit this issue, when looking at the actions of the accused as a factor in delaying the scheduling of the trial.

[57] I conclude that there was unreasonable institutional delay of three (3) months caused by the Court's scheduling error.

(f) Delays Attributable to the Accused

[58] The Court in *Morin, supra,* confirmed that it is not necessary for the accused to assert his or her right to be tried within a reasonable time, although it was held that: "Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider".

[59] In this case there were many adjournments, and scheduling and rescheduling was sometimes delayed because of actions attributable to the accused.

[60] The court in discussing the factor of the "Actions of the Accused" said the following in *Morin, supra*:

> 45 An example of such actions is provided by *Conway, supra*. In *Conway*, the

> accused made a number of requests which led to the proceedings being delayed. Those requests included a change of venue motion, changes of solicitor and a request that the accused be allowed to re-elect trial by judge alone. A further example is provided in *Bennett, supra,* where the accused made an election at his scheduled Provincial Court trial to be tried in the then District Court. This converted a scheduled trial into a preliminary inquiry. While the type of action of the accused in both these cases was unquestionably *bona fide*, each action contributed to the delay and must therefore be taken into consideration in determining whether the overall delay suffered by the accused was reasonable.

[61] In *R. v Godin*, 2009 SCC 26, Cromwell, J. held at para. 23:

> 23. ….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.…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'.

[62] Let me say at the outset that I find no evidence that the accused engaged in actions that were undertaken specifically for the purposes of delaying the trial. As I will outline, a problem of delay did emanate from the regular unavailability of defence counsel.

[63] I have previously summarized, date by date, the events at each court appearance of the past four years. Mr. Clare retained Alfred Seaman to represent him and his first court appearance for the accused was on November 22, 2010.

[64] On September 14, 2011, just two weeks prior to the commencement of the Preliminary Inquiry Mr. Clare appeared to seek an adjournment because he could no longer afford to retain Mr. Seaman, and while he had already been qualified for the services of Legal Aid his appointment would not be until October 13, 2011.

[65] Mr. Clare was entirely correct in having resolved the qualification issue with Legal Aid first, and then bringing the matter before the court in advance of the Preliminary Inquiry date. However, I am concerned that he waited 10 months from when Mr. Seaman first appeared for him to determine that he couldn't afford to pay the required legal fees. Had the retainer been determined much earlier the Preliminary Inquiry may have been able to proceed as scheduled; or the length of the adjourned period may have been addressed sooner causing a shorter overall delay.

[66] The change of legal counsel in September caused the Preliminary Inquiry to be delayed until July 19, 2012, a period of ten months which I attribute to the actions of the accused.

[67] The Preliminary Inquiry was further adjourned to August 15, 2012, again at the request of defence counsel, who found he had a conflict with a personal matter for the July 19th date. This resulted in a further delay of one month attributable to the accused.

[68] The Preliminary Inquiry did not proceed on August 15th. A review of an e-mail exchange between defence and Crown counsel that took place during the week prior to the scheduled Preliminary Inquiry shows that it was at that time that defence counsel became uncertain as to whether he had received all of the disclosure from previous counsel.

[69] On August 10, 2012, the Crown Attorney invited defence counsel to attend at her offices to review and compare the contents of the Crown file with the information that defence counsel had. It is not apparent on the record that defence counsel had done this previously.

[70] Although this requested adjournment was presented as a "joint request", the

problem was with the defence for failing to confirm in a timely manner that all disclosure materials in the possession of previous defence counsel were transmitted to succeeding counsel, at the time of the change of counsel.

[71] Defence counsel had been on the file for over eight months prior to the date for the Preliminary Inquiry. Had counsel reviewed the file more carefully at an earlier time then the issues that led to the adjournment of the Preliminary Inquiry could have been addressed.

[72] Defence counsel had not ensured, in a timely manner, that the disclosure provided by the Crown to Mr. Seaman had in fact been transmitted to him back in November 2011, when Mr. Planetta took over carriage of the matter.

[73] The problem was resolved by negotiation and ultimately a waiver of Preliminary Inquiry took place on September 26. The delay from the date of the August 15th preliminary hearing date to the committal date of September 26, 2012, was caused in my view or attributable to the defence. This amounted to a further delay of forty-two days.

