SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Melvin*, 2017 NSSC 273

Date: 11-02-2017
Docket: CRH 447189
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

JAMES BERNARD MELVIN

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 26, 2017, in Halifax, Nova Scotia
Written Decision:	November 1, 2017
Subject:	Mistrials – discharge of defence counsel during trial – appointment of *amicus curiae* in such cases
Summary:	Mr. Melvin was charged with attempted murder. After the Crown had completed the bulk of its case and the likely determinative civilian witnesses, Mr. Melvin fired his counsel.
Issue:	Is a mistrial required?
Result:	Motion for mistrial denied. Court concluded Mr. Melvin can have a fundamentally fair trial representing himself. Nevertheless, given the seriousness of the charge, and that it is a jury trial, the court appointed an *amicus curiae* to assist Mr. Melvin.

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Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 26, 2017, in Halifax, Nova Scotia
Counsel:	Rick Woodburn, Christine Driscoll, and Sean McCarroll, for the Provincial Crown Glenn Anderson Q.C., for the Attorney General of Nova Scotia Philip Star Q.C., for the Accused Patrick Atherton, for Patrick MacEwen

By the Court:

Introduction

[1] Is this a proper case for the declaration of a mistrial? It is not. I announced the result in court on September 26, 2017. These are my reasons.

[2] During a judge and jury trial, Mr. Melvin fired his lawyer, Patrick MacEwen. Mr. Melvin says he will not receive a fundamentally fair trial if he is required to be self -represented for the remainder of the trial. I concluded that he can. However, to ensure this, I have also concluded that it is appropriate for the court to appoint an *amicus curiae* to assist the court in ensuring a fair trial for Mr. Melvin.

Background

[3] Mr. Melvin is being tried by a jury regarding the following charges:

[4] That he did on the 2nd of December 2008 at or near Harrietsfield, Nova Scotia, attempt to murder Terry Marriott Junior contrary to s. 239 of the *Criminal Code*; and at the same time and place did conspire with Jason Hallett, an unindicted co-conspirator, to commit the murder of Terry Marriott Junior contrary to s. 465(1)(a) of the *Criminal Code*.

[5] To understand the context, I will briefly highlight Patrick MacEwen' s recent involvement as counsel for Mr. Melvin in two related cases.

The murder charges

[6] On **February 20, 2009**, **Terry Marriott Junior** was shot to death. There had been an ongoing violent feud between the "Melvins" and the "Marriotts". **By information sworn July 20, 2015, only Mr. Melvin was charged** with having committed the offence. It was alleged that he and **Derek MacPhee** had agreed to do so, and together did murder him. Mr. MacPhee had received immunity from prosecution, and testified for the Crown. Patrick MacEwen was counsel for Mr. Melvin. After a judge and jury trial from May 4 - June 2, 2017, Mr. Melvin was found not guilty.

The attempted murder charges

[7] **By information sworn July 18, 2015, Mr. Melvin and Reagan Henneberry were charged with having committed the offences**. Here, the Crown alleges that on the morning of **December 2, 2008, Jason Hallett** received a call from Jimmy Melvin Junior to meet him at Jessy's Pizza in Spryfield. They met in an upstairs apartment. Mr. Hallett testified that: Mr. Melvin had the intention to kill **Terry Marriott Junior** that day and enlisted Mr. Hallett's help - Mr. Hallett agreed; Mr. Melvin believed he was being surveilled by police so they exited by a second-story window and left the area which led them to an encounter with Michael Coombs, who was just leaving the Lions Spryfield Rink; he gave them a short drive to the Tartan Avenue area; they got out there and almost immediately encountered Trevor Hanna, who also gave them a short drive to Greystone Drive; they got out and started on a path into the woods; they travelled for four hours on foot through unfamiliar and very difficult terrain [rough and filled with ponds/lakes and swamp]; they arrived at Crystal Pizza, and were picked up there by **Vanessa Slaunwhite** who drove them to Warren Clarke's home in West Pennant; by that evening, Mr. Hallett and Mr. Melvin were still at Warren Clarke's home, and had armed themselves with a .357 Magnum handgun and a semi-automatic rifle; they believed that Terry Marriott Junior was at **Derek MacPhee**'s house because Vanessa Slauenwhite, on Mr. Melvin's directions, had gone there in the afternoon to purchase cocaine and confirmed Marriott was there. She had dated Jason Hallett off and on for many years, and had repeatedly lived with **Reagan Henneberry**, who she considered to be very close- like an older brother. When it was dark, Reagan Henneberry drove Mr. Melvin and Mr. Hallett, armed as indicated, to within 200 yards of Derek MacPhee's home. Their intention was to kill Terry Marriott Junior. From that distance they became aware of the presence of marked police vehicles around the home with their lights on. They turned the vehicle around and went to a nearby home of a friend (Natalie DiGioacchino). There, the firearms were stashed in a field or woods by Reagan Henneberry.

How the events of December 2, 2008, came to police attention, and the fallout thereof

[8] On December 10, 2008, Jason Hallett provided a police statement against Aaron Marriott, who had tried to kill him three times in the previous six months, most recently by shooting five bullets at him from close distance on November 18,

2008. He thereby entered the RCMP (federal) witness protection program. By March 18, 2011, he had been kicked out of that program.

[9] The precise facts underlying the December 2, 2008 alleged offences here only came to the attention of police on March 18, 2011, as a result of an intercepted conversation between Jason Hallett and Vanessa Slaunwhite wherein they discussed their involvement in the events of that day. Their conversation revealed that they had highly relevant personal knowledge regarding these allegations. The content of the conversation implicated Mr. Hallett. In exchange for immunity for his involvement in these offences and other considerations, he provided a statement to police on June 9, 2011. Similarly confronted, Vanessa provided a "without prejudice" statement to police on June 12, 2011. Their statements implicated Mr. Melvin. Reagan Henneberry was arrested June 26, 2011. He gave a statement to police then, but was not charged until years later. In October 2017, he faces his own trial by judge and jury on the very same charges that Mr. Melvin is facing here.

Derek MacPhee's involvement as a Crown witness in the attempted murder charges

[10] On February 20, 2009, Terry Marriott Junior was shot to death. Until July 20, 2015, noone was charged. That day, Mr. Melvin alone was charged with his murder.

[11] On June 8, 2015, Derek MacPhee was arrested in relation to a Bedford-area home invasion-robbery. He was caught "red-handed". He testified that he believed he would be going to jail for seven years if convicted. He gave a police statement on June 25, 2015, regarding the events of December 2, 2008. By July 17, 2015, he had, through his lawyer, Joel Pink, Q.C., negotiated an immunity agreement for that offence and others. He entered the Halifax Regional Police witness protection program.

[12] As part of his immunity agreement, Derek MacPhee agreed to testify against Mr. Melvin at his trial on the attempted murder *and* murder charges. I have reviewed the written final instructions that Justice Campbell gave to the jury which acquitted Mr. Melvin of that charge on June 2, 2017. From the instructions, it appears Derek MacPhee testified that, on February 20, 2009, he accompanied Mr. Melvin to the location where Terry Marriott was that day, and once there Mr. Melvin shot Terry Marriott Junior. Regarding the attempted murder charges, he testified that on December 2, 2008, Reagan Henneberry told him in the evening

that Jimmy Melvin was imminently planning to murder Terry Marriott, Jr. at MacPhee's house that day. Mr. MacPhee called a police officer to have marked cars sent to his house. But for the arrival of these cars, Mssrs. Melvin and Hallett would have had a clear path to carrying out their plan. Instead, they turned their vehicle around, their plan for that day being frustrated.

[13] In summary, since at least July 18, 2015, and until September 20, 2017, Patrick MacEwan has continuously represented Mr. Melvin in relation to these charges. I say "these charges" because he has represented him concurrently on the February 20, 2009 murder charges as well as the December 2, 2008 attempted murder/conspiracy to commit murder charges.

The legal proceedings herein to date – the "timing of the firing" context

[14] In relation to the attempted murder charges, the only pretrial *voir dire* scheduled was in relation to a Crown application to have the verbal statements of two deceased persons [Trevor Hanna and Michael Coombs] to police officers ruled admissible pursuant to the principled exception to the hearsay rule – *R. v. Khelawon*, 2006 SCC 57, and *R. v. Bradshaw*, 2017 SCC 35. The combined *voir dire* commenced before me on August 9, 2017.

