Court of Queen's Bench of Alberta

Citation: R v Mella, 2021 ABQB 785

Date: 20210930
Docket: 171392731Q1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Francis Emmanuel Mella

Accused/Applicant

Reasons for Decision of *Jordan* Application
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] Francis Emmanuel Mella was charged with fraud and theft on June 28, 2017. Mr. Mella is alleged to have defrauded or stolen over two million dollars from 336239 Alberta Ltd. ("336239") between July 2008 and October 2014.

[2] For various reasons that will be discussed below, including Mr. Mella absconding from the jurisdiction for over a year, the COVID pandemic, and the Alberta Court of Queen's Bench priorities in setting criminal trials during the pandemic. Mr. Mella's judge-alone trial in Queen's Bench is not set to conclude until October 22, 2021. That is a period of 52 months from the date of the charge and is presumptively over the ***Jordan*** threshold.

[3] As a result of this passage of time, Mr. Mella applies under s 11(b) of the *Charter* seeking a stay of the charges against him.

Background

[4] Mr. Mella was charged with these offences in June 2017. By then, 336239 had obtained a consent judgment against him and others for $2,269,757.00 as a result of their "fraudulent misappropriation of funds". Mr. Mella was not in custody from the time he was charged until Mr. Mella returned to Canada from Belize (where he had absconded to in early 2019) on May 6, 2020. Mr. Mella has been in custody since then, awaiting trial.

[5] Mr. Mella was initially detained at the Edmonton Remand Centre ("ERC"), but was then transferred to the Fort Saskatchewan Correctional Centre ("FSCC") to begin serving a one-year sentence for civil contempt of court.

[6] Mr. Mella had on number of occasions been held in contempt of court in the civil proceedings with 336239 and as a result of non-compliance with various orders and directions from the Court during 336239 collection efforts. Before fleeing Canada for Belize, he had served a one-year sentence for civil contempt, and on his involuntary return to Canada, faced another such sentence.

[7] It is unclear from the record in this proceeding when he began serving the civil contempt sentence. In any event, Mr. Mella did not apply for bail or judicial interim release on his arrest on May 6, 2020, and it appears that his first bail application was in April 2021. Mr. Mella explained in his testimony on the application that he did not apply for bail because he believed it would not be granted because of his having fled the jurisdiction and because of the civil contempt proceedings.

[8] Early in the proceedings, the Crown proffered a direct indictment. Mr. Mella had been denied legal representation by Legal Aid, and made a ***Rowbotham*** application ***(R v Rowbotham***, 1988 CanLII 147 (ONCA). The Crown assisted Mr. Mella with the application process, and ultimately consented to the application in February 2018. Once Mr. Mella had counsel, the matter was set for trial from April 29 to May 3, 2019.

[9] In March 2019, it became apparent that there may be difficulties with the trial proceeding because Mr. Mella was out of the country. When he failed to appear in court on March 21, 2019, after being directed to do so through his designated counsel on March 14, 2019, a warrant was issued for his arrest and the April-May trial dates were vacated.

[10] Mr. Mella was eventually deported from Belize, where he had been located, and returned to Canada on May 6, 2020. He was arrested at the airport in Toronto and transported to Edmonton where he has been in custody ever since.

[11] In August 2020, after being returned to Edmonton and retaining counsel, trial dates of January 11 – January 15, 2021 were set. Unfortunately, the week before the trial was to start someone in Mr. Mella's unit either got COVID or was a close contact of someone who had COVID, and the unit was quarantined. Shortly after that, Mr. Mella himself got COVID.

[12] Because of the quarantine and then Mr. Mella's own diagnosis, the trial could not proceed. Attempts were made to book the trial for September 2021, but those dates were only available for accused persons in custody who had been denied bail. That requirement came from the Court of Queen's Bench COVID priorities and directions given by Court administration to the trial coordinators. Since Mr. Mella had not been denied bail (because he had not yet applied for bail) he was not eligible for trial

dates in September 2021 in priority to accused persons who were in custody because they had been denied bail. The first available dates for non bail-denied persons were some two months later and the trial was set for those dates: October 18-22, 2021.

[13] I was appointed pre-trial judge to deal with this ***Jordan*** application, as well as other preliminary matters. The application was heard by me during the week of September 7, 2021. Mr. Mella testified and was cross-examined. Mr. Chris Gibson and Cpl. Karen Janecke testified for the Crown, and were cross-examined.

[14] The starting point of a ***Jordan*** application is to look at what actually happened, then to determine what if anything constitutes "delay", and then attribute the delay in accordance with the ***Jordan*** principles.

[15] The Crown's written submissions contained a table of relevant events, which I have amended to add in events referenced by Ms. Quinlan in her submissions and to delete comment. There is no disagreement over the relevant events. The Table of Events is attached as Appendix I.

Issues Raised

[16] Ms. Quinlan for Mr. Mella notes that the trial will now end on October 22, 2021. That is essentially 52 months from the date on which Mr. Mella was charged. That is obviously outside the ***Jordan*** 30-month limit for trials in Superior Court (***R v Jordan***, 2016 SCC 27).

[17] Ms. Quinlan notes that the ***Jordan*** 30-month period is a "ceiling", and that there may be inordinate delay warranting *Charter* s 11(b) remedies before 30 months have passed in appropriate circumstances. Here, she says that 30 months was too long in any event as the matter proceeded under a direct indictment early in the proceedings and should not have taken so long in Court of Queen's Bench.

[18] The first trial, had it proceeded, would have been about 22.5 months from the date the charges were brought.

