SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Melvin*, 2017 NSSC 149

Date: 20170109
Docket: Hfx. No. CRH 453327
Registry: Halifax

Between:

Her Majesty the Queen

v.

Cory Patrick Melvin

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	January 9, 2017, in Halifax, Nova Scotia
Written Reasons For Decision:	May 30, 2017
Counsel:	Eric R. Woodburn, for the Crown Stanley MacDonald, Q.C., for the Defence

By the Court:

Introduction

[1] Corey Patrick Melvin is charged:

> 1) that on or about the 16th day of August 2011 at, or near Halifax, in the County of Halifax, in the Province of Nova Scotia, he did unlawfully wound, and endanger the life of Callum Paul MacDonald thereby committing an aggravated assault, contrary to s. 268(1) of the *Criminal Code.*
>
> 2) And further that he at the same time and place aforesaid, did unlawfully have in his possession a weapon, to wit, knife for the purpose of committing an offence, contrary to s. 88(2) of the *Criminal Code.*

[2] The charges were laid on September 7, 2011, and Mr. Melvin's trial is scheduled to be heard from January 16 to January 20, 2017. This will be his third trial with respect to these charges. His first was declared a mistrial (December 5, 2013) when his defence counsel was required to withdraw as a result of finding herself in what was described to the court as an ethical conflict, albeit one that did not arise as a result of any conflict and/or breakdown of communication with the accused. This was a jury trial. The mistrial was declared after the parties had been seven days into it.

[3] The accused's second trial, also before judge and jury, commenced on February 2, 2015. That trial consumed nine days of court time, after which the accused was convicted on the two charges that have been noted above. He was found not guilty with respect to two other assault charges and was sentenced to a total of eighteen months of custody (eighteen months on the aggravated assault charge and six months on the s. 88(1) charge, to be served concurrently).

[4] Prior to the commencement of his second judge and jury trial on February 2, 2015, Mr. Melvin had applied for a stay of proceedings, alleging that his right to be tried within a reasonable time, as set out in s. 11(b) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), had been infringed.

[5] Justice James Chipman, of this court, in a decision rendered on January 15, 2015, and reported as *R. v. Melvin,* 2015 NSSC 13, dismissed the application and,

in so doing, concluded that a violation of the accused's s. 11(b) rights had not been established.

[6] On June 2, 2015, Mr. Melvin appealed his conviction in the second trial. He was sentenced the following day and received the sentence noted above.

[7] Over one year later, in a decision released on June 9, 2016, the Nova Scotia Court of Appeal overturned Mr. Melvin's convictions, and ordered a new trial with respect to these two remaining charges.

[8] Following the Court of Appeal's decision in this respect, on July 14, 2016, the parties appeared at Crownside and available dates were canvassed. Mr. MacDonald, present counsel for the accused, appeared on this date. Another judge and jury trial (the third) was scheduled for November 7 to 28, 2016. A return date was scheduled for Crownside on July 28, 2016 in order for defence counsel to confirm his availability on the proffered trial dates.

[9] On July 28, 2016 the parties returned to Crownside and the court was advised that the defence was not available for dates in November 2016, so they were released by the court. The matter was adjourned to August 25, 2016 (at Crownside) to set new dates for Mr. Melvin's third trial. The dates thus scheduled were January 16 to February 6, 2017.

[10] On October 13, 2016, the court was advised that the accused wished to re-elect so as to have his trial heard by judge alone. This request was granted and, in light of this, counsel advised that the time required to try the matter could be reduced from fifteen to five days. That is how the present dates of January16 to 20, 2017 came about.

[11] At the October 13, 2016 appearance, the court was also advised of the accused's intention to bring a second s. 11(b) *Charter* application – the present one. On November 21, 2016, I held a scheduling conference with counsel, at which time dates were set for the filing of the defence notice and brief (November 28, 2016) and the Crown brief (December 16, 2016). In addition to these specified documents, I have also received the accused's reply brief to the Crown submissions, which reply was dated December 22, 2016.

[12] On January 9, 2017, I dismissed this (Mr. Melvin's second) s. 11(b) application with reasons to follow. I now provide them herewith.

LAW AND ANALYSIS

(A) The Jordan Framework

[13] Integral to my determination in this case was the majority decision in *R. v. Jordan*, 2016 SCC 27.

[14] I will begin by summarizing the framework established by *Jordan*, reserving consideration of the transitional principles that are also contained in that decision to be dealt with later on in these reasons.

[15] The basic *Jordan* framework is summarized in paras. 46 to 48 thereof, to the following effect:

> [46] At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).
>
> [47] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.
>
> [48] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

[16] Accordingly, the first step of the analysis requires me to determine the "total length of time between the charge and the actual or anticipated end of trial".

(B) What is the total delay?

[17] In this case, the period of time from September 7, 2011 (when the charges were laid) to January 20, 2017 (end of the third trial as anticipated) is five years and four months, or 1920 days, if we speak in terms of “30 day” months.

Obviously, the thirty month global ceiling prescribed by *Jordan*, *supra*, for cases going to trial in this court has been exceeded.

[18] Having said that, the Supreme Court of Canada in *R. v. Potvin*, [1993] 2 S.C.R. 880, concluded at para. 26:

> . . . that as a general rule "a person charged under Section 11" does not include an accused person who is a party to an appeal . . . [and] . . . that the interpretation that gives both of these elements and best harmonizes the other subsections is that the subsection applies to the pretrial period and the trial process but not to appellate proceedings.

[19] Accordingly, both counsel have agreed that the time attributable to appellate delay does not factor into this analysis.

[20] Mr. Melvin was convicted by a jury on February 19, 2015. He was sentenced on June 3, 2015. His Notice of Appeal (with respect to conviction) was filed the day before, on June 2, 2015.

[21] The delay in sentencing (from February 20, 2015 to June 3, 2015) was almost entirely attributable to the need to prepare a presentence report, which was requested by Mr. Melvin. This usually necessitates a delay in the neighbourhood of eight weeks.

[22] The original date for sentencing had been May 19, 2015. The accused requested and was granted a short adjournment beyond that date (to June 3, 2015) to provide his counsel with an opportunity to speak to the victim in this matter, who had elected to file a victim impact statement which provided some contact information.

[23] The total delay attributable to the appeal by Mr. Melvin of his conviction by the jury on February 19, 2015 is, therefore, the period from June 2, 2015 to June 9, 2016. It consists of one year and seven days, which I round to one year.

[24] The global or total delay is accordingly reduced to four years and four months (1560 days).

(C) What, if any, portion of this delay was either occasioned by defence conduct or waived by the defence?