[15] Two police witnesses testified: Detective Constable John Mansvelt recounted that he and Detective Constable Nick Pepler spoke to Trevor Hanna on June 14, 2011. Hanna confirmed verbally that he remembers a couple of years ago he was near his girlfriend's place, 33 Tartan Avenue, in his truck, when Jimmy Melvin jumped in front of his truck and stopped him. Melvin got into the front passenger seat and Jason Hallett jumped into his back seat. Melvin told him to drive towards Herring Cove. He was then told to take them to the top of Carson Street, [now Greystone Drive], where he pulled over near a school, and a path which goes into the woods. There Melvin and Hallett got out, and started into the woods.

[16] Constable Mansvelt recounted that he alone spoke to Michael Coombs on September 28, 2011, outside his residence. Coombs told him that one day coming out of the Lions Spryfield Rink, he was approached by Jimmy Melvin and Jason Hallett for a drive – he gave them a drive to the Tartan Avenue area. There, he understood that they got another drive with Trevor Hanna- he recalled Hanna felt Coombs had "dumped" them onto him.

[17] The pretrial had to be adjourned to be continued sometime during the jury trial period, September 11 – October 4, 2017. The Crown indicated it had only one further witness who would testify – Jason Hallett. At trial, defence and Crown agreed that the trial evidence of Mr. Hallett that was relevant to the *voir dires* could be applied by the court in determining whether the statements of Mr. Hanna and Coombs were admissible. Mr. Hallett finished testifying September 14, 2017. As directed, written legal arguments on the admissibility of those statements have been received by the court – initially June 28 and July 20; and in response to the court's specific request for commentary regarding *R. v. Bradshaw*, 2017 SCC 35, further submissions were received on September 18 and 19 from the Crown and defence, respectively. As of September 19, 2017, I was in a position to determine this issue, without further submissions.

[18] After the Crown's opening statement, it called the following witnesses: Jason Hallett (September 13, 2017, until 4:00 p.m. on September 14, 2017); Reagan Henneberry (September 18, 2017 until 12:00 noon); Vanessa Slauenwhite (September 18, 2017, 1:30 p.m. – 3:00 p.m. and September 19, 2017 for half an hour); Derek MacPhee (September 19, 2017 from 2:45 p.m. – 4:30 p.m. and September 20, 2017, from 10:00 a.m. – 11:05 a.m.). Immediately after the conclusion of his evidence, the jury was excused, Mr. MacPhee had exited with a security detail given his status in the witness protection program, and I turned to leave the courtroom when I heard Mr. Melvin state: "Your Honour, I want to fire my lawyer". At that point, I advised him that I would hear from his counsel when we resumed. Court resumed approximately 45 minutes later. At that time, Mr. MacEwen stated that there had been a breakdown in the solicitor client relationship and "Mr. Melvin has lost confidence in me".

[19] Crown counsel noted that Mr. Melvin "fired" Mr. MacEwen unexpectedly and immediately after the last civilian, and significant, Crown witness was called.

[20] Crown counsel estimated two further days would see the Crown evidence completed. Only police witnesses remain to testify:

1. Both the RCMP and Halifax Regional Police were surveilling Mr. Melvin and his brother Cory on December 2, 2008. It will be the evidence of those officers that they surveilled Mr. Melvin from 7 a.m. until late evening. They saw Mr. Melvin going into Jessy's Pizza as testified to by Jason Hallett, however they did not see him emerge therefrom at any time that day. Officers also surveilled Cory Melvin, and will testify that in the evening, they saw him make a brief

appearance at the home of Natalie DiGioacchino - he pulled his truck into her driveway. They did not see Jimmy Melvin in the vehicle then, however, they followed it, and when it arrived at his home, Jimmy Melvin also emerged from the vehicle;

2. Constable Jeff Clark will testify that Derek MacPhee called him on the evening of December 2, 2008, and requested police cars come to his home – and that he arranged for police cars to go there;
3. Constable Darrell Morgan will testify that he searched Reagan Henneberry's house [see trial exhibit 2, photograph 6] and there located a semi-automatic rifle – mini 14 Ruger, designed for .223 calibre ammunition;
4. Martin Champion, will give expert evidence in relation to the firearms seized at Reagan Henneberry's – he will confirm it fits the definition in s. 2 of the *Criminal Code* for "firearm".

[21] I agree that the key witnesses for the Crown are the civilian witnesses. The case will likely rise or fall on their first-hand evidence of what happened December 2, 2008. Thus, the bulk, and determinative content, of the Crown's case has been completed.

[22] I note that the witnesses who have testified to date were each very reluctant, and all appeared to be unusually anxious while testifying:

1. Jason Hallett [who was noticeably hyperventilating giving his testimony, especially on September 13, 2017 –remains in witness protection] – he stated that he "just wanted to get this over with". When it was put to him that he only cooperated with police in relation to these charges because his life would be in danger *in jail* if he had not received immunity in relation to the present charges, he answered: "it's like that regardless if I testify or not";
2. Reagan Henneberry - was a reluctant witness who did not appear initially in response to a subpoena – a warrant was issued, after which he was released from custody and he did then appear. He testified that he refused to meet in a pre-trial interview with Crown Attorneys and had no conversations otherwise with them. While testifying, I observed him to be slouching down in the witness chair, and sighing in a resigned, and at times irritated fashion;

3. Vanessa Slauenwhite – she had no prior criminal record; she was arrested June 12, 2011. She gave a "without prejudice statement" to police. At one point during her direct examination, I stated to her that if she ever needed a break, including a bathroom break, she should just let me know – to which she responded "I just want to get out of here";
4. Derek MacPhee testified September 19 through until 11:00 a.m. on September 20, 2017 – he remains in witness protection. He said that he had to leave the area "for my protection", noting that even in December 2008 he had surveillance cameras to show the perimeters of his property because of "my paranoia… they're all shooting each other like crazy – I don't trust anybody". He admitted he had shot Reagan Henneberry four times in the leg on one occasion sometime around December 2, 2008. While testifying, he was visibly nervous.

[23] Once the Crown completes their case, it will fall to the defence to decide whether or not to call any evidence. I have no inkling at this time regarding whether the defence will be calling evidence.

Why the court should not declare a mistrial, but rather let Mr. Melvin represent himself for the remainder of this trial

[24] The evidence at the mistrial application and the position of Mr. Melvin's application counsel underline that practically there are only two choices available here: declare a mistrial because as a self- represented individual Mr. Melvin will not be able to have a fundamentally fair trial; or continue with Mr. Melvin self-represented.

[25] Mr. Star had suggested in his brief that, although my letter to counsel set out at least four options that he should address, he viewed as realistic only, either the declaration of a mistrial, or an adjournment to see if Mr. Melvin can get competent counsel of his choosing. [1]

[26] I find there is no realistic prospect that a competent defence counsel would be able to become involved as Mr. Melvin's chosen counsel without a lengthy adjournment of this judge and jury trial. Mr. Star agreed during oral argument, that it was "highly unlikely" that this jury trial could be resumed before several months

[1] The other two options were that Melvin continue self-represented and the Court appoint an *amicus curiae*. I also acknowledge that, with consent, s. 469 charges may be re-elected to a judge alone trial – s. 473 Criminal Code – but is this possible mid-trial? This possibility was not raised by Mr. Star, thus it was not the subject of argument.

at the earliest, *inter alia*: in order to allow new counsel to become familiar with, the Crown disclosure, the proceedings to date, to find sufficient time to consult with Mr. Melvin who was in custody, as well as ultimately to be available to conduct the trial.

[27] Effectively, the jurors would have to wait at least three months, and likely longer, to resume hearing evidence. Would they be able to recall the evidence of the Crown witnesses to date or have to sit through listening to the evidence again? Would the jurors even be available at that time? I find that, for the trial to be rescheduled with Crown counsel, myself, and the existing jurors, and time for Mr. Melvin to find competent and willing counsel to conduct this trial for him, it will more likely than not be at least three to six months into the future before this trial could resume.

[28] Those and other considerations militate against concluding that an adjournment is appropriate. I find it is not in the interests of justice: *R. v. Beals* factors cited in *R. v. Halnuck*, (1996) 107 CCC (3d) 401 (NSCA) at para. 80 per Clarke CJNS.

[29] I will add here that if a new trial is to be scheduled for a similar number of days as this trial, then at present the court likely could not accommodate that request until early 2019. However, delays of that length, will tend to significantly degrade the quality of the evidence, and the quality of justice. As the court stated in *R. v. Jordan*, 2016 SCC 27:

> 19 As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.
>
> 20 Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.
>
> 21 At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as

possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(*b*) was not intended to be a sword to frustrate the ends of justice (*Morin*, at pp. 801-2).

22 Of course, the interests protected by s. 11(*b*) extend beyond those of accused persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.

23 Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

24 Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.

25 Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).

26 Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as "a fair and balanced criminal justice system simply cannot exist without the support of the community" (*Askov*, at p. 1221).