[74] Once in Supreme Court the trial date could have been set as early as January 14, 2013. However, defence counsel was not available until after May 2013. This meant that the trial could only be scheduled in June or after August 2013.

[75] The delay in setting the first trial date because of the unavailability of the defence counsel stretched from February 20, 2013, being the earliest date available and which the Crown accepted, to September 23, 2013, a period of seven (7) months.

[76] I acknowledge that in normal circumstances some time should be allowed to

the defence to recognize prior scheduling commitments. I am also cognizant of the fact that two months of that period , being July and August, were not available for the scheduling of a jury trial; however, by November 29, 2012, the case was already over two years post charge. Delay was an issue that had to be in the minds of the Court, the Crown and the defence.

[77] At a certain point, when it becomes apparent that the time that it is taking to get to trial is approaching unreasonable lengths, and when the court is offering hearing dates that would significantly shorten that delay, then the accused and his counsel must make it a priority for their scheduling. While each adjournment may seem reasonable in its own right there must be some responsibility upon the defence to consider that the cumulative effect of their actions may contribute to unreasonable delay in the matter coming to trial. In my view this is when it must be asked whether the cumulative delay can be said to have amounted to "reasonable availability and cooperation". Simply put, defence counsel should have either tried to make themselves available much sooner than the June 2013 trial dates or acknowledged that they were too busy to handle the case in an expeditious fashion. Otherwise, the defence leaves itself open to the conclusion that it is not being reasonable and cooperative in trying to bring the matter to trial in a reasonable time.

[78] A delay from November 29, 2012, (which was the setting down date) to a date in February, a period of three months would have been reasonable. Instead it took almost ten months to get a trial date. I conclude that the difference of seven months is attributable to the actions of the accused.

[79] Therefore, I conclude that the actions of the accused did not amount to reasonable availability and cooperation and that in total nineteen months and twelve days of delay is attributable to the defence, largely because of the change of counsel or counsel's unavailability on dates offered by the court.

(iv) Prejudice to the Accused

[80] There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay. *Morin*, *supra* at paras 61-62 reads in part:

> 61 …Section 11(b) was designed to protect the individual, whose rights are not to be determined on the basis of the desires or practices of the majority. Accordingly, in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined.
>
> 62 This Court has made clear in previous decisions that it is the duty of the Crown to bring the accused to trial (see *Askov*, *supra*, at pp. 1225, 1227, 1229).

[81] I conclude that there is no basis to find that the accused engaged in a pattern of conduct that was intended to delay the trial. I accept that a period of over four years awaiting trial on criminal charges that have their foundations in alleged domestic violence (using that term broadly) and where there is a child involved leads to a reasonable inference of prejudice. These are events that require a prompt resolution for all parties, the complainant, the accused, and society. Delay in resolution puts lives on hold.

[82] I am cognizant of the fact that over nineteen months of the delay has been attributed to the actions of the accused. Prejudice that is founded solely on the passage of time would be mitigated to some extent when the actions of the accused created some of that extension of time before the matter was brought to trial, and from that which would be reasonable.

[83] However, in this case, the Crown had ongoing problems with identifying material in its possession for disclosure and the witnesses that it intended to call at

the trial. In its submissions on this application the Crown argues that the substantive effects of the late disclosure were not serious and that late disclosure was not a result of "abject failure…to prepare their case" as asserted by the accused.

[84] There are two flaws in this submission:

1. Justice Robertson has already ruled that the failures were serious and impacted upon the accused's right to a fair trial. I am not in a position to now conclude that she was wrong; and

2. Assuming that the Crown's argument that the additional disclosure and additional witnesses did not create a substantive prejudice to the accused's ability to make full answer and defence, it is still a matter of the timing of the disclosures. These issues would and should have been identified much earlier than the eve of the trial. I can only conclude that they were not because the file until Mr. Keaveny came on it was apparently not being looked at, at least not far enough in advance of the trial in order to identify the matters that Mr. Keaveny did on the eve of the trial. This is not the fault of the accused.

[85] The fact that the Crown only advised the defence on the second day of trial of its intention to call an additional three or four witnesses, was found to impact the fairness of the trial. Information before the court indicates that some witnesses that were intended to be called at the trial had not given statements, and without a Preliminary Inquiry were not called upon to testify previously.