(i) Delay - September 7, 2011 to February 20 , 2015

[25] It is important to recognize that the above noted time increment comprises that portion of the overall delay that was the subject of the first s. 11(b) *Charter* application brought by Mr. Melvin. Of course, it was heard in a "pre *Jordan*" milieu. This was Justice Chipman's decision and it was delivered on January 15, 2015 as previously mentioned.

Res Judicata/Issue Estoppel

[26] I will comment initially on the issue of *res judicata* or issue *estoppel* and whether such considerations are applicable (in this, the second s. 11(b) application) with respect to the findings made in relation to defence/Crown and/or inherent delay in that first application.

[27] The only authority that I have been able to locate that is somewhat on point is that of *R. v. Trudel,* [2007] O.J. No. 113, a decision of the Ontario Superior Court of Justice. Therein, the two accused, Trudel and Sauve, were charged with the first degree murder of a low level drug dealer and his wife. Charges were laid in late December 1990, and a preliminary inquiry was held between September 1991 and February 1994. An application pursuant to s. 11(b) of the *Charter* was heard by the trial judge on December 5, 1994, and dismissed. The trial commenced on January 23, 1995, and a conviction was entered on May 30, 1996. Trudel and Sauve appealed their convictions and a new trial was ordered on January 30, 2004. The new trial commenced with another s. 11(b) motion.

[28] On the subject of the dismissal of the earlier s. 11(b) application on December 5, 1994, Justice MacKinnon had this to say at paras. 45 - 49:

> 45 Crown counsel have submitted that the decision of McWilliam J. dismissing the application for a stay of proceedings pursuant to s. 11(b) is *res judicata* and rely primarily on the decision of the Alberta Court of Appeal in *R. v. Robinson* (1999), 250 A.R. 201 (C.A.). A careful reading of the case discloses that the comments of McFadyen J.A. opining that a previous determination of an application brought under s. 11(b) would amount to *res judicata* were specifically disagreed with by Berger J.A. when he stated at para. 55:
>
> > Section 24(1) should be given an expansive, liberal interpretation. Moreover, the conduct of the Crown pre-dating the first trial is properly re-evaluated in the light of the unfolding of the narrative giving rise to and concluding with the second trial. That which may have been assessed to be innocuous and benign by Dea, J. at

> the time of his adjudication may well have taken on a greater significance given the passage of time and intervening events at the time of Cooke, J.'s adjudication. It follows that Cooke, J. was required to consider afresh the motion for a judicial stay as well as the motion for costs. The defence was not estopped, for these reasons, from re-litigating issues heard and determined earlier by Dea, J. on a different factual footing.
>
> 46 I find this reasoning persuasive and more in keeping with the judgment of the Supreme Court of Canada in *R. v. Duhamel*, [1984] 2 S.C.R. 555, quoting with approval from *R. v. Hilson*, [1958] O.R. 665, 121 C.C.C. 139 (C.A.) holding that a ruling of one trial judge cannot bind another where a new trial is ordered. A new trial is a trial of all issues *de novo*, except as counsel might otherwise agree to be bound by rulings made by the judge in the original trial.
>
> 47 Perhaps more germane is the fact that the s. 11(b) application was reasserted before McWilliam J. on September 5, 1995, and was dismissed. No reasons are available for the dismissal. This court cannot be bound by a decision in which reasons are unavailable.
>
> 48 In the alternative, the Crown has argued that the decision of McWilliam J. should be viewed as "instructive". While I appreciate that Justice McWilliam is a highly respected and very experienced trial judge, I nonetheless view my task as requiring a determination of the case on the merits, based on the material filed before me on the present application.
>
> 49 In any event, the first decision of McWilliam J. was rendered more than 12 years ago. The terrain has altered considerably. Even assuming McWilliam J.'s 1994 decision was *res judicata*, there have been such substantial delays since that time that the case demands a fresh look and, in the end, a different determination.
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> [Emphasis added]

[29] In *R. v. Mercer*, 2007 NLTD 128, both accused were charged in 1998 and acquitted after the first trial in 2003. An earlier application for a s. 11(b) stay had been dismissed. On appeal, a second trial was ordered and the accused brought another application for a stay in 2006, before his second trial got underway. Justice Hall stated, in para 12:

> 12. …I am satisfied that based upon the decision of the Supreme Court in *Potvin* any delays in the trial process leading up to the conclusion of the First Trial, and the rendering of the Court of Appeal decision remitting the matter back for a new trial, cannot now be considered in terms of re-arguing the issue of delay. In my view those decisions have already been made and the matter is res judicata. The principle of res judicata is applied to avoid a multiplicity of proceedings litigating the same issue. In the Crown appeal of the acquittal decision by Rowe J. the applicants ought to have then cross-appealed on the issue of delay generally. They

> chose however to only argue appellate delay, which argument was dismissed by the Court of Appeal. In my view the failure to raise trial delay in the Court of Appeal puts an end to that issue as an element of delay, leaving only the question of delay, subsequent to the decision of the Court of Appeal ordering a new trial, to be considered in this present application.

[30] Albeit in a context involving multiple trials rather than multiple s. 11(b) proceedings, Justice Paciocco in *R. v. Fitts*, 2015 ONCJ 746 at para. 5 stated:

> 5 There are cases that take both approaches, but the parties before me agree with the bulk of the authorities holding that where there has been a retrial, the delay calculation "includes the period when the charge was laid to the completion of the first trial, as well as the period from when a new trial is ordered to the new trial date": *R. v. Spencer* [2004] O.J. No. 5863 at para 105 (Ont.C.J.), see also *R. v. Follows* [2013] O.J. No. 5790 (Ont.C.J.), and *R. v. Konnafis* [1996] O.J. No. 3961 (Ont. Court of Justice (Gen. Div.)). This is sensible given the purpose served by section 11(b). It is a constitutional assurance that the state will not subject a person charged to "overlong exposure to the vexations and vicissitudes of pending criminal accusation": *R. v. Mills*, [1986] S.C.J. No. 39, at para. 146. Put more simply, section 11(b) recognizes that individuals who are being prosecuted are presumed to be innocent, and that the prosecution process can have significant adverse impact on the liberty interests and personal well-being of those who are charged. Since an accused person facing a retrial will have experienced the adverse effects of the prosecution from the time the charge was initially laid, that entire period should, in my view, be taken into account. This is particularly so given that accused persons are not ordinarily responsible for the need for a second trial. A second trial becomes necessary because of judicial error, or extenuating circumstances requiring a mistrial at the first hearing. Accused persons should not, in my view, be expected to undergo unacknowledged subjection to the stress and challenges of delay simply because, through no fault of their own, the first trial failed to dispose of the matter.

[31] *R. v. Duhamel*, [1984] 2 S.C.R. 555 involved the following facts (which are taken from the headnote):

> The Appellant was charged with two counts of robbery and tried separately on each count. At the first trial, following a *voir dire*, statements made by the accused were declared inadmissible and the accused was acquitted. The second trial took place before a different judge. Despite the accused's objection that the Crown was estopped from relitigating the issue of voluntariness of statements, the trial judge held a *voir dire* and admitted the statements. The accused was subsequently convicted. His appeal from conviction and sentence was dismissed.