27 Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so. As D. Geoffrey Cowper, Q.C., wrote in a report commissioned by the British Columbia Justice Reform Initiative:

> ... the widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realised: they are, in practice, interdependent.

(*A Criminal Justice System for the 21st Century* (2012), at p. 75)

> 28 In short, timely trials further the interests of justice. They ensure that the system functions in a fair and efficient manner; tolerating trials after long delays does not. Swift, predictable justice, "the most powerful deterrent of crime" is seriously undermined and in some cases rendered illusory by delayed trials (McLachlin C.J., "The Challenges We Face", remarks to the Empire Club of Canada, published in (2007), 40 U.B.C. L. Rev. 819, at p. 825).
>
> …
>
> *Problems With the Current Framework*
>
> 34 Despite this confusion, prejudice has, as this case demonstrates, become an important if not determinative factor. Long delays are considered "reasonable" if the accused is unable to demonstrate significant actual prejudice to his or her protected interests. This is a problem because the accused's and the public's interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trials may also cause prejudice to the administration of justice.

[30] Nevertheless, the realistically arguable choices available are: to declare a mistrial, or continue with Mr. Melvin representing himself.

(i) The general principles regarding mistrial applications

[31] A successful application for a mistrial is an acknowledgement that a fundamental flaw in the trial process has arisen. In such cases, there is no remedy but to prematurely conclude the trial, with a view to starting from scratch at some future point. It is, therefore, a remedy to which especially serious consideration must be given. See, for example:

> (a) In *R. v. Muller*, 2013 BCCA 528, 304 C.C.C. (3d) 483, Madam Justice Stromberg-Stein (in dissent but not with respect to the legal principles relating to mistrials) stated:
>
> > [66] Having regard to the authorities, I conclude a mistrial is a discretionary remedy of last resort that should not be granted unless other, less extreme, corrective measures are incapable of preventing a miscarriage of justice: [*R. v. Chiasson*, 2009 ONCA 789, 258 O.A.C. 50] at para. 14. A mistrial should only be granted "in the clearest of cases", where there is a fatal wounding of the trial process'. A "fatal wounding of the trial process" is "a wounding to the administration of justice which cannot be cured by remedial measures": [*R. v. Paterson* (1998), 122 C.C.C. (3d) 254 (B.C.C.A.)] at para. 93, citing [*R. v. Lawson*, (1991), 1 B.C.A.C. 204 (Chambers)] at 209.
> >
> > [Emphasis by Stromberg-Stein J.A.]

(b) In *R. v. Harrer*, [1995] 3 S.C.R. 562, McLachlin J stated at para. 45:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: R. v. Lyons, [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. [Emphasis added.]

(c) In *R. v. Arabia*, 2008 ONCA 565, Watt JA stated at paras. 51-52:

> Trial judges are more likely to encounter mistrial applications before, rather than after verdict or judgment, and when sitting with a jury, rather than in judge alone trials. The underlying circumstances that ground mistrial applications prior to verdict are myriad, but often involve the introduction of inadmissible evidence or the intrusion of some trial or related event that puts trial fairness at risk or compromises the integrity of the decision-making process.
>
> While there may be some uncertainty about the precise standard a judge is to apply in determining whether to declare a mistrial *before* verdict or judgment, it is well-settled that the authority to declare a mistrial should only be exercised in the clearest of cases. *R. v. R.(A.J.)*. (1994), 94 C.C.C. (3d) 168 (Ont. C.A.) at 174; *R. v. Paterson* (1998), 122 C.C.C. (3d) 254 (B.C.C.A.) at paras. 93-98. There seems no reason in principle to apply any less rigorous standard to applications for the same remedy made after verdict or judgment.

[32] I specifically bear in mind that, speaking of what is a "miscarriage of justice", Justice Cromwell included the appearance of, as well as actually finding, that a trial is fundamentally unfair – *R. v. Wolkins*, 2005 NSCA 2, at paras. 88-89.

(ii) Mr. Melvin fired Mr. MacEwen in a purposeful manner in order to obtain a mistrial

[33] A transcript of some of my exchanges with Mr. Melvin has been filed as an exhibit.

[34] Mr. Melvin discharged Mr. MacEwen on September 20, 2017 – after all the key Crown witnesses had testified. However, he had confidence in him to deal with

both the attempted murder and murder charges since at least July 18, 2015. Mr. MacEwen was his counsel when he was acquitted of the February 20, 2009 murder of Terry Marriott Junior. Mr. MacEwen also represented him in a drug trafficking trial which started in 2016 and concluded in the spring of 2017 with Mr. Melvin having been found guilty. Mr. MacEwen is a very experienced criminal counsel, and my observations of his conduct in this trial satisfy me that he very likely did a competent job defending Mr. Melvin in this case.

[35] I conclude that Mr. MacEwen was *not* aware that Mr. Melvin was going to fire him *until* Mr. Melvin blurted it out in court at 11:06 a.m. on September 20, 2017. I say this because:

1. Mr. MacEwen indicated to the court afterwards (11:46 a.m.) that there had been some difficulties between them previously, but we "worked through those";
2. My observations of the interactions between Mr. MacEwen with Mr. Melvin throughout the proceedings to date did not reflect any discord between them at any time;
3. He prefaced that he was choosing his words "carefully", before Mr. MacEwen stated to the court that he was "shocked", ["came as a shock to me"] when characterizing his reaction to the statement 40 minutes earlier by Mr. Melvin: "Your Honour, I want to fire my lawyer". Mr. MacEwen characterized the situation *thereafter* as an irreconcilable breakdown of the solicitor-client relationship;
4. Had Mr. Melvin fired Mr. MacEwen *before court* that morning as Mr. Melvin claimed he had, surely as an officer of the court, Mr. MacEwen would not have continued to act as his counsel and finish one hour more of the cross-examination of Derek MacPhee (10-11:00 a.m.)?
5. Although not available to me at the mistrial application September 26, on the September 27 motion for reconsideration of the appointment of Patrick MacEwen as *amicus curiae*, I was provided with the September 27, 2017, opinion letter from the Nova Scotia Barristers Society regarding the ethical obligations applicable to the prospect of Mr. MacEwen remaining as an *amicus curiae* in this trial to assist Mr. Melvin. Therein, Darrel Pink, Executive Director of the Society wrote to Mr. MacEwen:

> You have advised that you were representing Jimmy Melvin Junior in relation to serious criminal charges… September 20, 2017 following the conclusion of evidence from a witness, Mr. Melvin requested that he be permitted to address the court. Justice Rosinski advised that he should do so through counsel, at which time Mr. Melvin advised the court that he wished to discharge his counsel. Mr. Melvin was removed from the court and you met with him in cells. *After some discussion with Mr. Melvin you concluded there had been a breakdown in the solicitor client relationship and that Mr. Melvin no longer wished to retain you as his counsel*".

6. I also heard by consent the factual representations of Crown Attorney, Sean McCarroll, who was present at counsel table no more than 10 feet away from Mr. Melvin, regarding what he saw and heard at 11:06 a.m. on September 20, 2017:

> Just after Derek MacPhee finished his testimony [and I was standing or passing by an exhibit on my way out of the court room I heard] Mr. Melvin "stir behind me" and he turned to face him when he observed an exchange between Mr. Melvin and his father who was present in the body of the court 20 feet away: Mr. Melvin said: "should I do it now? Should I do it now?" To which his father was observed to respond "nodding enthusiastically" and immediately after which Mr. Melvin stated "Your Honour, I want to fire my lawyer."

7. Immediately after Mr. Melvin stated "Your Honour I want to fire my lawyer" and court concluded, (Constable Josh Underwood testified that) Mr. Melvin's father burst out of the courtroom into the foyer where 10 police officers who were excluded witnesses were present, and loudly proclaimed: "that's it, it's done, it's a mistrial – Jimmy just fired his lawyer". To that point, there had been no mention of a "mistrial".