[19] Ms. Quinlan concedes that the period from April 29, 2019 to May 6, 2020 was caused by Mr. Mella being absent from Canada, but notes that 12-month period only reduces the total time to a little less than 40 months. She argues that in those 40 months, Mr. Mella did nothing to delay the matter himself or through counsel, and that there are a number of periods that should be treated as Crown delay.

[20] It is clear that the loss of the January 11, 2021 trial date was the direct result of the COVID pandemic. Ms. Quinlan argues that while the pandemic itself was an extraordinary event, the January 2021 trial date was lost because of negligent prevention and protection by the Alberta Government and in particular staff at FSCC. Mr. Mella says that the early January 2021 shut-down and quarantine of his unit at FSCC and his contracting COVID-19 at that time were the direct result of negligent policies and practices.

[21] Had the trial been concluded by January 15, 2021, as scheduled, the total time would have been 29 ½ months.

Evidence

[22] On the ***Jordan*** application, Mr. Mella submitted his own affidavit and an affidavit from Niki Weisbeck, Ms. Quinlan's legal assistant. Ms. Weisbeck dealt with the relevant chronology and documents relating to the matter. Ms. Rosborough submitted an affidavit from Jenielle Anselmo, a legal assistant at Alberta Justice whose affidavit dealt with chronology and documents as well.

[23] Mr. Mella testified at the application, and was cross-examined by Ms. Rosborough. His testimony in chief focused on conditions in FSCC and his allegations about mismanagement of COVID leading to his unit being locked down and him contracting COVID. The Crown called Chris Gibson, acting head of security for FSCC who testified about FSCC COVID policies and procedures, and Cpl. Karen Janecke who was the lead police investigator and testified mainly about communications she had with Mr. Mella while Mr. Mella was in Belize about his plans to return to attend the trial. They were cross-examined by Ms. Quinlan.

[24] I note at the outset that I do not need to recite or comment on the oral evidence on this application in any great detail. I also do not find it necessary to comment on the credibility or reliability of any of the witnesses, particularly that of Mr. Mella. While there were some divergences between the evidence of Mr. Mella and Mr. Gibson, it is not necessary to try to resolve those divergences. Mr. Mella testified mainly about his experiences in FSCC. Mr. Gibson testified mainly about the development and implementation of COVID policies and procedures for FSCC, his role in that as head of security, and the role AHS played in developing and implementing various procedures including procedures for FSCC.

[25] Neither Mr. Mella nor Mr. Gibson had personal knowledge of the actual cause of the January COVID outbreak that resulted in the delay of Mr. Mella's trial, or how the unit came to be infected, or how Mr. Mella himself came to be affected. No other witnesses were called on these issues.

Charter **Breach in Superior Court before 30 Months has Elapsed**

[26] At the outset I join with many others in being uncomfortable describing the entire period from the date of charge to the date of completion of the trial as "delay". That presumes that there should be a trial the day the person is charged, and every day thereafter is "delay". In this decision I will refer to the time from charge to trial completion as "total time" and the time resulting from delaying events as "delay".

[27] I have also tried to distinguish between the "prosecution" and the "Crown". While the terms are normally interchangeable in a criminal prosecution, "Crown actors" is a broader group than the prosecution, and "Crown" for the purposes of ***Jordan*** is a group that includes more than the prosecutor but less than everyone who works for or at the direction of the Provincial and Federal governments. The distinction is important in relation to Mr. Mella's criticisms of FSCC and AHS.

[28] ***Jordan*** gives provincial courts a maximum of 18 months to complete the process of conducting a preliminary inquiry or a trial without preliminary inquiry. Where the accused is committed for trial in superior court, or has a provincial court trial following the preliminary inquiry, the maximum time to complete the trial is 30 months.

[29] That case makes no distinction between a trial in superior court following a committal to stand trial after a preliminary inquiry, and a trial after there has been a direct indictment without a preliminary inquiry having been held. It is far from clear that the absence of a preliminary inquiry results in overall time savings because of the benefits to the defence in being able to assess key witnesses and to the prosecution in being able to better assess the reasonable prospects of conviction at trial.

[30] ***Jordan*** clearly recognizes that *Charter*-violating delay may occur before the ***Jordan*** maximums have been reached. That is dealt with at paras 82 and 83:

> [82] A delay may be unreasonable even if it falls below the presumptive ceiling. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) is less than

> 18 months for cases going to trial in the provincial court, or 30 months for cases going to trial in the superior court, then the defence bears the onus to show that the delay is unreasonable. To do so, the defence must establish two things: (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. Absent these two factors, the s. 11(b) application must fail.
>
> [83] We expect stays beneath the ceiling to be granted only in clear cases. As we have said, in setting the ceiling, we factored in the tolerance for reasonable institutional delay established in *Morin*, as well as the inherent needs and the increased complexity of most cases.

[31] I was not referred to any cases where a total time (adjusted for delay) was less than 30 months in superior court where that time had been found to be unreasonable and a *Charter* remedy given. In my own case-law review, I found none in Alberta.

[32] The Alberta Court of Appeal considered the issue in ***R v Chang***, 2019 ABCA 315 but concluded at para 78:

> If the net time to trial exceeds the ceilings after exempting judicial delay and making other deductions, then the delay will be presumptively unreasonable. In cases where the net time falls below the ceilings, an accused may still argue that he or she has been deprived of a trial within a reasonable time, in part due to deliberation time. Jordan established a test for such situations, as discussed below. Given what follows at paragraphs 82-83, it is unnecessary for us to comment on the whether any factors or considerations should be added to the under-the-ceiling test to account for deliberation delay.