[32] In relation to the application of issue estoppel to the *voir dire* ruling in the first trial, Justice Lamer of the Supreme Court of Canada stated at paras. 14 to 19:

Much has been written and said on issue estoppel and *res judicata*.

Although *res judicata* has, since the decision of this Court in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, become a term of art in Canada, I will refer to it in its broadest and traditional sense.

A clear exposition on the matter may be found in Martin L. Friedland's *Double Jeopardy*, Oxford, Clarendon Press, 1969, and more recently in Jacques Fortin's *Preuve pénale*, Montréal, Éditions Thémis Inc., 1984, and need not be repeated here at any length.

In short, *res judicata* means "something that has clearly been decided" and is the reason given by the Romans and the legal systems stemming from theirs, such as ours, to a doctrine that strives to achieve the following:

Having regard to fairness to an accused

> (a) that a person not be put in jeopardy once again after an acquittal (*autrefois acq*uit);
>
> (b) that a person not be punished twice for the same conduct (*autrefois convict* and the *Kienapple* principle);and, having regard to the efficiency and reputation of the judicial system,
>
> (c) that matters that have been fully litigated between parties be not reopened, over and over;
>
> (d) that the scandal of conflicting decisions be avoided.

This case illustrates the undesirability of relitigation, as being costly and time consuming, and prone to the risk of conflicting decisions.

There is no doubt in my mind that if there is a bar to an extension of the doctrine of res judicata to rulings on confession *voir dires*, it does not stem from principle or logic. It is desirable that we avoid relitigation of the issue and, as in this case, the risk of conflicting decisions. And, if a *voir dire* is "a trial within a trial" logic commands such an extension unless there are overriding reasons not to do so. In fact, I even think the doctrine could be extended in such cases beyond its actual application to criminal matters so as to introduce "mutuality" (i.e. a finding being a bar not only to the Crown but to the accused when adverse to his interest). Indeed, mutuality of issue estoppel has been excluded in criminal law because of the Crown's burden of proving in each and every case all of the elements of the offence. But as I have already said, the facts relevant to the finding and the finding itself on such a *voir dire* are foreign to the facts to be proved by the Crown as regards the commission of the offence by the accused; therefore, what would inure to the Crown through "mutuality" of the finding in no way relaxes its burden of proving facts.

Be that as it may, I do not think it desirable that we extend the doctrine, with or without "mutuality", to such findings.

[Emphasis added]

[33] Of course, the alignment of the case at bar with the situations encountered in *Trudel, Mercer* and *Duhamel* is not exact. That said, for reasons that I will expand upon, (and like Justice MacKinnon in *Trudel*), I am satisfied that the determinations made in the first s. 11(b) application are not binding upon me. I am also satisfied that this view also is more consonant with the Supreme Court of Canada's reasons in *Duhamel, supra*, even though the parallel is inexact.

[34] I say this even though the first s. 11(b) application could have been appealed by the accused (and was not) and even though (strictly speaking) the law bearing upon the question of defence waiver remains unchanged.

[35] I say "strictly speaking", because a waiver analysis appears to be nuanced somewhat differently in *Jordan's* aftermath, as compared to such an analysis as previously encountered in *R. v. Askov*, [1990] 2 S.C.R. 1199, and *R. v. Morin*, [1992] 1 S.C.R. 771. I will return to this particular point later in these reasons.

[36] One reason why I do not consider the findings in the first s. 11(b) *Charter* application binding upon me lies in the fact that this (third) trial must (in all respects) be a trial *de novo.* By necessary implication, this trial should be unencumbered by whatever has occurred in the previous two, including any pre-trial motions decided in relation to them. This allows the court to give appropriate recognition to the entire period of time during which the accused has had the figurative "sword of Damocles" hanging above his head (per *Fitts* and *Trudel).*

[37] Finally, and buttressing the conclusion at which I have arrived with respect to this issue, affidavit evidence was tendered by the accused/applicant in this (second) s. 11(b) application. This evidence was (obviously) not before Justice Chipman when he rendered his decision in the first. For the moment, it is sufficient to note that this evidence consists of one affidavit by Patrick MacEwen, Mr. Melvin's counsel during the interval following the first trial (which was declared a mistrial after day seven) through to the conclusion of the second trial. This affidavit was admitted without cross-examination of the deponent. The other piece of new evidence was the affidavit of Mr. Melvin himself, in relation to which he was subjected to cross-examination. The relevant portions of each affidavit will be considered in proper course.

September 20, 2011 to February 20, 2015 revisted

[38] Against the above-noted background, it is appropriate to consider the accused's appearances both in the Provincial Court and in this one. First, I will

consider those up to February 2, 2015, which was the date of commencement of Mr. Melvin's second trial, and encompasses the period of time considered by Justice Chipman in Mr. Melvin's first s. 11(b) application.

Appearance Date (D/M/Y)	Provincial Court 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**

Appearance Date (D/M/Y)	Supreme Court 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**

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 MacEwen appearing. States that he has just recently been retained. Mr. MacEwen 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. MacEwen 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. MacEwen informs the court that disclosure is still making its way over from Ms. Buckle's office. Mr. MacEwen 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.	**2 months, 26 days**
2/5/2014	Pre-Trial conference held. (no transcript available)	**1 month, 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 second trial.**	

[39] It is clear that the charges were laid on September 7, 2011. The time interval between that date and the first court appearance on September 26, 2011 (19 days) is not inordinate (or sufficiently in excess of what was reasonable) so as to be considered anything other than inherent delay.

[40] My comments are the same with respect to the 17 days that elapsed between September 26, 2011, and October 13, 2011. I also classify the 11 days between October 13, 2011, and October 24, 2011 as inherent/neutral delay. Eleven days to wait for a bail decision was not, under these circumstances, anything such as to warrant comment.

[41] So, too, the period between October 24, 2011, and December 5, 2011. This delay is not attributable to either side and is simply part of the ordinary process, particularly where defence counsel had noted that she continued to await further disclosure that had not yet been provided. This shall also be classified as inherent/neutral delay.

[42] With respect to the appearance on December 5, 2011, as noted, the accused appeared with his counsel, who indicated that she continued to await further disclosure from the Crown. The election was accordingly set over to December 19, 2011. I assign this fourteen day delay to the Crown.

[43] On December 19, 2011, the parties appeared and the defence noted the accused continued to wait on disclosure prior to making election and setting preliminary inquiry dates. Thus, the delay until the next court appearance (on January 23, 2012) shall also be attributed to the Crown.