[36] There were also indications throughout the trial to date that Mr. Melvin was attempting to interfere with the integrity of the trial process:

(a) On September 13, 2017, at approximately 12:30 p.m., shortly before the lunch break, I personally observed Mr. Melvin mouth towards Mr. Hallett, who was facing him while in the witness box, the words "love you" – I said nothing and permitted the jury to leave before I admonished Mr. Melvin that I had seen him do that, and such behaviour would not be tolerated, noting that possible consequences could involve a mistrial, which I informed him would involve a delay

> of 15 months, *or* I could place him into a court room elsewhere in the building with closed circuit TV to ensure he is still "present" during his trial. After the lunch break I received a note from Juror #417. The note was to the effect that just before the lunch break, she had seen Mr. Melvin mouth a number of words she could not make out toward Mr. Hallett, who appeared to nod in response. I held an inquiry, and for that reason discharged the juror, who had not relayed the information to any other jurors. It was precisely these kinds of concerns that caused the Crown in its September 6, 2017 email to the court to request that Mr. Melvin not be permitted to sit at counsel table:
>
> > "The Crown has safety concerns regarding Mr. Melvin for the following reasons:
> >
> > 1-He has been convicted of assaulting and threatening correctional staff. Including throwing fecal bombs at staff.
> >
> > 2-He has outstanding matters which allege he assaulted and threatened correctional staff.
> >
> > 3-Mr. Melvin became enraged after his sentencing in the drug trial done by [the same Crown counsel as in this trial] counsel. There are charges pending.
> >
> > 4-Mr. Melvin has a lengthy and somewhat violent record.
> >
> > 5-Mr. Melvin engaged our main witness [Derek MacPhee] on two occasions in the homicide trial. Sheriffs had to intervene on both occasions."

[37] Rather than preclude Mr. Melvin from sitting at counsel table, I ordered him to sit at the very end of counsel table at the rear table closest to the door through which he would be brought into the courtroom, since he is in custody throughout this trial (I did not restrict his counsel's positioning). This measure was taken primarily in an effort to avoid any interference with witnesses, but also to address the safety concerns articulated by the prosecuting Crown Attorneys. However, by the time he was mouthing words to Jason Hallett he had moved approximately 10 feet over much closer to the middle of the counsel table – I consequently ordered the deputy sheriffs to ensure that he sit no more than 3 feet from the end of the table, as this would still give him a vantage point from which to observe the witnesses and hear them, but hopefully would prevent repeated instances of such attempted interference with witnesses. In preparing for the trial, I had been informed, by the sheriffs and court personnel who were present at relevant times at the murder trial before Justice Campbell in May – June 2017, that Mr. Melvin had

significant verbal interactions with Crown witness Derek MacPhee within the courtroom *before* the proceedings were being recorded. In part this is what I sought to avoid at this trial.

b. Although the following instances are not directly the actions of Mr. Melvin, they do cause me to question whether he was involved in a concerted effort to undermine or disrupt the integrity of the trial process, namely-

i. There was an exclusion of witnesses order put in place prior to my preliminary instructions to the jury and the Crown's opening address. From that point forward Mr. Melvin's brother, Cory, was an excluded prosecution witness throughout the proceeding. However, on September 13, 2017, the Crown counsel represented to the court that it was aware from speaking to court or police personnel that during Jason Hallett's testimony Cory Melvin was directly outside the door looking in the window to see what was going on and attempting to hear through the cracks in the door what was being said – I consequently directed sheriffs' staff to advise him he may not be within 10 feet of the doorway to the courtroom.

ii. On September 18, 2017, Crown counsel represented to the court that it was aware from speaking to Constable John Mansvelt, that while the Constable was outside the courtroom, and was speaking with Warren Clarke, a subpoenaed Crown witness, he noticed Cory Melvin video-recording on his mobile phone them speaking together. Cory Melvin showed it to them, so they could see it was in recording mode. I consequently directed sheriffs' staff to advise him that for the remainder of the trial, he may not be present on the third floor where the trial was taking place – my concern was that this was an instance of attempted witness intimidation.

iii. Crown counsel represented to the court that, as Reagan Henneberry was being escorted to the court room to begin his testimony, Mr. Melvin's father, directly and loudly said to him, either: "Hi Reagan" or "Hey Reagan".

> I am satisfied that it is more likely than not that James Melvin Senior has an antagonistic view of Mr. Henneberry's testifying against his son. I consequently excluded James Melvin Senior from the courtroom while Mr. Henneberry was testifying as I was concerned this was an instance of attempted witness intimidation.
>
> iv. Crown counsel represented to the court, again without objections, that during the trial James Melvin Senior also used his mobile phone to videotape police officers outside the courtroom on the third floor speaking with subpoenaed witnesses.

[38] While these are not the direct actions of Jimmy Melvin, Jr., the court is satisfied that these actions by Cory Melvin, James Melvin Senior, and Jimmy Melvin, were purposeful – the purpose on each occasion was an attempt to interfere with the integrity of the court process. As the Crown documentation of his criminal record and participation in recent trials indicates, Mr. Melvin, has participated in many criminal court proceedings – without doubt he is aware of the proper behaviour expected of accused persons.

[39] In summary, I reject the suggestion that the timing of Mr. Melvin's firing of Mr. MacEwen was coincidental, or that the reason was a genuinely held belief that there were good grounds of reasonably perceived incompetence by Mr. MacEwen. I am satisfied that Mr. Melvin chose to fire Mr. MacEwen after he had a chance to see the likely determinative Crown witnesses testify, and that he thereafter believed that the case was not going well for him. That is a reasonable conclusion for him to have come to.

[40] I conclude that he ultimately seeks a new trial, to reset the process, with a hope that the Crown case will degrade further by the time any new trial can be completed.

[41] While I have concluded that Mr. Melvin's firing of Mr. MacEwen is a sham, I still must consider with an open mind whether he can, as a self-represented individual, have a fundamentally fair trial. – See e.g. *R. v. Ryan*, 2012 NLCA 9 at para. 156; *R. v. Wolkins* 2005 NSCA 2, at para. 70, per Cromwell, JA (as he then was).

Why Mr. Melvin can still have a fundamentally fair trial

[42] Mr. Melvin has been unable to arrange for other counsel to take Mr. MacEwen's place on short notice. This jury trial started on September 11 and is to end on or before October 4, 2017.

[43] Mr. Melvin, therefore, will have to represent himself if this trial is to continue on. I must ask myself: Can Mr. Melvin have a fundamentally fair trial if he represents himself?

[44] To date Mr. Melvin was competently represented by Patrick MacEwen. The bulk of the Crown case is before the jury. Final submissions have been received in relation to the pretrial *voir dire* that has continued into the trial period.

[45] The remaining major decisions and actions that Mr. Melvin will have to consider are:

1. Conducting cross-examination of the remaining Crown witnesses;
2. Determining whether it is in his best interests to call evidence on his own behalf (including calling himself as a witness);
3. Presenting closing arguments about why the Crown had not proven his guilt of any of these offences;
4. Drafting a defence position for inclusion in my final jury instructions; and
5. Possibly making commentary on the appropriateness of my jury instructions, or suggestions on which instructions should be included.

[46] I recognize expressly that I have an obligation to ensure that his trial, if it proceeds with him self-represented, will be a fair one.

[47] I also agree that, as the Crown counsel have argued, they have a quasi-judicial "Minister of Justice" responsibility to ensure that Mr. Melvin, as with any other accused, has a fundamentally fair trial: *R. v. Cawthorne*, 2016 SCC 32 at paras. 23-26. I expect, and presume, that they will carry out that duty conscientiously.

[48] Notwithstanding those protections, Mr. Star argues that Mr. Melvin is not capable of representing himself, to a level that he would have a fundamentally fair trial.

[49] His counsel presented the notations suggested to be attributable to Dr. Stuart Grassian, MD, 401 Beacon Street, Chestnut Hill, Massachusetts, USA; his

curriculum vitae which appears to be current to approximately 2013; and an article on "psychiatric effects of solitary confinement", which I understand were used in an attempt to explain Mr. Melvin's throwing of feces at correctional services officers in New Brunswick, while he was in prison around 2013.

[50] Even if I accepted that Dr. Grassian has all the qualifications indicated in his *curriculum vitae*, there is no indication he has ever been qualified in a court in Canada, to give the type of opinion evidence that is sought to be given here – i.e. about the psychological condition and capacity of Mr. Melvin to represent himself at *present* in this trial. Moreover, he has not filed an expert report, nor is his knowledge of Mr. Melvin's circumstances up to date.

[51] I mentioned to Mr. Star that Mr. Melvin may be the best source of information insofar as his capacity to represent himself, but counsel declined to call him as a witness. Mr. Melvin is presumed "fit" to stand trial – s. 672.22 of the *Criminal Code*. While no formal application for a fitness assessment was requested, I am satisfied that there does not appear to be any basis to request such assessment, and my observations of him do not raise a realistic concern that he is not fit to stand trial, as defined in s. 2 of the *Criminal Code* and elaborated upon in *R. v. Eisnor*, 2015 NSCA 64.

[52] Ultimately, I have limited knowledge of Mr. Melvin's ability to represent himself. However, I do conclude from what I observe of Mr. Melvin when I speak to him in court, and his experience in the criminal justice system, including his most recent experience with a very similar case in fact and law – the February 20, 2009 allegation that he murdered Terry Marriott – that more likely than not, he is capable of representing himself in criminal matters, and specifically for the remainder of this trial, such that he would have a fundamentally fair trial.