[33] As best I can tell, no accused has yet been able to satisfy a court (or at least a court binding on me) that a total time in a superior court matter, whether there by direct indictment or following a committal to stand trial, and adjusted for delay and below the presumptive sealing was unreasonable and that the accused "had taken meaningful steps that demonstrate a sustained effort to expedite the proceedings" and that "the case took markedly longer than it reasonably should have".

[34] That of course does not mean that there will be no such case. I recognize that there may be a case where the accused in an uncomplicated case unaffected by exceptional circumstances can show that there were unreasonable delays by the prosecution or by others for whom the prosecution is responsible, like the police and the Courts, and that the accused and their defence counsel did everything within their power to expedite the case. Prejudice to the accused would probably help but is not a requirement.

[35] Depending on my view of the various delaying events raised by the parties, I may have to determine if Mr. Mella is that accused.

Case Law

[36] Both parties referred me to a number of cases in support of their respective positions.

[37] I have attached Mr. Mella's List of Authorities as Appendix II, and the Crown's list of Authorities as Appendix III.

[38] I do not intend to refer to many of these or other cases in my decision. I am satisfied from what has been submitted that but for ***Jordan*** and ***Chang***, few of the other cases cited are binding on me and

many have no direct bearing on the issues before me. That is not to say that the cases have not been helpful, but it is not necessary to repeat what has been said by others.

[39] I will observe at the start that some of the issues have already been dealt with in manners that I accept and adopt.

[40] Firstly, the Ontario Court of Appeal held in ***R v Morgan***, 2020 ONCA 279 that the Court could take judicial notice of COVID facts as widely disseminated to the public through government publications and media reports.

[41] Many trial level cases have held that the COVID pandemic is a discrete, exceptional circumstance for the purposes of ***Jordan***.

[42] For example, in ***R v Khattra***, 2020 ONSC 7984, Woollcombe J held at para 61:

> There can be no question that the global pandemic has had, and will continue to have, far reaching impacts on the administration of justice in Ontario. Indeed, I cannot imagine that when the Supreme Court of Canada crafted the Jordan framework, it contemplated the dramatic effect that a global pandemic and consequent lockdowns, shutdowns of the Courts and suspension of jury selection and trials would have on the right to be tried within a reasonable time. While the Jordan framework is the analytic tool that must be used to assess this application, I do so knowing that it was created to redress what was perceived as a culture of complacency towards delay, not to impose a straight-jacket on courts struggling to do justice in the face of the widespread, unforeseeable consequences to the administration of justice of a global health pandemic.

[43] In Alberta, Kubik J held at paras 23 and 24 of ***R v Harker***, 2020 ABQB

> The question then becomes what period of time falls into the category of exceptional circumstance. The Crown argued that this period would be ninety-nine days, measuring it from the date Master Order #1 was issued through to the date of fixation in Criminal Appearance Court on June 22, 2020. In fact, the appropriate measurement is from April 21, 2020, the date of the first scheduled hearing through to August 28, 2020, when this application and the sentencing submissions were heard. To limit the discrete event to the date of fixation would leave no room for the Court to prioritize *Jordan*-threatened trials, in custody trial matters, and matters adjourned as a result of the pandemic, and implies that the Court could have heard substantive matters on June 22, 2020, when in fact this was merely intended for fixation. Accordingly, four months and one week is deducted as a discrete and exceptional circumstance. That results in a total sentencing delay from the date of conviction to the date of the sentencing hearing of four months and one week.
>
> I am satisfied that this delay is not unreasonable having regard to the circumstances of the pandemic and its effect on Court operations, including the need to ensure that trial matters could proceed safely. The Court adapted its processes and fixed reasonable priorities to ensure that criminal matters, such as this one, were adjourned for the shortest possible period and were rescheduled for continuation once COVID-safe courtrooms were available to accommodate in-person appearances.

[44] In that case, Kubik J was dealing with a delay caused by the adjournment of a sentencing hearing as a result of Master Order 1. The same logic clearly applies to Amended Master Order 3.

[45] Renke J dealt with COVID issues in ***R v Pettitt***, 2021 ABQB 84. Mr. Pettitt argued that his s 11(b) rights were violated because his jury trial had to be rescheduled.

[46] Renke J stated at paras 18-21:

> I find that the pandemic was an exceptional event. It was unavoidable. It has caused excess death and severe illness. No government was prepared for the pandemic. Institutions across the planet were shut down. The Courts were not spared. See *R v Harker*, 2020 ABQB 603, Kubik J at para 20; *R v Loblaws Inc*, 2020 ABPC 250, Fradsham PCJ at para 66; *R v Ofiaza*, 180360893Q1 (unreported: Calgary QB, November 4, 2020), Ashcroft J at 6.12-22.
>
> Steps had to be taken to make courtrooms safe. New facilities for jury trials had to be leased, to permit social distancing, safe courtroom interactions, and appropriate security. An online platform had to be deployed and debugged for matters that could be dealt with remotely.
>
> The adjournment of jury trials in March 2020 did not freeze the number of jury trials and non-jury trials in the queue. Like river water accumulating behind a dam, the reservoir of unheard matters comprised not only the matters scheduled for trial over the months when jury trials were not heard, but the new jury and non-jury trials that moving through the system. And the Courts are responsible for more than criminal matters. Family, civil, commercial, and judicial review matters also accumulated. Bail and Chambers matters had to be dealt with. Emergency matters had to be dealt with. All this at sitting points across the Province.
>
> The Courts did what could be done to get jury trials heard as soon as possible – and did what could be done to have all other litigation matters heard as soon as possible. Some triage and priorization was inevitable (e.g. for in-custody accuseds). There is no foundation for any claim that the Courts did not resume jury trials at the earliest reasonable opportunity.