[44] With respect to the court appearance of January 23, 2012, Ms. Buckle (Mr. Melvin's counsel) informed the court that she had recently received the sought after disclosure and required time to review it. She requested an adjournment to February 28, 2012 which was granted. The 35 days which intervene between that date and the next appearance are defence waived.

[45] On February 28, 2012 counsel returned to court and an election to the Supreme Court (judge and jury) was entered. So, too, was a request for a preliminary inquiry. There was some discussion with respect to dates. The first date proposed was June 15, 2012, for which the Crown was unavailable. The next date proposed was June 26, 2012. Ms. Buckle stated "that's fine".

[46] It is not disputed that the eleven days which elapsed between the originally proposed date for the preliminary inquiry, and that upon which the parties ultimately settled (June 26, 2012) should be attributed to the Crown, on the basis of counsel's unavailability on the earlier date. The thornier issue is whether acceptance of the June 26, 2012 date for the preliminary inquiry with the words "that's fine" constitutes a defence waiver of the ensuing three months and eighteen days.

[47] It will be recalled that, as per *Askov, supra,* a waiver must be clear and unequivocal with full knowledge of the rights protected under s. 11(b). It is also abundantly clear that Ms. Buckle (as she then was, now the Honourable Judge Elizabeth Buckle of the Nova Scotia Provincial Court) was an eminently well qualified and experienced criminal lawyer, through whom the accused can be taken to have been well aware of his *Charter* rights and the implications of one course of action over another.

[48] That having been said, it must also be born in mind that, as per *Morin, supra*, mere acquiescence or acceptance of the "inevitable" cannot constitute waiver for the purposes of this discussion. This receives even greater emphasis when regard is had to the comments on the subject in *Jordan, supra.*

[49] Consider, first, what the majority in *Jordan, supra*, had to say at para. 61:

> [61] Defence delay has two components. The first is delay waived by the defence (*Askov*, at pp. 1228-29; *Morin*, at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11 (b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (*R. v. Conway*, [1989] 1 S.C.R. 1659, per L'Heureux-Dubé J., at p. 1686).

[50] Read in isolation, this does not appear to differ meaningfully from prior statements on the topic in *Askov, supra, and Morin, sup*ra. However, at paras. 187 – 191 of *Jordan*, we find the following:

> 187 The concept of "waiver" by the accused in the s. 11(b) context has given rise to some confusion and this case provides an opportunity to bring further clarity to that issue.

> 188 First, the language of "waiver" in this context may be misleading. As stated by this Court in *Conway*, when the courts speak of "waiver" in the context of s. 11(b), "it is not the right itself which is being waived but merely the inclusion of specific periods in the overall assessment of reasonableness": p. 1686. This means that periods of time to which the accused has or is deemed to have agreed will not count towards any determination of unreasonable delay.
>
> 189 Second, there is admittedly some lack of clarity in our jurisprudence as to whether the accused's consent to an adjournment sought by the Crown constitutes "waiver" of the resulting delay. In *Smith*, this Court created a rebuttable inference of waiver if defence consents to a future trial date. This proposition was qualified, however, by the point that "inaction or acquiescence on the part of the accused, short of waiver" does not result in a forfeiture of an accused's s. 11(b) rights: *Smith*, at p. 1136. In *Morin*, Sopinka J. explained that the accused's consent to a trial date "can give rise to an inference of waiver", but this is not the case "if consent to a date amounts to mere acquiescence in the inevitable": p. 790. This Court, albeit in very short decisions, upheld this approach in *R. v. Brassard*, [1993] 4 S.C.R. 287, at p. 287, and *R. v. Nuosci*, [1993] 4 S.C.R. 283, at p. 284, stating that consent to a future date will be characterized as waiver in the absence of evidence that it is acquiescence.
>
> 190 A rebuttable inference of waiver from the accused's consent to an adjournment does not sit well with the settled law that waiver must be clear, unequivocal and must be established by the Crown: see e.g. *Askov* at p. 1232. As noted in *Morin*, the waiver must be done "with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights", and that such a test is "stringent": p. 790.
>
> 191 I conclude that, when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than "mere acquiescence in the inevitable," and that it meets the high bar of being clear, unequivocal, and informed acceptance that the period of time will not count against the state.
>
> [Emphasis added]

[51] So, too, we have the comments of Watt, J.A. in *R. v. Manaserri*, 2016 ONCA 703:

> 303 Defence waiver of delay can be explicit or implicit, but it must be clear and unequivocal. An accused must have full knowledge not only of his or her rights, but also of the effect waiver will have on those rights: *Jordan*, at para. 61.
>
> 304 Delay caused solely by the conduct of the defence takes in a variety of conduct that either directly causes the delay or reveals a deliberate and calculated

> tactic to delay the trial, such as frivolous applications and requests: Jordan, at para. 63. Where the court and Crown are ready to proceed, but the defence is not, the defence will have directly caused the delay. Not so, however, where the court and the Crown are unavailable, even if the defence is not: *Jordan*, at para. 64.
>
> 305 On the other hand, defence conduct legitimately undertaken to respond to the charge falls outside the scope of defence delay: *Jordan*, at para. 65.
>
> [Emphasis added]

[52] The decision in *Jordan, supra,* was rendered approximately one and one-half years after Justice Chipman's decision in the first s. 11(b) application brought by Mr. Melvin, and as such, this clarification was not available to him at the time he conducted his deliberations in the course of it.

[53] A reading of the context in which the words "that's fine" were spoken by defence counsel and the dates proffered by the court, supports the inference that these were the earliest dates that the Provincial Court had available for preliminary inquiry. It also supports an inference that the words "that's fine" spoken on that occasion by Mr. Melvin's counsel amounted merely to an indication that she was available on the June 26, 2012 date that was offered (as an alternative to the earlier proposed date, for which Crown counsel was unavailable). Given this, I would attribute the four months that elapsed from the date of that appearance (February 28, 2012) to June 26, 2012, when the preliminary inquiry was held, to be inherent or neutral delay, with the exception of the last eleven days of that period, which constitute Crown delay.

[54] In sum, of the time that this matter spent in Provincial Court, I allocate 259 days to inherent and/or Crown delay, and 35 days to defence delay.

[55] The first appearance in Supreme Court occurred on July 5, 2012. The parties confirmed at that time a date for a pre-trial conference (July 20, 2012) and, at the request of the defence, the date of September 6, 2012 was also assigned for the purpose of fixing trial dates.

[56] At the September 6, 2012 appearance, there was considerable back and forth as the parties attempted, with the assistance of the court, to schedule the trial dates. Although the words used by counsel on this occasion suggest that each was attempting to obtain the earliest available dates, counsel's schedules were nonetheless punctuated with some periods of unavailability. This compounded the process of assigning dates for the first trial, which was expected at the time to consume ten days of court time.