[53] Mr. Melvin has had the benefit of Mr. MacEwen's presumed competent advice and conduct,[2] in preparing for this trial, and during the trial proper to date. Having said that, I appreciate that no longer having Mr. MacEwen does place Mr. Melvin at a greater disadvantage than had he continued to retain Mr. MacEwen.

[54] I should also point out that in his exchange with me on September 21, the following appears:

> Court – what is your position? I didn't get it exactly yesterday. That's why we put it over to today, as to what you are suggesting the court should do it at this stage?

[2] Which remains in spite of a mere allegation of incompetence, *R. v. GDB*, [2000] 1 SCR 250

> Mr. Melvin – I'm assuming your honour, that Mr. [Kevin] Burke must be seeing if he can get his schedule ready for… To help me out with this.
>
> …
>
> Court – have you retained Mr. Burke?, or has he been…
>
> Mr. Melvin – not officially, but I'm sure, yeah, I'm sure he's going to be retained come this week [only to represent Mr. Melvin on any adjournment/mistrial application]. *Or, I can represent myself because I know enough about the courts myself, yeah. I can probably represent myself.*

[55] I interpret Mr. Melvin's reference to, "I can represent myself because I know enough about the courts", to be a limited reference to the adjournment/mistrial application.

[56] It is also appropriate that I recognize that the Crown and public are entitled to a fair trial, and one that should not be delayed any further except for very good reasons. If a mistrial is granted, as I noted to Mr. Melvin at the time he made the mouthed "love you" comments to Mr. Hallett, a new trial could be as far off as 15 months away.

[57] Taking all the proper considerations and circumstances into account, if we continue the present trial I am satisfied that Mr. Melvin self-represented, will be able to have a fundamentally fair trial.

[58] Nevertheless, this is a jury trial, involving charges that carry a maximum of life imprisonment, and in that respect there are aspects where legal training would be particularly helpful – for example: regarding making an effective closing argument to the jury; and presenting the court with an articulate and reasoned basis why my jury charge may be incomplete, misleading or incorrect. Similarly, the decision whether or not to call defence evidence is a significant one, which cannot be accurately assessed until the Crown case is completed.

[59] Given the cumulative risks that Mr. Melvin could be exposed to in his defence, because of his lack of legal training, even with the benefit of the oversight and assistance of the court, and the fairness expected of Crown counsel, there is a sufficient concern here that he may be prejudiced to a sufficiently great degree if he does not have some further measure of assistance to ensure a fundamentally fair trial with even greater certainty.

[60] In these exceptional circumstances, I am inclined to the view that the appointment of an *amicus curiae* is an appropriate response to my residual concerns.

Who should be the *amicus curiae* – his discharged private counsel or a new competent and available counsel?

[61] In a criminal trial, this court has the authority to do the following things, *inter alia*, in order to ensure a fair trial: [3]

1. Appoint an *amicus curiae* – "friend of the court"- to assist the court in ensuring a fair trial: *R. v. Imona-Russell*, 2013 SCC 43, at paras. 44- 48:

> *Amicus Curiae and the Inherent Jurisdiction of the Court*
>
> (1) Appointing *Amici*
>
> 44 While courts of inherent jurisdiction have no power to appoint the women and men who staff the courts and assist judges in discharging their work, there is ample authority for judges appointing *amici curiae* where this is necessary to permit a particular proceeding to be successfully and justly adjudicated.
>
> 45 *Amici curiae* have long played a role in our system of justice. As early as the mid-14th century, the common law courts from which our superior courts are descended received the assistance of *amici* (see S. C. Mohan, "The *Amicus Curiae*: Friends No More?", [2010] S.J.L.S. 352, at pp. 356-60). Indeed, as one scholar has noted, "[t]here can be no doubt as to the age and wide acceptance of the amicus curiae. As to its origin, on the other hand, there is a great deal of doubt. Like so many things of great age, its roots are lost even though the practice still continues" (F. M. Covey, Jr., "Amicus Curiae: Friend of the Court" (1959), 9 DePaul L. Rev. 30, at p. 33). A number of cases have recognized the practice; in addition, there are statutory provisions that provide for the appointment of *amicus* in certain circumstances.[4]
>
> 46 **A court's inherent jurisdiction to appoint *amicus* in criminal trials is grounded in its authority to control its own process and function as a court of law. Much like the jurisdiction to exercise control over counsel when necessary to protect the court's process that was recognized in *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18, the ability to appoint *amici* is linked to the court's authority to "request its officers, particularly the lawyers to whom the court afforded exclusive rights of**

[3] The authority of superior courts to control their own process, was reiterated in Quebec (*Director of Criminal and Penal Prosecutions*) v. Jodoin, 2017 SCC 26, where personal costs were ordered against a defence lawyer. The court will soon also hear a "civility" case involving the LSUC: Groia v. Law Society of *Upper Canada*, SCC case 37112, to be argued November 6, 2017.

> **audience, to assist its deliberations"** (B. M. Dickens, "A Canadian Development: Non-Party Intervention" (1977), 40 *Mod. L. Rev.* 666, at p. 671).
>
> 47 Thus, orders for the appointment of *amici* do not cross the prohibited line into the province's responsibility for the administration of justice, provided certain conditions are met. First, the assistance of *amici* must be essential to the judge discharging her judicial functions in the case at hand. Second, as my colleague Fish J. observes, much as is the case for other elements of inherent jurisdiction, the authority to appoint *amicus* should be used sparingly and with caution, in response to specific and exceptional circumstances (para. 115). Routine appointment of *amici* because the defendant is without a lawyer would risk crossing the line between meeting the judge's need for assistance and the province's role in the administration of justice.[5]
>
> 48 So long as these conditions are respected, the appointment of *amicus* avoids the concern that it improperly trenches on the province's role in the administration of justice.
>
> [my emphasis added]

2. Refuse to allow defence counsel to withdraw, and require a defence counsel during a trial or hearing to continue, if the only issue between counsel and the client is the payment of fees: *Cunningham v. Lilles*, 2010 SCC 10:

> 40 - **I am also unpersuaded by the Law Society of British Columbia's point that forcing unwilling counsel to continue may create a conflict between the client's and lawyer's interests.** It is argued that where counsel is compelled to work for free, he or she may be tempted to give legal advice which will expedite the process in order to cut counsel's financial losses even though wrapping up a criminal matter as quickly as possible may not be in the best interests of the accused. This argument, however, is inconsistent with the Law Society's position -- with which **I agree -- that the court should presume that lawyers act ethically.** There are many situations where counsel's personal or professional interests may be in tension with an individual client's interest, for example where counsel acquires an interesting new file that requires immediate attention, or has vacation plans that conflict with the timing of court proceedings affecting the client. Counsel is obligated to be diligent, thorough and to act in the client's best interest. Similarly, if counsel agrees to be retained pro bono, he or she must act just as professionally as if acting for the client on a paid retainer of the same nature. **Where the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less.**
>
> [my emphasis added]

[62] The court in *Cunningham* went on to specifically address "refusing withdrawal":

> D. Refusing Withdrawal
>
> 46 The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles.
>
> 47 If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.
>
> 48 **Assuming that timing is an issue, the court is entitled to enquire further.** Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. **Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused.** Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., Law Society of Upper Canada, r. 2.09(7)(b), (d); Law Society of Alberta, c. 14, r. 2; Law Society of British Columbia, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., Law Society of Upper Canada, r. 2.09(2); Law Society of Alberta, c. 14, r. 1; Law Society of British Columbia, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, **in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.**
>
> 49 **If withdrawal is sought for an ethical reason, then the court must grant withdrawal** (see *C. (D.D.)*, at p. 328, and *Deschamps*, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be *required* to withdraw in order to comply with his or her professional obligations. **It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.**
>
> 50 If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (*C. (D.D.)*, at p. 327). **In exercising its discretion on the**

> **withdrawal request, the court should consider the following non-exhaustive list of factors:**
>
> - whether it is feasible for the accused to represent himself or herself;
>
> - other means of obtaining representation;
>
> - impact on the accused from delay in proceedings, particularly if the accused is in custody;
>
> - conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
>
> - impact on the Crown and any co-accused;
>
> - impact on complainants, witnesses and jurors;
>
> - fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
>
> - the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.
>
> **As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.**
>
> ……
>
> 59 In sum, a court has the authority to control its own process and to supervise counsel who are officers of the court. The Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. This jurisdiction, however, should be exercised exceedingly sparingly. It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary, nor where counsel seeks withdrawal for ethical reasons. Where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether withdrawal would cause serious harm to the administration of justice.
>
> [my emphasis added]

3. Require a defence counsel to continue a hearing or trial as *amicus curiae* where, although nominally counsel claims the solicitor-client relationship has irreconcilably broken down, the court finds that the sole reason for the breakdown is the client's purposeful sabotage of the continuation of the trial.