[86] The passage of time is often cited as an impediment to the ability of witnesses to recall events accurately. That problem is made worse when there was no recording of their expected testimony in a statement or a "Will Say" statement form that is created contemporaneously with the events. This can cause prejudice to the accused's ability to make full answer and defence.

[87] The accused is entitled to know the case that he has to meet. Justice Robertson concluded that Crown actions undermined the fairness of the trial. The accused's preparation would not have anticipated these extra witnesses, even though they may have been identified in the investigative file. In effect the accused was put in the position of trying to revisit his defence strategy when the time for preparation was gone. The Crown's delays in making full disclosure existed independently of any delay that might be attributed to the defence. The prejudice was exacerbated by the length of time between the charge and the date of the disclosure.

[88] Finally, there is the stress of having serious criminal accusations hanging over the accused for extended periods of time, including but not limited to the requirements of complying with the conditions of a Recognizance.

[89] Based on these facts I conclude that prejudice to the accused has been generated by the delay.

Conclusion

[90] In summary I have concluded that:

1. The time from charge to the scheduled conclusion of the trial is October 10, 2010 to December 16, 2014, or 50 months and 6 days which is *prima facie* unreasonable and merits inquiry by the court;

2. The institutional delay attributable to systemic and Crown actions is 18 months;

3. The time attributable to the actions of the defence is 19 months and 12 days;

4. The accused did not waive his right to trial in a reasonable time;

5. There has been prejudice to the accused occasioned by the delay.

[91] The burden is on the accused to show a **Charter** violation. Here the delay is unusual. The inherent time requirements of this case, having regard to the nature of the charges, the type and volume of the disclosure materials as I understand them, the number of witnesses, the estimated time for a preliminary hearing, and the estimated time of a jury trial would be 18 months to 21 months. By the expected completion of the trial over 50 months will have passed. There is a burden on the Crown to explain this unusual delay.

[92] Although the actions of the accused contributed to a delay of 19 months and 12 days, it would still have taken approximately 30 ½ months for this matter to come to trial, significantly in excess of the guideline of 18 months, and more than the 21 months that I would allow as a reasonable estimate of the inherent time requirements for this case to be brought to a conclusion. In fact, if one removes the time attributable to the actions of the accused and of the institutional delay that I found, then this matter theoretically could have been tried in less than 15 months from the date of charge, a time that would have been within the guidelines.

[93] In *R. v. Morin*, *supra* Justice Sopinka explained the competing interests at issue in assessing a s 11(b) breach. Beginning at para. 26 he says:

> 26 The primary purpose of s. 11(b) is the protection of the individual rights of accused. A secondary interest of society as a whole has, however, been recognized by this Court. I will address each of these interests and their interaction.
>
> 27 The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.
>
> 28 The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

> 29 The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in *R. v. Beason* (1983), 36 C.R. (3d) 73 (Ont. C.A.): 'Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused...' (p. 96).…
>
> 30 There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In *Conway*, a majority of this Court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in *Askov* in the reasons of Cory J. who referred to 'a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law' (pp. 1219-20). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.

[94] Domestic violence is a serious problem in society. The inability of a complainant to live in peace without harassment and the fear that it can cause supports the position that there is a strong societal interest in seeing that there is a trial on the merits of such allegations. Crimes such as attempting to obstruct justice and failing to comply with judicial interim release orders are also very serious matters for society and must be prosecuted as part of the overall effort to ensure that the public has confidence in and respect for the administration of justice.

[95] However, in balancing all of the factors and in particular having considered the statement that I just read by Justice Sopinka in *Morin, supra*, I have concluded that the delay in this case was unreasonable and that the appellant's right to trial within a reasonable period of time under s.11(b) of the **Charter** was breached.

[96] It is well accepted that the minimum remedy for such an infringement is a stay of proceedings (see *R. v. Rahey*, [1987] 1 S.C.R.588, *R. v. Kporwodu* (2005), 75 O.R. (3d) 190 (C.A.), *R. v. Thomson*, 2009 ONCA771, *R. v. R.E.W.*, 2011

NSCA 18); the latter being a decision from our Court of Appeal.

[97] Therefore I order that a judicial stay is entered of all charges outstanding and Mr. Clare is discharged.

Duncan, J.