[57] The matter was ultimately set down for September 3 to 16, 2013. The parties subsequently appeared on January 31, 2013 for the purpose of varying Mr. Melvin's release conditions. The court was also advised at that time that the scheduled trial dates (September 3 to 16, 2013) were no longer convenient for the Crown. As a result, new trial dates from November 25, 2013, to December 6, 2013, were assigned. Consequently, 440 days elapsed from the September 6, 2012 court appearance to the first date of trial.

[58] I note that nowhere in this discussion is it reflected what would have been the court's earliest availability for the trial. Given that reality, I conclude that defence counsel's lack of availability until the end of March 2013 would likely have corresponded fairly closely with the court's own availability for a ten day trial. Consequently, this is inherent delay which I do not attribute to the accused.

[59] With respect to the portion of time that elapsed from the end of March 2013, to the commencement of the trial itself on November 25, 2013, the analysis is more nuanced. There was back and forth between counsel and the Court as to counsel's availability (as previously noted). Initial trial dates were set, commencing on September 3 to run to September 16, 2013. Both counsel indicated on the record, "that's fine".

[60] As has been noted, while ordinarily not being inclined to invest those words, on their own, with determinative significance, I believe that on this occasion, they must be taken in tandem with defence counsel's earlier indication (on January 31, 2013, when the parties appeared and adjourned the trial to commence on November 25, 2013). It will be recalled that the Crown had indicated to the court that it was unavailable for the initially scheduled dates in September. At that point, Ms. Buckle indicated that her client was "not opposed to the request for the adjournment of the trial" and also that her client was content with the trial being scheduled "into the New Year". After that indication, the parties were nonetheless able to agree that the trial would run from November 25 to December 6, 2013.

[61] When defence counsel's words are cumulatively measured against the aforementioned comments in *Morin, supra, Askov, supra,* and *Jordan, supra,* in my view, there can be little doubt that they constitute a defence waiver of the time period beyond the end of March, 2013. Defence counsel had indicated, as noted, on January 31, 2013, that the accused was content to have the trial go into the New Year (i.e. January 2014). The court actually provided earlier dates than that, which both counsel ended up accepting. As a consequence, 235 days from April 1 to

November 25, 2013 have been waived by the accused. The nine days that elapsed prior to the mistrial, which was declared on December 5, 2013, shall be considered neutral delay.

[62] Accordingly, accounting for delay while the matter was before the Supreme Court (up to the date of the mistrial), renders 275 days of days inherent or Crown delay, and 235 days attributable to defence waiver.

[63] The matter continued before the Supreme Court after the mistrial. Mr. Melvin appeared on December 12, 2013, unrepresented, and his appearances from January 16, 2014, up to February 6, 2014, are dealt with in his affidavit and the *viva voce* evidence that he offered on January 9, 2017, when this (his second) application for a stay was heard. The salient portions of Mr. Melvin's affidavit follow:

> EFFORTS TO RETAIN COUNSEL AFTER MISTRIAL
>
> 27. From November 25 to December 5, 2013, my first trial proceeded in the Nova Scotia Supreme Court, at the end of which a mistrial was declared. I was ordered to appear in Crownside in Halifax on December 12, 2013.
>
> 28. Between December 5 and December 12, 2013 I did not make specific efforts to find a lawyer, aside from discussing my options with Elizabeth Buckle.
>
> 29. Between December 12, 2013 and January 16, 2014 I made efforts to retain a new lawyer. These efforts were certainly hindered by the Christmas holiday season, during which time it was difficult to schedule an appointment with a criminal defence lawyer.
>
> 30. The specific efforts that I made to retain a lawyer between December 12, 2013 and February 6, 2014 that included:
>
> - Discussing with Ian Hutchison the possibility of being represented by Craig Garson, Q.C., at which time I was advised that Mr. Garson could not represent me.
> - Engaging in telephone conversations with Elizabeth Buckle.
> - Engaging in telephone conversations and an eventual meeting with Kelly Serbu, who advised me that he as not prepared to represent me.
> - Telephone call to Michael Taylor, who I understood was involved [in] a murder trial at or around that time. Mr. Taylor was prepared to meet with me, but not until February of 2014.
> - A telephone conversation with Stan MacDonald, who advised me that he was unable to represent me at my re-trial.

- A telephone conversation with Patrick McEwen to arrange a meeting with him, which occurred on February 3, 2014.

31. On February 6, 2014, I appeared in Crownside with Patrick Mac Ewen, at which time Mr. MacEwen confirmed his representation of me and new trial dates were set.

[64] We also have Patrick MacEwen's affidavit, which beginning at para. 4, says as follows:

4. In January, 2014, I was contacted by telephone by Cory Melvin, at which time he requested that I meet with him to discuss his potential retainer of me to represent him on Criminal Code charges that were outstanding against him at that time.

5. After speaking with Mr. Melvin, I spoke by telephone with Elizabeth Buckle, Mr. Melvin's former counsel. I then arranged to meet with Mr. Melvin on February 3, 2014.

6. While speaking with Ms. Buckle, we discussed the conduct of the trial which had taken place in November/December of 2013, resulting in a mis-trial. Ms. Buckle advised me, and I believed, that the mis-trial, which had been scheduled for 10 days of court time, had been under-booked in the sense that there would not have been sufficient time to complete the trial within 10 court days.

7. When I met with Mr. Melvin on February 3, we discussed the time requirements for a new trial and we agreed that 3 weeks (15 court days) would be required.

8. During my meeting with Mr. Melvin on February 3, he made it clear that he was concerned about delay and he instructed me to set the earliest available dates, without the benefit of my review of all of the disclosure materials before setting the trial dates.

9. During my meeting with Mr. Melvin on February 3, he expressed his concern about being subject to release conditions and that he wanted to have the trial heard expeditiously.

10. At no point did I agree with Mr. Woodburn to specific trial dates in the fall of 2014.

[65] Although Mr. Melvin was cross-examined as to the contents of his affidavit, he was not questioned as to the efforts recounted therein to obtain counsel in the aftermath of his mistrial.

[66] I am prepared to accept his evidence thus tendered as it relates to those efforts, and to consequently interpret his response to the court's question on

December 12, 2013, “Have you tried to obtain counsel”, to which Mr. Melvin replies “no not yet”, accordingly.

[67] That said, I still must measure this question against Mr. Melvin’s earlier comments (through counsel) when Ms. Buckle had indicated that he was content to have the trial set down “into the New Year”. Although the Court provided him with dates earlier than that (which trial culminated in the mistrial being declared on December 12, 2013), I nevertheless conclude that the accused, in effect, waived delay up to the end of January 2014, although his efforts to retain counsel following the mistrial were, overall, not unreasonable. Consequently, the 79 days that follow the declaration of the mistrial on December 5, 2013, up to and including February 6, 2014, (by which time Mr. Melvin was once again represented by legal counsel, this time Mr. Patrick MacEwen) are defence waived delay.