[47] His comments are equally applicable to judge-alone trials.

Exceptional Circumstances

[48] Exceptional circumstances are essentially "no fault" events which cannot fairly be attributed to the prosecutor or Crown, or to the defence. A sort of "force majeure" in the contract world, or perhaps a change in circumstances in other contexts. ***Jordan*** does not purport to define these circumstances and only gives examples in para 81 of "a discrete event (such as an illness, extradition proceeding, or unexpected event at trial), excluding chronic institutional delay."

[49] Definition was added by the Supreme Court in ***R v Cody***, 2017 SCC 31 at para 48:

> [48] The exceptional circumstances analysis begins with discrete events. Like defence delay, discrete events result in quantitative deductions of particular periods of time. The delay caused by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not be reasonably mitigated by the Crown and the justice system (*Jordan*, at paras.73 and 75).

[50] In ***R v KJM***, 2019 SCC 55 the Supreme Court stated at para 98:

> [98] Delay caused by "discrete exceptional events" that are reasonably unforeseeable or reasonably unavoidable must also be deducted to the extent such delay could not reasonably have been mitigated by the Crown or the justice system (see *Cody*, at para. 48, citing *Jordan*, at paras. 73 and 75). The event need not be "rare or entirely uncommon" to qualify as a discrete exceptional event (*Jordan*, at para. 69). Examples would include "an illness, extradition proceeding, or unexpected event at trial" (*ibid.*, at para. 81). "[O]nly circumstances that are genuinely outside the Crown's control and ability to remedy" may qualify (*ibid.*).

[51] ***Jordan*** recognizes "complexity" as something that may extend the maximum time at para 80, giving little direction and essentially leaving that to the trial judge's determination. As a trial judge, I can observe that complexity may result from their being a large number of charges, a large number of documents, a large number of witnesses, or complex, difficult or time-consuming applications, as examples.

[52] ***Jordan*** emphasizes that the onus is on the prosecution to move the matter to a speedy conclusion (i.e. within 30 months in superior court) without being unduly delayed by the accused or their counsel. A less rigorous standard is applied to defence counsel in conducting their duties (at para 85: "the defence is required to act reasonably, not perfectly").

[53] The defence does bear the burden of proving unreasonableness if the presumptive ceiling has not been passed.

[54] The prosecution thus bears the burden or responsibility to ensure reasonable and timely cooperation from the police, and while the prosecution has no control over the police, they will be tagged with any delays by the police in complying with disclosure obligations or locating witnesses or securing witnesses' attendance. Similarly, while the prosecution has no control over how and when the Courts schedule matters before them, any delays in scheduling or resulting from systemic delay will be to the prosecution's account.

[55] The premise behind this is that the police, the prosecution, and the Courts have a joint responsibility to ensure that an accused person's s 11(b) *Charter* right to be tried within a reasonable time are complied with.

Analysis

[56] In ***R v Keyes***, 2017 ONCJ 5, Green J expressed a lofty approach to delay following Jordan:

> [22] The authoritative approach to the assessment of s. 11(b) claims is that set out in *R. v. Jordan, supra*. In expressly overruling *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771, the Supreme Court took a sharp knife to the Gordian-like knot into which unreasonable delay jurisprudence had wound itself. For reasons of doctrine and efficiency, the *Jordan* Court largely reconstructed the s. 11(b) analytical scaffolding so as to put an end to the "culture of complacency" that had frustrated the right to trial without unreasonable delay. The "micro-counting" and judicial "guesstimations" that had come to characterize the application of the "*Morin* framework" were condemned for allowing "tolerance for ever-increasing delay": *Jordan*, at para. 37. Instead, courts hearing s. 11(b) applications were cautioned that they "must avoid failing to see the forest for the trees" (here invoking the wisdom of *R. v. Godin*, 2009 SCC 26 (CanLII), [2009] 2 S.C.R. 3, at para. 18) or, as said, at para. 91, "trial judges should step back from the minutiae and adopt a bird's-eye view of the case".

[57] I fear that approach has not come to pass, as we continue to analyze delay on a day by day, event by event application of hindsight, where arguments focus on delays measured in days and weeks, not months.

[58] In my view, this case is marked by at least three extraordinary experiences: the ***Rowbotham*** application, Mr. Mella absconding to Belize, and the COVID-19 pandemic. A fourth might be the complexity of the case arising out of the number of transactions involved in the charges and the number of documents, and I will consider that as the Crown has emphasized those issues.

Rowbotham

[59] One of the challenges with ***Jordan*** is determining what is an "extraordinary" circumstance. The 30-month deadline before a s 11(b) stay of proceedings is the presumptive result is arbitrary and presumes that the proceedings will proceed in a normal or usual fashion with no unexpected or unforeseeable events or unusual delays.

[60] But setting a 30-month schedule for a criminal proceeding is like setting a 30-month schedule for completing a building, without knowing what kind of building it will be, how big it will be, and what the site conditions are (along with many other important criteria). Before a contractor can commit to a reasonable schedule, they have to have a good understanding of what they are building and where it will be.