[63] Regarding that outcome, I am mindful of the court's comments in *Imona-Russell*:

- *Amicus* as Defence Counsel

> 49 Further, I agree with my colleague Fish J. that **"[o]nce clothed with all the duties and responsibilities of defence counsel, the *amicus* can no longer properly be called a 'friend of the court'"** (para. 114). *Amicus* and court-appointed defence counsel play fundamentally different roles (see D. Berg, "The Limits of Friendship: the *Amicus Curiae* in Criminal Trial Courts" (2012), 59 *Crim. L.Q.* 67, at pp. 72-74).
>
> 50 The issue of whether it was appropriate to appoint *amicus* to effectively act as defence counsel was raised by the Attorney General of Quebec and the Attorney General of British Columbia, who were interveners in this Court. It was not challenged by the Attorney General of Ontario. **However, to the extent that the terms for the appointment of *amici* mirror the responsibilities of defence counsel, they blur the lines between those two roles, and are fraught with complexity and bristle with danger.**
>
> 51 First, the **appointment of *amici* for such a purpose may conflict with the accused's constitutional right to represent himself (**see *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 972).
>
> 52 Second, it can also defeat the judicial decision to refuse to grant state-funded counsel following an application invoking the accused's fair trial rights under the *Charter*. For instance, by expanding the role of the *amicus*, first to act as though he was defending a client who remained mute, and later to take instructions from the accused, the trial judge in *Imona Russel* undermined the court's earlier decisions to deny state-funded defence counsel.
>
> 53 Third, **there is an inherent tension between the duties of an *amicus* who is asked to represent the interests of the accused, especially where counsel is taking instructions, as in *Imona Russel* and *Whalen*, and the separate obligations of the *amicus* to the court. This creates a potential conflict if the *amicus*' obligations to the court require legal submissions that are not favourable to the accused or are contrary to the accused's wishes.** Further, the privilege that would be afforded to communications between the accused and the *amicus* is muddied when the *amicus*' client is in fact the trial judge.
>
> 54 Thus, it seems to me that this current practice of appointing *amici* as defence counsel blurs the traditional roles of the trial judge, the Crown Attorney as a local minister of justice and counsel for the defence. **Further, the use of *amici* to assist a trial judge in fulfilling her duty to assist an unrepresented accused might result in a trial judge doing something indirectly that she cannot do directly**. While trial judges are obliged to assist unrepresented litigants, they are not permitted to give them strategic advice. **Where an *amicus* is assigned and is instructed to take on a solicitor-client role, as in *Imona Russel* and *Whalen*, the court's lawyer takes on a role that the court is precluded from taking**.

> 55 Finally, **there is a risk that appointing *amici* with an expanded role will undermine the provincial legal aid scheme**. In this case, the Ontario legislature had passed the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, which provides for the representation of indigent accused. The inherent or implied jurisdiction of a court cannot be exercised in a way that would circumvent or undermine those laws. Absent a constitutional challenge, the judicial exercise of inherent or implied jurisdiction must operate within the framework of duly enacted legislation and regulations.
>
> 56 For all these reasons, I conclude that a lawyer appointed as *amicus* who takes on the role of defence counsel is no longer a friend of the court.

[64] In spite of the Supreme Court's words, appellate courts have endorsed the appointment of *discharged* defence lawyers during trial, and appointed them *amicus curiae- R. v. Phung*, 2012 ONCA 720, leave to appeal refused, [2014] SCCA No. 973 where the accused agreed to *amicus* appointment*; R. v. Amos*, 2012 ONCA 334, leave to appeal refused [2014] SCCA No 160, (though in that case the discharged lawyer *agreed* to continue as *amicus curiae*; *see also the later decision R. v. El-Enzi*, 2014, ONCA 569). In *Amos*, the role of amicus included: objecting to perceived legal errors; assisting the accused in drafting a statement of the defence position; assisting the accused in subpoenaing any defence witnesses; and advising the accused on any questions of law – it did not include the examination of any defence witnesses, including the accused, or closing address to the jury.

[65] In *R. v. Mastronardi*, 2015 BCCA 338, within days of the start of a dangerous offender hearing, the defendant fired his counsel, yet the counsel was prepared to act as *amicus*, according to the following terms: "to act for the benefit of the accused and to defend the case by, *inter alia*, cross-examining witnesses, raising objections, making legal arguments and, when the accused cooperates, taking instructions from the accused." As Justice Kirkpatrick noted:

> 41 The practical difficulties posed by the Supreme Court's decision were deftly addressed by Mr. Justice Code in *R. v. Jaser*, 2014 ONSC 2277 at paras. 35-37:
>
> > [35] **The practical difficulty, left unresolved and unaddressed in *Ontario v. C.L.A., supra*, is that a number of authorities have held that self-represented accused can sometimes conduct their own defence so incompetently that a "miscarriage of justice" results**. In these cases, the trial judge properly carried out the duty to assist the self-represented accused. Nevertheless, the accused's complete inability to conduct the defence led to an unjust result that was reversed on appeal through s. 686(1)(a)(iii) -- the "miscarriage of justice" power. One of the remedies suggested in these cases is the appointment of *amicus*, in effect, to assist with the otherwise incompetent conduct of the defence. The result

in these cases, on appeal, tended to turn on the strength of the prosecution's evidence and whether viable defences existed that the self-represented accused failed to bring out. The result also turned on whether the trial judge intervened and appointed *amicus*, once the accused's incompetence became apparent, in order to actively assist the self-represented accused. See: *R. v. W. (P.H.L.)* (2004), 190 C.C.C. (3d) 60 (B.C.C.A.); *R. v. Ryan* (2012), 281 C.C.C. (3d) 352 (Nfdl. C.A.); *R. v. Peepeetch* (2003), 177 C.C.C. (3d) 37 (Sask. C.A.); *R. v. Bitternose*(2009), 244 C.C.C. (3d) 218 (Sask. C.A.); *R. v. Phung* (2012), 103 W.C.B. (2d) 599 (Ont. C.A.).

[36] These cases confront the difficult issue of whether an accused's right to insist on self-representation includes a right to potentially bring about a wrongful conviction, and whether the courts must interfere with the former right in order to prevent the latter result. As Chief Justice Green put it in *R. v. Ryan, supra* at paras. 104-5, in a case where there was "real concern about the reliability of the verdict":

> "Does individual autonomy always win out over trial fairness? Will the accused always be allowed, effectively, to commit litigation suicide particularly in a murder case where the consequences are so serious."

Assuming the accused's own incompetence in conducting the defence has brought about an unreliable result at trial, the question that arises is whether the court can "wash its hands of any further concerns" and conclude that the accused must "be taken to have waived the right to protection against a miscarriage of justice". This is how Chief Justice Green framed the issue in *R. v. Ryan, supra* at paras. 118 and 127.

[37] The Supreme Court of Canada did not refer to the above line of authority or address these difficult issues in *Ontario v. C.L.A., supra*, perhaps because the parties on appeal never raised the issue of the proper role of *amicus*. It was two intervenors who raised this issue. The only live dispute between the parties, which became the main focus of the Court's judgment, was whether the judiciary could set the scale of *amici's* fees. **When the Court briefly turned to the new issue raised by the two intervenors, concerning the proper role of *amicus*, the above line of authority was not discussed and the functional reason for giving *amicus* an expanded role in these particularly difficult cases was not addressed**. This is understandable since *Ontario v. C.L.A.* was solely a dispute between lawyers and the government over fees. None of the self-represented accused in the underlying cases had appealed and made the argument that there had been a "miscarriage of justice". **As a result, the Court's reasoning** concerning the role of *amicus* has a theoretical or doctrinal coherence to it but it does not address and **may not have resolved the underlying problem which caused the trial courts to appoint *amicus*, and give them a more expansive role, in those**

exceptional cases where there is a real risk of a "miscarriage of justice".

42 As to the three reasons given in *CLA* which render inappropriate the appointment of *amicus* to act as defence counsel, the appellant at bar concedes that, **in this case**, **the appointment did not conflict with his right to represent himself (as, when he chose to participate, he did so freely**); and the appointment did not defeat any decision to refuse to grant state-funded counsel (as Mastronardi, through his repeated dismissal of counsel, exhausted his access to legal aid funding).