[68] I have reviewed the transcript of the appearance on February 6, 2014, and am unable to conclude, on the basis of what was said, that earlier dates were available than those for which the trial was ultimately scheduled (February 2 - 20, 2015). Reference to the possibility of earlier dates in September and October of 2014 was made by Mr. Scott, who appeared for the Crown on this occasion, but there was no indication that these dates had been available at any point that would have done the parties any good in this context. I refer to the following excerpt from the court transcript for that appearance:

> MR. SCOTT: My Lord, from what I understand, and I know Mr. Woodburn was here with Mr. MacEwan [sic], 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 [sic], et cetera, but ---
>
> THE CLERK: Not anymore.
>
> MR. SCOTT: Oh, I'm sorry.
>
> THE CLERK: [Inaudible].
>
> MR. SCOTT: Oh. Oh.
>
> MR. MacEWAN [sic]: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.

[69] From February 6, 2014, 361 days elapsed prior to the commencement of Mr. Melvin's second trial on February 2, 2015. Therefore, of the 417 day period from December 5, 2013 to February 2, 2015, I attribute (as indicated), 79 days as defence waived, the rest is either inherent or Crown delay, as noted.

[70] Therefore, from September 7, 2011 to February 2, 2015, the total delay is apportioned as follows: Crown/inherent/neutral = 872 days = 29 months. Defence (caused or waived) delay = 349 days = 11.6 months (I reiterate that for the purposes of this arithmetic I have used thirty day months.)

(ii) Delay – February 20, 2015 to January 20, 2017 (anticipated end of third trial)

[71] To continue, the accused's (second) trial began on February 2, 2015 and concluded on February 19, 2015 with a finding by the jury that Mr. Melvin was guilty of the predicate offences. He appeared the next day (February 20, 2015) and dates were set for imposition of sentence. The accused appealed his conviction on June 2, 2015, and was sentenced on June 3, 2015. On June 9, 2016 the Court of Appeal released its decision allowing his appeal against conviction and ordering a new trial on the charges. Below is a chart of all court appearances, from February 20, 2015, to October 13, 2016:

Appearance Date Date (D/M/Y)	Note	Time to next Appearance
20/02/2015	Mr. Melvin attends with counsel Patrick MacEwen. Crown and defence agree that accused, although convicted by jury, will not be remanded while awaiting sentence. Released with surety, curfew 7-7 and other associated conditions. Pre-Sentence Report requested by defence and a date to return for sentence. Mr. MacEwen acknowledges that it will take approximately eight weeks to prepare a Pre-Sentence Report. Court notes that this puts the matter of sentencing to late April or May 2015. Mr. MacEwen unavailable first two weeks of May, requests third week of May because "I don't think my schedule is going to allow me to be here any other time". Date set May 19, 2015 at 9:30 a.m.	**88 Days**

19/05/2015	Mr. Melvin attends with counsel Patrick MacEwen. Defence requests adjournment to deal with information it obtained from victim post-delivery of Victim Impact Statement. Adjournment granted, new date June 3, 2015 at 2:00 p.m.	**15 Days**
02/06/2015	Accused sentenced	**1 Day**
03/06/15	Accused appeals conviction	**44 Days**
09/06/16	Court of Appeal release decision – overturns conviction, new trial ordered	**Time does not count**
14/07/2016	Crown notes that Court of Appeal overturned conviction and ordered a new trial. Counsel, Stan MacDonald, Q.C. is present for the accused. Counsel agree that three weeks needed for a judge and jury trial (the 3rd). Mr. MacDonald advises he would be available last week of September, first two weeks of October. Trial set for three weeks, plus a day, commencing November 7, 2016. Counsel to return on July 28, 2016 to confirm those dates.	**14 Days**
28/07/2016	Mr. MacDonald attends for Mr. Melvin and advises that he is unavailable for the dates assigned last day. Matter put over to August 25, 2016 for the assignment of new dates.	**28 Days**
25/08/2016	Lesley Sawers attends on behalf of Stan MacDonald, QC, for accused. Eric Taylor for Crown. Trial dates confirmed for January 16 to February 6, 2017, excluding January 27, 2017.	**49 Days**
13/10/2016	Kevin MacDonald attends for Stanley MacDonald, QC on behalf of Accused. Mr. Woodburn attends for the Crown. Accused re-elects trial by judge alone. Estimate of time needed for trial reduced to five days. Defence also notifies that it will be filing a s. 11(b) delay	**93 days**

	application (the second such application). The Crown asks if the Court has five days available for trial earlier than January 16. Court replies in the negative. Crown indicates that if defence had re-elected earlier, the trial would likely have been concluded by now. Trial dates January 16 to 20, 2017 assigned	

[72] The interval from February 20, 2015, to June 2, 2015 (the date that sentence was imposed) represents a delay that was occasioned by the defence request for a Pre-Sentence Report prior to the imposition of sentence. The defence also requested a brief adjournment from the originally scheduled May 19, 2015 sentencing date. A request for a Pre-Sentence Report is certainly not unreasonable in this context, given the nature of the charges. That said, the defence, in requesting the pre-sentence report, can be seen to expressly consent to and/or waive the resultant delay which preparation of the report would necessarily impose upon the sentencing process.

[73] For the reasons earlier discussed, the period from the date upon which the accused was sentenced (June 3, 2015) (he had appealed a day earlier) until the date of the release of the Court of Appeal's decision overturning his conviction (June 9, 2016) is, for the purposes of this decision, "dead time". As a consequence, "the elapsed time" or delay following the June 3, 2015 appearance, at which the accused was sentenced, until his next court appearance, post-appeal, on July 14, 2016, is 44 days. This is clearly inherent delay.

[74] On July 14, 2016, dates were scheduled for a 22-day jury trial commencing November 7, 2016. It was noted that counsel were to return on July 28, 2014 to confirm those dates. The fourteen intervening days also count as inherent delay.

[75] However, on July 28, 2016 counsel for the accused, Mr. MacDonald, attended and advised that he was unavailable for the dates assigned. As a consequence, the parties were required to return on August 25. New trial dates were confirmed for January 16 to February 6, 2017.

[76] It will be seen that 170 days will have elapsed from the appearance on July 28, 2016 to the scheduled commencement of the trial (January 16, 2017). Of these dates, I attribute the period up to the end of November (trial dates were originally assigned for three weeks plus a day commencing November 7, 2016) to inherent delay, and the period from December 1, 2016, to January 16, 2017, to the defence

as having been waived. This involves 124 days being added to the inherent/Crown side of the ledger, and 46 days being attributed to the defence as having been waived.