[61] I recognize that Justice Cromwell was alone and in dissent when he approached delay in ***R v Kokopenace***, 2015 SCC 28 with the question "what is a reasonable time for the disposition of a case like this one?" (at paras 235-238). However, I can think of no other way to determine if there has been a delay without first determining what time should have been taken until the next thing that could be done was done but for the delaying event or cause.

[62] Contractors are generally obliged to complete the work they undertake in a fixed period of time. One of the skills required of a contractor are in identifying everything that needs to be done and when it needs to be completed to allow other things to be done, all to meet the completion date. There are frequently penalties if the contractor does not meet the completion date, subject to adjustments for things outside the control of the contractor or for which the contractor did not assume the risk. But before signing onto the schedule, the contractor will generally have detailed plans and specifications and know exactly what is to be built with what materials.

[63] Setting a 30-month schedule for a criminal trial could be viewed in the same way. Except that counsel do not have detailed plans and specifications at the time the schedule begins. When the charges are laid, starting the clock, the police may be expected to have some idea as to complexity of the matter, the number of records involved, and the likely number of witnesses. But there will be ongoing production and disclosure obligations until the trial concludes. Importantly, the accused will need some time to get legal advice and retain counsel before anything of substance can be done. The clock is still ticking. Retaining and instructing counsel may be the most important item on the critical path towards trial.

[64] The accused is expected to be diligent in exercising their right to counsel and instructing counsel without unreasonable delay. Counsel will need some time to get up to speed so they can give the accused some preliminary advice. That in turn may depend on what disclosure they have been given. Disclosure will inform what may be required for the length of a preliminary inquiry, or trial in the case of a direct indictment. Only after receiving a certain level of disclosure and resulting preliminary legal

advice is the accused in a position to commit to election and plea and a trial or preliminary inquiry date. That decision will in turn inform in which court the trial will be.

[65] What steps along the way, and when the ultimate trial date can be set depends on a number of variables, and in the early stages of a prosecution there are a lot of "unknowns".

[66] As I understand ***Jordan***, the police are expected to have everything relating to production available promptly. The prosecutor is expected to be available for all steps on any dates offered up by the Courts when the defence is available, or find someone else who can take charge of the matter. And the Courts are expected to have available dates for preliminary inquiries, applications, and trials without any unreasonable delay.

[67] I get that many steps in a prosecution are not on the critical path towards trial. Once the accused has made their election and plea, many things can be done concurrently. A trial date or preliminary inquiry date can be set based on early assumptions about production of records and witness statements as well as the number of witnesses expected to be called by the prosecution at the preliminary inquiry or at trial. Following committal for trial at the preliminary the accused can be arraigned and a trial date set.

[68] By that time, counsel should have a pretty good idea about what the trial might look like, including any special applications that may have to be made.

[69] Here, Mr. Mella spent from the date he was charged, June 28, 2017 until February 23, 2018 after Ms. Quinlan was appointed to act for him after the ***Rowbotham*** order. At that stage, Ms. Quinlan not unreasonably sought a further month to review disclosure. The first meaningful appearance was on March 23, 2018 when the first trial was set 13 months hence.

[70] The Crown could do nothing to move the matter along from June 28, 2017 until February 23, 2018 which was the first Queen's Bench appearance after Mr. Mella had obtained counsel. That was a period of nearly 8 months. I cannot see that as a "usual" period of time in which to obtain counsel. Mr. Mella is entitled to a reasonable time to take the necessary steps to become represented, but in this case, this step occupied more than 25% of the allotted time under ***Jordan*** for superior court matters, or more than 40% for provincial court matters. Remember Mr. Mella had been charged and was without counsel for the five months before the direct indictment was proffered on November 28, 2017.

[71] ***Rowbotham*** applications are rare, and I doubt that they were intended to be part of the generic 30-month period under ***Jordan***. I would characterize the additional time occasioned by the ***Rowbotham*** process as being "extraordinary" and attribute the delay resulting from that process to Mr. Mella. I note that the prosecution appears to have mitigated as best as possible any delays by assisting Mr. Mella and by ultimately consenting to the order. Otherwise, the delay would undoubtedly have been longer.

[72] I should emphasize that "delay" does not impute or infer bad motives or bad conduct on anyone's part. Not surprisingly, many self-represented litigants struggle with the process. But there is only one time period under ***Jordan***, and that applies to both represented litigants and self-represented litigants. Self-represented litigants are expected to familiarize themselves with procedural requirements and to act expeditiously in their defence. They are entitled to the same ***Jordan*** protection as represented litigants, but in turn they have to play their part.

[73] Ms. Rosborough for the Crown suggests that Mr. Mella should be responsible for a 17-day delay in making an application to Legal Aid after he was charged. During the ***Rowbotham*** proceedings, Ms. Rosborough argues that Mr. Mella should be responsible for a further 18-day delay because an illness caused a docket court adjournment. After the direct indictment was filed and Mr. Mella obtained

counsel, Ms. Rosborough says that a further one-month delay should be attributed to the defence as Ms. Quinlan had sought a one-month adjournment to review disclosure.

[74] Ms. Quinlan argues that there was no inappropriate delay on Mr. Mella's part and that there should be no delay attributed to him.

[75] I approach things slightly differently than does the prosecution. In the ordinary course, I do not think taking a couple of months to review voluminous records would be unusual or unreasonable. In the ordinary course, I would expect an accused to be in a position to make their election and plea within several months from being charged. That could be extended if there were delays in providing meaningful disclosure, but that is not alleged here.

[76] Mr. Mella was aware that he needed to make a ***Rowbotham*** application by October 3, about two weeks after the first appearance in provincial court. On December 8, he was given a deadline of December 21 to file his materials.