43 **Rather, Mastronardi focused on the appearance that solicitor-client privilege "could have been compromised".** The essence of this submission is that Mr. Patey disclosed confidential (but not privileged) information to the sentencing judge at the time of J.M.'s cross-examination, which led the sentencing judge to exempt Mr. Patey from taking instruction from Mastronardi. In Mastronardi's submission, the disclosure had the effect of exposing "past communications and related 'difficulties' between lawyer and client ... before the trial judge in open court."

44 **In my opinion, the theoretical prospect that the appointment of defence counsel as *amicus* could, in the words of the Supreme Court in *CLA*, "blur the lines" between the roles of counsel for the court and counsel for the accused was not realized in this case.**

45 First, the clear wording of the order appointing defence counsel as *amicus* left no doubt as to the person for whom counsel was to act. **The obligations owed by the defence counsel appointed to the role of *amicus* did not arise in an abstract vacuum or by necessary implication; to the contrary, the obligations were set out in the express terms of the court order.**

46 Thus, the "inherent tension", referred to at para. 53 of the Supreme Court decision, was neutralized by the terms of the order. Further, it appears the court was concerned **about the potential conflict when counsel is asked to represent the interests of the accused and the separate obligations owed to the court. However, in the case at bar, the only obligations owed to the court were residual.**

47 In this case, **the terms of the order appointing Mr. Patey did not include any explicit term that led to contradictory obligations owed to the court and Mastronardi,** The order did not require Mr. Patey to make legal submissions to the court that were not favourable to the accused. **There was also no implicit conflict between a duty owed to the court as an advocate (e.g., not to mislead the court) and the terms of the order appointing Mr. Patey as *amicus***. Thus, the danger cautioned against by the Court in *CLA* did not arise here.

48 Second, it is clear that **Mr. Patey was keenly aware of the danger of inadvertent disclosure of matters protected by solicitor-client privilege.** As Mr. Patey stated to the judge in discussions as to the contours of his appointment:

> ... What I will likely do with a fair degree of frequency is seek very specific directions from Your Lordship as to how the court specifically views my role on particular issues as we go along. And the reason I -- I do that, I've consulted with senior counsel on this issue in anticipation of it possibly arising, what may happen, and it may be a non-issue, it may never happen, but what may happen is, of course**, I -- I have previously been counsel, and so I have previously had instructions, and I've previously had the benefit of Mr. Mastronardi's views on certain topics and issues in the case, and so on, and if I find myself as *amicus* compelled to proceed in a way that doesn't coincide with -- with my prior instructions** when I was counsel, it would be at that point that I would -- **I would seek very firm direction from -- from the court,** without breaching the privilege that still exists from the time when I was counsel.
>
> So it's not really a *caveat*, but with that -- with that footnote, Mr. Allingham and I have no problem proceeding as *amicus*.

49 Third, and contrary to Mastronardi's submission, no new information had been disclosed to the judge at the time Mr. Patey sought an exemption from taking instructions from Mastronardi. Nothing was "laid bare before the trial judge in open court" at the time. This is because the "difficulties" concerned the events disclosed by both Mastronardi and Mr. Patey on January 6, 2011 and January 11, 2011 (i.e., that Mastronardi refused to meet with Mr. Patey). In the impugned exchange, Mr. Patey reminded the judge of events that had already been disclosed. Ultimately, there was no disclosure of confidential information and nothing transpired that supports a breach of solicitor-client privilege. In any event, the information that was disclosed was entirely tangential to the merits of the dangerous offender hearing and it is clear the judge did not in any way rely on this information in his assessment of whether Mastronardi should be declared a dangerous offender.

50 Fourth, **this was the very kind of unusual case -- a highly manipulative offender who was determined to derail the proceedings -- in which the appointment of *amicus* was vital to protect the court's process and, indeed, to prevent a miscarriage of justice.**

51 The dangerous offender hearing had been unconscionably delayed for years due to Mastronardi's manipulative conduct. A further (and, inevitably, extensive) adjournment to accommodate Mastronardi's insistence on the appointment of a "neutral" *amicus* was not a realistic option. Nor does Mastronardi claim on appeal that the hearing should have been further delayed to accommodate the appointment of a "neutral" *amicus*.

52 The only alternative option available to the judge (legal aid funding having been exhausted and *Rowbotham* funding having been denied) was to tell Mastronardi he had to represent himself without any assistance, other than the limited assistance which the judge could provide.

> 53 Further, it is clear that Mastronardi appreciated his own limitations in conducting his case without assistance. He vacillated between insisting on his right to conduct his own case (which he was fully permitted to do within the bounds of relevance) and asking to speak with "his lawyer".
>
> 54 **In my opinion, a reasonable bystander or observer, fully informed as to the role performed by the *amicus curiae* in this case, would not consider that the appointment of former defence counsel as *amicus* amounted to a miscarriage of justice:** see *R. v. Samra* (1998), 129 CCC (3d) 144 (Ont. C.A.), leave to appeal ref'd [1999] 1 S.C.R. xiii at paras. 33 and 62.
>
> 55 In my view, Mastronardi has not demonstrated that his interests were adversely affected by the conduct of *amicus* (indeed, he concedes there was no ineffective assistance of counsel). **There was no actual prejudice and, indeed, no appearance of prejudice that would justify a finding of a miscarriage of justice.**
>
> 56 Furthermore, even if I am wrong in this opinion and the judge was in error in appointing defence counsel as *amicus*, I would, under s. 759(3) of the *Criminal Code*, dismiss this ground of appeal on the basis that there was no substantial wrong or miscarriage of justice.
>
> [my emphasis added]

[66] Interestingly, Russell Silverstein, counsel for the defendant in *Amos*, wrote an October 19, 2015 article "The role of *amicus* in criminal trials" in The Criminal Lawyers Association Newsletter 36-2–F8, (which can be accessed through WestlawNext Canada, Thomson Reuters Canada Limited):

> *When defence counsel for the accused is discharged and then becomes amicus*
>
> There have been several instances in the jurisprudence where counsel for the accused have either been discharged or have been forced to withdraw, and have been appointed amicus by the presiding judge. This is usually done to prevent a mistrial and ensure that the trial can continue. **Sometimes these appointments are made over the protests of the former defence counsel.**
>
> In such instances, it is natural for the trial judge to want former defence counsel to stay on the case. After all, no one knows the case better than she, and thus the trial can continue without delay. What will often happen is that the trial judge will appoint *amicus* but deprive *amicus* of the ability to take the steps necessary to really assist the accused, such as preparing him to testify in cross-examining witnesses. Instead, some kind of halfway house will be constructed.. **I believe, notwithstanding [*Imona-Russell*], in such an instance *amicus* should try to convince the trial judge to extend as much leeway as possible to *amicus***, so as to avoid a situation where the accused is being punished by depriving him of the fair trial. Nothing appears quite as unfair as forcing an accused to go it alone

> against an able prosecutor, while a capable defence lawyer is seated in the courtroom yet prevented from assisting.
>
> *Ethical considerations*
>
> [*Imona-Russell*] is still a relatively new decision. Time will tell how it will be applied by trial judges. However, I have recently begun to have concerns about the ethics of acting as *amicus* in the legal setting created by [*Imona-Russell*]. **Certainly, in situations where an accused wishes to represent himself, to cross-examine witnesses, and to address the jury, the appointment of *amicus* to be "on call" to provide legal advice to the accused raises no ethical concerns**. The accused has made his choice to proceed without counsel. However, there are times when the accused wants to be represented by counsel, but is not (for financial or other reasons) or is too mentally ill to make an informed choice about whether to retain counsel. In such situations, as set out above, *amicus* may be appointed in an effort to ensure a fair trial… despite [*Imona-Russell*, the appointment of an *amicus* will], continue to be used often because judges appreciate their duty to protect the rights of the unrepresented accused and realize that no one can do it better than a criminal defence lawyer.… ***Amicus* should offer to conduct cross-examinations for the accused since the accused is unlikely to succeed in accomplishing what cross-examination is designed to accomplish**. The trial judge may balk at this offer because of [*Imona-Russell*], but all judges are susceptible to the argument that the **worst that can happen is that the accused will get to be on a level playing field with the prosecution.** Moreover, no one can complain where the accused consents to an expanded role for *amicus* and is either acquitted or convicted after having been well assisted by *amicus*. **It is only when *amicus's* hands are unduly tied and the accused is convicted questions may arise**."
>
> [my emphasis added]

Epilogue to the appointment of Patrick MacEwen as amicus curiae

[67] I accept that accused persons have a constitutional right to self-representation if they knowingly so choose. On the other hand, courts have an obligation to ensure that no self-represented person suffers a perceived or actual miscarriage of justice. Such matters, in particular, may evoke impassioned arguments by counsel. On September 26, 2017, both Mr. Star and Mr. Atherton referred to the court appointing an *amicus curiae* over the objections of an accused person, as having the appearance of "railroading" the individual through the criminal justice system. Both were opposed to Mr. MacEwen being appointed *amicus curiae* in any form. In a moment of unfortunate and hyperbolic advocacy, Mr. Atherton referenced the court's decision to appoint the discharged defence

counsel of Mr. Melvin, as similar to pre-World War II Germany when State authorized counsel were appointed for defendants.