[77] The period from February 20, 2015, to January 16, 2017, covers a span of 326 days (after the "appeal time" is removed). Of this, the defence bears responsibility for 149 days waived, which equal 4.96 months, which I will round to five. The Crown is, therefore, responsible for the remaining 177 days, which equals 5.9 months.

[78] The global delay attributable to each side is, therefore, now apparent. Total inherent and/or Crown delay is 34.9 months, which I round to 35 months.

[79] This delay, when considered in relation to the guidelines established in *Jordan, supra*, is presumptively unreasonable. The majority in *Jordan, supra*, stressed:

> 56 We also make this observation about the presumptive ceiling. It is not an aspirational target. Rather, it is the point at which delay becomes presumptively unreasonable. The public should expect that most cases can and should be resolved before reaching the ceiling. For this reason, as we will explain, the Crown bears the onus of justifying delays that exceed the ceiling…
>
> [Emphasis added]

Crown Onus - Delay exceeds 30 months

(a) Exceptional Circumstances

[80] In *Jordan*, the majority noted at paras. 68 to 71:

> 68 Delay (minus defence delay) that exceeds the ceiling is presumptively unreasonable. The Crown may rebut this presumption by showing that the delay is reasonable because of the presence of exceptional circumstances.
>
> Exceptional Circumstances
>
> 69 Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.

> 70 It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful -- rather, just that it took reasonable steps in an attempt to avoid the delay.
>
> 71 It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(*b*) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.
>
> [Emphasis added]

[81] Dealing quickly with the first of the two broad categories of exceptional circumstances indicated above, it is important to recognize that this was not a particularly complex case. This is immediately apparent when it is contrasted with the observation in *Jordan, supra,* and in some of the decided authorities post *Jordan, supra,* many of which are replete with observations to the effect that even a typical murder case will not ordinarily be sufficiently complex to engage this criterion.

[82] Therefore, I turn to consider whether “discrete events” arose throughout the course of this matter, from start to finish, which would be sufficient to fall under the rubric of “exceptional circumstances”. In order to qualify as such, they would have to be either “reasonably unforeseen or reasonably unavoidable”, and the resultant delay not reasonably remediable by the Crown. As Justice Watt in *Manasseri, supra,* observed at paras. 309 and 310:

> 309 In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases: *Jordan*, at para. 71.
>
> 310 Discrete events that delay completion of trial proceedings may arise outside the trial context or within it. Any period of delay caused by any discrete events must be subtracted from the net delay to determine whether the delay falls above or below the presumptive ceiling. But the Crown and the justice system must always be prepared to mitigate the delay resulting from discrete exceptional circumstances. Reasonable efforts to prioritize faltering or stumbling proceedings must be

> undertaken. Thus, any part of the delay that the Crown and system could reasonably have mitigated may not be subtracted: *Jordan*, at para. 75. See also, *Vassell*, at para. 10.

[83] In a related vein, Goepel, JA noted in *R. v. Singh*, 2016 BCCA 427, at para 19:

> 19 In *Jordan*, the Court did not attempt to categorize all the circumstances which might be considered discrete events. It did provide some examples, such as medical or family emergencies, cases with international dimensions, and unforeseeable or unavoidable developments that arise during trial. The Court noted that if at trial unforeseeable issues arise at a time close to the ceiling, it would be more difficult for the Crown and the court to respond with a timely solution. As a result, unforeseeable or unavoidable delays occurring during trials will often qualify as presenting exceptional circumstances. Periods of delay caused by a discrete exceptional event must be subtracted from the total period of time for determining whether the ceiling has been exceeded (paras. 72-75).
>
> [Emphasis added]

[84] As I see it, there were two developments during the course of this case that could potentially qualify as discrete exceptional events. The first was the mistrial, which was declared on December 5, 2013, and the second was the appeal and subsequent reversal of the jury's conviction of Mr. Melvin in his second trial.

[85] The second of these occurrences may be disposed of quite summarily. The delay occasioned by the appeal has already been subtracted from the overall delay in this matter, so that responsibility for it does not encumber either party. It, therefore, cannot constitute an "exceptional circumstance" for the purposes of this particular consideration.

[86] With respect to the mistrial, however, the situation is different. While not unheard of, mistrials do not occur as a matter of routine or regularity. The court cannot expect that the prospect of one emerging during the course of the first trial ought to have been a contingency in everyone's mind. There was no way (in these circumstances) that either counsel could (or should) have foreseen this development.

[87] Moreover, I find no fault attributable to either the Crown or defence when the mistrial is considered. As much as can be determined from the record, both Crown and (then) defence counsel handled the matter (which arose in the middle of the trial) with professionalism and in an otherwise appropriate manner. As earlier

noted, a problem arose which placed defence counsel in a previously unforeseen position. Unfortunately, this occurred after seven actual days of trial had been consumed. Nothing which occurred subsequent to the mistrial could suffice to negate the impact of this singular event. I have not found anything unreasonable or unduly protracted about the manner in which the parties responded to this development and proceeded to schedule the second trial.

[88] To put a finer point upon it, there was nothing realistically that the court or the Crown would have been able to do to accommodate an anticipated three week jury trial more quickly than it did. Moreover (notwithstanding my comments when I made determinations as to which portions of the ensuing delay prior to the onset of the second trial ought to be allocated to each party) counsel were, in an overall sense, reasonable in the efforts that they made to mitigate the impact of this development upon the accused. This is not to say that a mistrial will inevitably give rise to "exceptional circumstances" in every factual situation in which it arises. The analysis must always be contextual. The Crown must be able to demonstrate that it, as well as the court, acted reasonably, once the development occurred, to accommodate the accused and, in particular, alleviate, to the extent possible, the impact of the development upon the accused and his right to a trial to be tried within a reasonable period of time.

[89] In this case, I conclude that the Crown and the court moved as quickly as they could reasonably have been expected to (again, in an overall sense) to reschedule the trial, given the time allocation that was requested, and given the schedule of defence counsel, when all of the circumstances are considered. In short, the Crown has demonstrated that exceptional circumstances (that is, the mistrial) intervened, and that (once the exceptional circumstances had arisen) it and the court acted reasonably to minimize, to the extent possible, the delay emanating from that circumstance. I had fixed the global delay (minus defence delay) at 35 months in this matter. I now subtract from that total the amount of time occasioned by the mistrial, in other words, from December 5, 2013, to February 2, 2015 (the beginning of the second trial) which is a span of thirteen months and twenty-eight days. This results in a delay that is below the *Jordan* limit threshold.

[90] It is clear from *Jordan*, *supra*, at para. 48, that once the delay from the charge to the end of trial (actual or anticipated), minus the delay attributable to the defence, and that attributable to exceptional circumstances, falls below 30 months, the onus then shifts to the defence to show that the overall delay is nonetheless

unreasonable. A stay beneath the ceiling will be unusual (or rare), and will only be granted in clear cases. The defence has not discharged this onus. This (alone) suffices to dismiss Mr. Melvin's application.