[77] In the ordinary course of events, it is not unreasonable to expect an accused charged with serious offences for which a prison sentence is usually imposed to have legal representation within a few months from being charged. To make this fact specific, Mr. Mella can hardly have been surprised about the charges having regard to the consent judgment acknowledging fraud in the summer of 2015. Instead of having counsel within three months, Mr. Mella was made aware of the need to make a ***Rowbotham*** application. It took him over 2 ½ months to do that.

[78] It would be unreasonable and wrong to charge all of this time towards the 30 months especially as the prosecution did nothing to delay the proceedings itself. I would characterize half of this time; four months, as defence delay.

[79] In my view, those circumstances would be exceptional, and in the ordinary course, the prosecution and the Court should be able to count on a 30-month timeframe in which to bring a direct indictment matter to trial.

[80] Subsumed within this four- month period is the 18 days in October 2917 when Mr. Mella required an adjournment because of health issues. That period would otherwise be a period of delay attributable to one of the discrete incidents described in ***Jordan***.

[81] Subtracting the ***Rowbotham*** delay from the total time leaves 48 months, still well over the Jordan maximum.

Belize

[82] At some stage before the first trial, Mr. Mella left Alberta for Belize. He was for some period unsure whether he would return for trial. When his appearance became questionable for the prosecution, the prosecution applied on March 14, 2019 for a review of his release conditions. Mr. Mella was ordered to appear in court in person on March 21, 2019. When he failed to show up, a warrant was issued for his arrest, and the April 29 through May 3 trial dates were released but for the morning of April 29.

[83] At some time in May 2019, Mr. Mella was detained by Belize authorities and he returned to Toronto on May 6. He was immediately arrested. There were a couple of video link remands while Mr. Mella was in custody in Toronto. By then, Ms. Quinlan had ceased to act after Mr. Mella failed to return to Edmonton for the first trial. He was transported to Edmonton on May 28. Ms. Quinlan was retained on June 2, and on July 17 a second trial date was set: January 11-15, 2020.

[84] Ms. Quinlan acknowledges that the delay resulting from Mr. Mella's flight to Belize should be treated as defence delay. She argues that the appropriate delay period is May 3, 2019 (the day the first trial would have ended) to September 7, would have been the last day of the second trial if it had been set for September 4-7 as being the first available trial. Ms. Quinlan challenges the reasonableness of the Court's Master Orders relating to scheduling and appearances during the pandemic.

[85] Master Order 1 was put in place as a COVID measure by the Chief Justice on March 25, 2020. Master Order 2 also dated March 25, 2020 dealt specifically with scheduling in criminal matters. Amended Master Order 3 dated April 21, 2020 replaced the earlier orders and was the governing order during the relevant times for the purposes of this application. I attach a copy of Amended Master Order 3 as Appendix IV.

[86] Ms. Quinlan submits there was an unnecessary adjournment from May 8 to July 17 because of Master Order 3. More importantly Mr. Mella was not eligible for an otherwise available September 2020 trial date at that time as he was not in custody because of being "bail denied" as was the interpretation applied to "in custody" by criminal case schedulers. At that time, Mr. Mella was in custody because of the civil contempt sentence he had also avoided when he left Alberta for Belize in advance of the first trial date. Counsel were advised by the criminal trial coordinator on July 13:

> As per the court's announcement of June 4, "Booking priority will be given on CAC lists in June to September 2, 2020 to in custody matters (bail denied), trials that were Jordan-threatened prior to the pandemic and trial adjournments from March 16 to June 26, 2020. During these CAC dates, matters meeting one of these criteria will be scheduled for hearings.
>
> It does not appear at this time that this file meets these requirements.

[87] Taking these factors into account, Ms. Quinlan quantifies this defence-responsible delay as being the 16 months from May 3, 2019 to September 7, 2020.

[88] Ms. Rosborough says the defence delay attributable to Mr. Mella's flight to Belize should commence on March 21, 2019, the day the warrant was issued for his arrest and the first trial cancelled and run until January 15, 2021, when the second scheduled trial would have ended. Her calculation for the defence delay is thus 20 months.

[89] I pause to note that the Crown did not argue that by fleeing to Belize and skipping his first trial, Mr. Mella waived ***Jordan*** entirely, or that the ***Jordan*** clock started over when Mr. Mella returned to Alberta. It is clear under ***Jordan*** that the accused and the defence have some responsibilities, and that is certainly emphasized in the majority decision referencing the defence onus on applications where the threshold time has not yet run.

[90] I find it somewhat offensive to treat someone in Mr. Mella's situation the same as someone who has not chosen to flee the jurisdiction to a non-extradition country and only returns when he is forced to do so by the foreign jurisdiction's authorities, and then decides he wants a speedy trial. In the circumstances of this case, it cannot be said that Mr. Mella has ever done anything to expedite the matter other than Ms. Quinlan agreeing to the January 2021 trial date in May 2019 before she was formally retained.

[91] I will firstly analyze the arguments made. There is a difference of four months between the parties. The defence does not accept any delay for the time before the ***Rowbotham*** order was put in place. Their starting point is that the total time of 52 months should be reduced by 16 months, leaving a total time of 36 months. Again, well over the ***Jordan*** maximum.

[92] Ms. Rosborough says that the total time should be reduced because of Belize by 20 months, leaving 32 months less whatever I attribute to the initial time period before counsel was retained following the ***Rowbotham*** order.