[68] After legal submissions on September 26, 2017, I appointed Mr. MacEwen as *amicus curiae*. I did so over his objection, as well as that of Mr. Melvin. I note here that Mr. Melvin is not indigent – he has the means available to retain private counsel. However, an accused need not have confidence in the *amicus* – only the court must have the confidence – *R. v. Amos, supra.* at para. 29. While in cases where a well intentioned judge appoints an *amicus* with an "expanded role more akin to the role of defence counsel" that appointment is more susceptible to criticism (*El-Enzi*, paras. 81-82). In Mr. Melvin's case the discharged counsel was not ultimately given an expanded role.

[69] Regarding Mr. MacEwen's mandate, I advised him in broad terms that the trial would continue September 27, 2017, at 9:30 in the morning, and at that time, although he was not Mr. Melvin's lawyer anymore, he was to be available to Mr. Melvin on an "as needed" basis at counsel table to provide legal advice. Their communications would be considered confidential. If an ethical issue arose he was to immediately advise me, and the issue could be addressed in an *in-camera* hearing, if necessary. I did advise him that I was *considering* an expanded role for him, which might include giving Mr. Melvin the benefit of his experience in relation to whether to call evidence possibly making a closing argument for Mr. Melvin and vetting my final jury instructions.

[70] Counsel for the Attorney General had been notified by my letter of September 22, 2017, that the court was considering appointing an *amicus curiae* for Mr. Melvin. Mr. Anderson had made contact with Nova Scotia Legal Aid in an effort "to put the word out" that the court, on short notice, was seeking a competent and available counsel for Mr. Melvin as *amicus*. Although there appeared to be promise that someone would step forward soon, there were no confirmed candidates on September 26.

[71] On the morning of September 27, 2017, the court reconvened to hear a reconsideration motion regarding the appointment of Mr. MacEwen as *amicus curiae*. I was advised that the Nova Scotia Barristers Society had provided Mr. MacEwen with an opinion that his appointment as *amicus curiae* placed him in an untenable conflict of interests. I indicated that it would be appropriate for there to be evidence from the Nova Scotia Barristers Society by way of witness or witnesses, to elaborate upon this position. We recessed until 2 p.m. September 27 to allow Mr. Pink (Executive Director of Nova Scotia Barristers Society) to attend.

[72] However, before we recessed, I advised Mr. MacEwen that I had given his mandate more thought, and that his primary role was to ensure that Mr. Melvin received a fair trial. Specifically, he should explain to Mr. Melvin the law, and what options he had based on the circumstances in the case; Mr. Melvin must determine what to do for himself – Mr. MacEwen would not give any recommendations to Mr. Melvin, nor would he address the court on behalf of Mr. Melvin. Mr. MacEwen could ask the court for clarification if any ethical issues etc. arose; and that their communications would be considered confidential.

[73] In short, Mr. MacEwen was knowledgeable about the case; the position that Mr. Melvin had wished to adopt in defending himself up until September 20, 2017; and he was immediately available to assist the court, over the short remainder of the trial.

[74] In the exceptional circumstances here, the Attorney General was prepared to make a reasonable arrangement for remuneration of an *amicus curiae* to assist Mr. Melvin.

[75] In my view, the opinion letter from the Nova Scotia Barristers' Society was unpersuasive. In *Krieger v. Law Society of Alberta*, 2002 SCC 65, the court had this to say in relation to Crown Attorneys:

> 50 There is a clear distinction between prosecutorial discretion and professional conduct. It is only the latter that can be regulated by the Law Society**.** The Law Society has the jurisdiction to investigate any alleged breach of its ethical standards, even those committed by Crown prosecutors in connection with their prosecutory discretion. This is important as the interests of the Attorney General in promoting the administration of justice may differ from those of the Law Society in regulating the legal profession and maintaining public confidence. The remedies available to each entity differ according to their respective function. The Attorney General's office has the ability to discipline a prosecutor for failing to meet the standards set by the Attorney General's office for prosecutors but that is a different function from the ability to discipline the same prosecutor in his or her capacity as a member of the Law Society of Alberta.

[76] There is also a clear distinction between the authority of the Nova Scotia Barristers' Society and this court, when it comes to regulating the activities of counsel. This Court admits counsel in this province to its Bar. Counsel are officers

of this court. Their in-court conduct is primarily the bailiwick of the court. [4] Justice Rothstein concluded in *Cunningham* that the court's inherent supervisory function trumps guidelines set by law societies on the withdrawal of a lawyer in a criminal court context. [5]

[77] The court determines in its best judgment, relying on the facts adduced and applicable law, how to conduct proceedings within its confines and authority. It has a duty to control its own process in a responsible manner given the competing interests at play. In the criminal context it has a constitutional imperative to ensure a fundamentally fair trial for an accused, while considering other public interest factors as well.

[78] In part, the letter of Mr. Pink reads: [6]

> … You have been discharged by your client. You owe a continuing duty of both confidentiality and loyalty to that client that survives the termination of the professional relationship.… As stated by the Supreme Court of Canada in its decision… the sole "client" of the *amicus* is the court.… **If your former client makes submissions that are untruthful or provides evidence that you know to be false, you will be in a position of conflict as between the duties owed to the former client and the court from which you cannot withdraw.** It is unclear how you can reconcile these competing ethical obligations. As a result, based on our understanding of the facts as you've described them and our interpretation of the rules of ethics as set out in the Code of Professional Conduct, **you will be in a conflict of interest if you remain as *amicus* to the court.** Because Mr. Melvin and the court have different, and likely divergent, interests in this matter **this is not a potential conflict which could be addressed by the consent of your former client.**
>
> [my emphasis added]

[79] The court did not hear evidence from Mr. Pink, as it was alerted before 2:00 p.m. on September 27, 2017, that Mr. Peter Kidston was available to act in the role of *amicus curiae* starting September 28, 2017. The court was of the view that Mr.

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[4] See *Quebec (Director of Criminal and Panel Prosecutions) v. Jodoin*, 2017 SCC 26; and regarding Crown Attorneys: *R. v. 974649 Ontario Ltd.*, [2001] 3 S.C.R. 575

[5] "The law societies play an essential role in disciplining lawyers for unprofessional conduct; however, the purpose of the court overseeing withdrawl is not disciplinary. The court's authority is *preventative* – to protect the administration of justice and ensure trial fairness (para. 35)." See also *CNR v. McKercher LLP*, 2013 SCC 39, at para. 16.

[6] The letter may have been premised on the court appointing Mr. MacEwen to an expanded *amicus* role. Nevertheless, no inherent conflict of interests exists merely by appointing discharged counsel to an *amicus* role in my opinion – *Mastronardi*, paras. 42-47.

Kidston was an appropriate candidate to act as *amicus curiae* and appointed him on the same conditions that Mr. MacEwen had been appointed. [7]

[80] Nevertheless, let me add that, although the position of the Nova Scotia Barristers' Society suggests that no discharged defence counsel can *ever* be appointed *amicus curiae* for the benefit of the court to ensure a fair trial for an accused, courts consider it otherwise in British Columbia and Ontario.

[81] While I acknowledge that, where neither discharged counsel nor the accused want to be/have an *amicus*, it could be an awkward experience for both of them, I remain of the view that the mandate herein of the *amicus*, should satisfy the legal requirement to ensure a fundamentally fair trial for Mr. Melvin, and be an administratively manageable outcome for a discharged defence counsel in circumstances such as in this case.

Conclusion

[82] In relation to Mr. Melvin's motion for a mistrial, I am satisfied that he will have a fundamentally fair trial even if he is self-represented. Proceeding with an *amicus* will add greater assurance that the actual and apparent fairness of Mr. Melvin's trial is not compromised. I dismiss his motion for a mistrial. This judge and jury trial will continue in a manner that attempts to ensure Mr. Melvin's trial will be fair, including his right to a full answer and defence to these charges.

Rosinski, J.

[7] Once appointed and throughout the remainder of the trial, I observed Mr. Melvin freely and continually interacting with Mr. Kidston. During some breaks, Mr. Kidston also attended to speak to Mr. Melvin in the cells area of the courthouse.