(b) "Transitional" Exceptional Circumstances

[91] Even if the Crown had not been able to discharge its burden of establishing that exceptional circumstances as specified in para. 71 of *Jordan* existed in this case, I would nonetheless have concluded that the transitional exceptional circumstances that pertain to this matter provide an alternate basis for the dismissal of the accused's application.

[92] The majority in *Jordan*, *supra*, recognized that the framework set forth therein was a departure from the law that had been previously applied in the analysis of s. 11(b) cases. The court elaborated upon the implications of this departure in para. 94 of *Jordan:*

> 94 Here, there are a variety of reasons to apply the framework contextually and flexibly for cases currently in the system, one being that it is not fair to strictly judge participants in the criminal justice system against standards of which they had no notice. Further, this new framework creates incentives for both the Crown and the defence to expedite criminal cases. However, in jurisdictions where prolonged delays are the norm, it will take time for these incentives to shift the culture. As well, the administration of justice cannot tolerate a recurrence of what transpired after the release of *Askov*, and this contextual application of the framework is intended to ensure that the post-*Askov* situation is not repeated.

[93] The court outlined two circumstances in which matters already in the system (such as the case at bar) may warrant consideration as to whether transitional exceptional circumstances exist. The first circumstance relates to cases in which the delay exceeds the presumptive ceiling, and it applies (as here) where the charges were brought prior to the release of the decision in *Jordan*. As the court went on to note in para. 96:

> 96 First, for cases in which the delay *exceeds* the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. <u>This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed.</u> This

> requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.
>
> [Emphasis added]

[94] The second category of transitional exceptional circumstances would apply in cases of "moderate complexity in a jurisdiction with significant institutional delay problems". I do not consider it necessary to consider this latter category in my present analysis. First, I do not consider Nova Scotia to be a jurisdiction "plagued by lengthy, persistent and notorious institutional delays". Second, I did not conclude this to be a "moderately complex" matter for reasons which I have already explained.

[95] I return, then, to consider whether the overall delay was justified having regard to the parties' reliance upon the state of the law as had existed prior to the *Jordan* decision. Certain things are more pertinent to this analysis than others. For example, the fact that the accused was and has been on conditions literally from the first appearance that he made in this proceeding (on September 26, 2011) is an important factor. He also filed a lengthy affidavit detailing the prejudice that he has sustained since charges were first laid.

[96] Mr. Melvin spent some time in custody following his arrest in this matter. This was attributable to the fact that he had been serving a conditional sentence order at the time that he was charged with these offences. He served the balance of that conditional sentence in custody and, upon his release in October of 2011, he applied for and was granted bail in relation to these charges.

[97] In December of 2011, when other charges that Mr. Melvin was facing were dropped, the Crown consented to a reduction in the conditions of his recognizance in relation to the current charges.

[98] The record discloses that the Crown was sensitive to, and indeed, over the course of time, consented to progressively less restrictive conditions as the cumulative delay in this matter increased. Of particular note is that, following the accused's conviction on February 20, 2015, he was not remanded. Upon being sentenced on June 3, 2015, he did serve a short period of time in custody, however, the Crown consented to his release pending the outcome of his appeal.

[99] This is not to minimize the cumulative toll taken by the restrictions to which Mr. Melvin was nonetheless subject during the time that has ensued since the charges were laid in September of 2011. For example, he was subjected to at least 190 "compliance checks" while on house arrest at various times. Even though most of these occurred after his conviction following the second trial, the curfew and compliance conditions (to which he was also subject) presented a much more than trivial imposition. I consider this prejudice since it was an integral part of a pre-*Jordan* analysis.

[100] There is, however, another (and very significant) component to this analysis. It is one which in my view conclusively demonstrates the parties' reliance upon the pre-*Jordan* state of the law. It arises from the first s. 11(b) decision rendered by this court in February 2015. It will be recalled that this decision contemplated and indeed dealt with the period of time that had passed from the laying of the charges on September 7, 2011, up to and including the anticipated conclusion of the second trial on February 20, 2015.

[101] Justice Chipman thoroughly analysed this time interval and concluded that only 7.5 months of institutional and/or Crown delay had occurred up to the anticipated conclusion of the second trial (February 20, 2015). It has been previously noted that Justice Chipman did not have the benefit of the Supreme Court's comments in *Jordan* (which was not released until about seventeen months later) which updated and provided further guidance as to how the concept of defence waiver was to be analysed. Some of the comments in *Jordan*, *supra,* (as has been pointed out) were indeed a departure from the manner in which the Supreme Court of Canada itself had approached its analysis of this issue in some cases in the past. It has also been noted that Justice Chipman did not have the benefit of the additional evidence which was tendered by the accused in this, his second, s. 11(b) application.

[102] Nonetheless, the parties cannot be faulted for concluding that they were in very good shape having regard to the pre-existing *Askov* and *Morin* and guidelines, given Justice Chipman's ruling, which was not appealed.

[103] Only 3.5 further months elapsed after February 20, 2015, before the accused was sentenced. Contemporaneous with his sentencing, he initiated an ultimately successful appeal. The release of the *Jordan* decision by the Supreme Court of Canada (again) was almost contemporaneous with the Nova Scotia Court of Appeal's release of its decision overturning Mr. Melvin's conviction by the jury in his second trial. Little more than six and one half months after his appeal was granted, his third trial will have concluded. I cannot conceive how the "system" could have responded with more alacrity than this.

[104] The aforementioned comments must inform the application of the rules regarding transitional exceptional circumstances to this case. I note, parenthetically, that the only way in which the time interval between the release of the Court of Appeal's decision and the scheduling of the accused's third trial could have been improved upon, would have been if the accused had made his re-election to a judge alone trial and reduced the consequent time requirement from fifteen to five days, earlier than on October 13, 2016. While the accused is certainly not to be penalized for asserting his right to a jury trial up to that date, the efforts of Crown and the Court to accommodate his election must inform a contextual analysis of whether the time incurred was reasonable or not.

[105] The parties' conduct of this matter up to the anticipated end of the second trial (February 20, 2015) and thereafter was predicated upon the result of a thorough and thoughtful analysis by Justice Chipman in the first s. 11 *Charter* application. The delay incurred after February 20, 2015 (like that which ensued after the mistrial in the first trial) cannot be viewed as in excess of what was required. Even when the prejudice sustained by the accused by virtue of the conditions to which he has been subject is considered, the delay was not unreasonable. The Crown has demonstrated that the time taken was reasonable based upon the "parties' reasonable reliance on the law as it previously existed".

Conclusion

[106] Mr. Melvin's application is dismissed

Gabriel, J.