[93] I agree with Ms. Rosborough that the defence delay in connection with Belize started on March 21, 2019 when Mr. Mella failed to appear in person despite being ordered to do so. The first trial was lost and would not have been regained even if Mr. Mella had appeared on April 29 as the trial dates had been released and the April 29 date was a speak-to appearance only.

[94] It would be completely artificial to have the delay period start for ***Jordan*** purposes on a day other than when Mr. Mella failed to show up in court resulting in the loss of the trial date. His failing to show up had nothing to do with illness or a mistake on his part. He was well aware of the trial date and made a conscious decision to stay in Belize where he believed he was free from being extradited back to Canada.

[95] In that regard, the shortest period of delay would be from March 21, 2019 to September 7, 2020 if the parties had been able to secure the September 2020 trial dates in May when Mr. Mella returned to Canada. That would be 17 ½ months.

[96] As for the loss of the September 2020 trial date because Mr. Mella was not eligible for those expedited dates as he was not "bail denied" according to Amended Master Order 3, I recognize why Mr. Mella did not apply for bail when he returned to Canada.

[97] In his evidence on the ***Jordan*** application, he acknowledged that he knew he was highly unlikely to be denied if he applied because of his flight to Belize. He was also facing a contempt sentence arising from the civil proceedings against him and indeed began serving that sentence immediately on his return to Alberta on May 28. It would have been futile for Mr. Mella to apply for bail any time prior to him being released from jail after serving his one year contempt sentence.

[98] There are two answers to the issues raised by the defence. Master Orders 1 and 2 arose out of exigent circumstances and are an exceptional circumstance as contemplated by ***Jordan***. Courts across Canada were shut down and in these early COVID days there could only be guesswork as to when there might be a return to circumstances that would permit trials to resume. It is hard to think of a more obvious "exceptional circumstance" than a global pandemic, the magnitude of which had not been seen for over 100 years.

[99] The Court of Queen's Bench was required to respond to the challenges caused by COVID, and it did so by setting priorities. I would not characterize Master Orders as extraordinary circumstances by themselves, but rather as part of the overall extraordinary circumstance of the COVID pandemic.

[100] I am doubtful that the Court's response to the pandemic and its attempt to keep court matters moving despite the tremendous uncertainty surrounding the pandemic itself and the Alberta Government shut-down response will ultimately be judged with a fine-tooth comb. To paraphrase ***Jordan***, the Court is expected to respond reasonably, but not perfectly. Perfectly will only be a standard defined by hindsight.

[101] Court policy for scheduling criminal trials in Queen's Bench prioritized ***Jordan***-threatened matters and in-custody matters over other matters in general, and during the COVID pandemic that has been especially difficult because of provincially-mandated health protocols and limited capabilities to conduct in-person trials.

[102] It will be up to others to judge the ultimate reasonableness of the Court of Queen's Bench response to COVID and its scheduling activities during the COVID pandemic when the pandemic is actually over and it can be appropriately analyzed. I do note that Queen's Bench returned to conducting in person jury trials (thanks in large part to additional resources being provided by the Provincial Government) by the fall of 2020 when many other Provinces did not or could not. In person criminal trials were scheduled and conducted by the fall of 2020 as well, with priority being given to in-custody accused persons.

[103] By way of comparison, Ontario has had a very different experience with out-of-custody in-person trials and preliminary hearings available only after May 25, 2021 in the Court of Justice, and the first jury trial in superior court being held in late November 2020.

[104] My conclusion is that the institutional delay occasioned by compliance with court policy in the face of a world-wide pandemic as a full answer to the defence objections. End of story.

[105] Alternatively, but in addition, I am satisfied that Amended Master Order 3 was a reasonable attempt by Queen's Bench administration to prioritize scarce trial time for criminal matters. Indeed, criminal matters were the only matters going ahead in person in May 2020, and there were few courtrooms equipped to deal with COVID protocols issued by Alberta Health, and few employees working in the Law Courts because of Alberta Health protocols.

[106] Trial dates for in-person trials were being given on all criminal matters except jury trials. Priority was given to accused persons in custody, and in particular those who were bail-denied on the charges to be tried. Some earlier dates were set aside to accommodate these circumstances. Accused persons in custody in other matters did not qualify for the expedited dates.

[107] That makes sense and is eminently fair. An accused person denied bail is still presumed innocent and is uncompensated for their lost liberty. If someone is already serving a prison sentence on another matter, they are in a completely different situation whether they have applied for bail or not. The facts here are that Mr. Mella would have been serving his contempt sentence until the spring of 2021 in any event of the result of this matter. It is not unfair that someone who had the chance of being released in September 2020 if the Crown failed to prove their guilt get a trial earlier than someone who was going to be in jail anyway until seven months after that trial date. Indeed, it would have been unfair to give the September 2020 date to Mr. Mella.

[108] In these circumstances, I conclude that the defence delay occasioned by Mr. Mella's flight to Belize started on March 21, 2019 and ended on January 15, 2021 when the second trial would have ended. That is a period of 22 months.

[109] Without any defence delay being attributed as a result of the ***Rowbotham*** circumstances, the Belize flight would bring the total time to a little less than 30 months (June 28, 2017 to January 15, 2021 less 22 months). That is under the ***Jordan*** maximum, and results in there being no presumption in favour of a stay.

[110] Adding in the four- month delay I attribute to the defence in the delay in getting counsel and making an election and plea, the total time is a little less than 26 months.

COVID

[111] COVID comes into play again because the January 11-15 trial dates were lost initially because Mr. Mella contracted COVID at FSCC in early January 2021 and was quarantined.

[112] It became clear that the January trial date would be lost in early January when Mr. Mella's unit at FSCC was locked down because someone had been transferred to FSCC from ERC. According to the evidence before me, FSCC COVID policy (working with Alberta Health Services) ("AHS") permitted the transfer of someone from ERC who had been quarantined there and tested negative for COVID to be transferred to FSCC without having to be quarantined on arrival at FSCC.

[113] Mr. Mella testified that someone from ERC was transferred to his unit, without being quarantined. Shortly after his arrival, it was learned that on of the transferee's "close contacts" at ERC had tested positive. That resulted in Mr. Mella's entire unit being quarantined. The quarantine period extended through Mr. Mella's anticipated trial dates.

[114] Ms. Rosborough and Ms. Quinan immediately began to try to find ways of keeping the trial going. Both Crown and defence worked together to expedite the matter and save the trial as best they could, but without success. Shortly after the quarantine began, Mr. Mella came down with COVID himself.

[115] The parties were briefly able to reschedule the trial to August 30-September 3, 2021 (the third trial date) but within a few days Ms. Rosborough advised that a key Crown witness was not available and the trial was rescheduled to commence October 18-22, 2021 (the fourth trial date). The delay to the fourth trial date was nine months from the January 2021 date. The delay occasioned by the unavailability of the Crown witness was a little over six weeks.

[116] Ms. Quinlan did not press the loss of the third trial date due to witness unavailability, and in any event, I would have characterized that as exceptional circumstances and deducted it from delay as such if that six week period were in any way significant or critical to either party's argument.

[117] The main issue is the handling of COVID. Ms. Quinlan argues that FSCC failed to take reasonable precautions to prevent Mr. Mella from getting COVID or allowing circumstances where accused persons would be unable to attend their trial because other inmates had contracted COVID. She suggests that AHC policies were negligent, especially as they related to transfers of inmates from one institution to another without quarantining them first.

[118] Ms. Quinlan in her submissions, and Mr. Mella in his testimony, said that the COVID outbreak at FSCC in January 2021 was "specifically attributable to the mismanagement of the pandemic by the state" and gave as examples:

- Placing inmates that were positive for COVID-19 on units with inmates who were not infected with the virus without any quarantine period or testing to confirm whether they were infected;
- Exposing inmates to other inmates who were or may have been close contacts of persons who were COVID positive;
- Asking inmates who had been tested for the virus, and had not heard back about their results yet, to serve food to other inmates;
- Failing to appropriately monitor the sanitation in the units; and
- Preventing the Applicant from self-isolating.

[119] Mr. Mella testified as to what were described as negligent procedures by FSCC relating to separating inmates and prison staff, cleaning procedures, use of protective measures such as masking and disinfectant, meal handling and laundry handling.

[120] The prosecution called Chris Gibson, FSCC acting head of security, regarding FSCC policies and protocols for COVID.

[121] In my view, the defence faces a number of challenges to have the consequences of the COVID pandemic visited on the prosecution for ***Jordan*** purposes. The first is that the COVID pandemic is undoubtedly one of the extraordinary circumstances spoken of but not articulated in ***Jordan***. When all levels of government declare health emergencies and impose restrictions on the liberty of all residents, that must be extraordinary circumstances.

[122] From a ***Jordan*** perspective, it seems to me that the burden is on the defence to establish that notwithstanding a extraordinary circumstances, the prosecution or some person or entity for whom the prosecution is responsible in "***Jordan*** law" failed to act reasonably in doing or not doing something that caused the accused to get COVID or be unreasonably delayed because of COVID. In other words, someone was negligent.

[123] In terms of COVID handling, it is very early to determine a standard of care and a failing to live up to the standard of care. The defence called no evidence as to the appropriate standard of care, and appeared to argue that FSCC or AHS or a combination of them should have been able to keep Mr. Mella safe and keep him in an environment where he could not be exposed to anyone who might have or be able to transmit COVID.

[124] I will leave evidentiary deficiencies aside apart from noting that Mr. Mella only has hearsay information about FSCC policies and AHS policies and how his unit-mate may have infected him or others in the unit. It is a plausible story. But it has not been proven on admissible evidence on a balance of probabilities.

[125] Additionally, while AHS policy or protocols may have allowed for institutional transfers without requiring quarantine before exposure to other inmates, it is by no means clear that policy or protocol was unreasonable or negligent. I do not see this as a case where *res ipsa loquitur* might apply: I was healthy, I was detained by the State in conditions I had no control over, I got sick; therefore, the State was negligent and failed to protect me. That has essentially been rejected in medical negligence cases and can hardly apply to treatment of a new virus which has not been capable of being fully controlled or contained anywhere in the world. The burden of proving negligence still rests on the accused.

[126] Mr. Mella testified as to questionable conduct and practices on his unit by FSCC staff. However, there was no connection proven between the questionable conduct in the fall of 2020 and the circumstances surrounding Mr. Mella's unit mate allegedly being infected and transmitting COVID to him and others in the unit.

[127] Since I find that Mr. Mella has not proven on a balance of probabilities how he got COVID, or how the unit came to be shut down other than because an inmate in that unit turned out to be a close contact of someone at ERC who had developed COVID (if that is in fact what actually happened), I do not need to go further.

Responsibility of FSCC and AHS

[128] But even if he had shown negligence on the part of FSCC staff or AHS in providing advice and directions to FSCC, I would be loath to hold the prosecution responsible for that and attribute the delay occasioned by these events to the prosecution for ***Jordan*** purposes.

[129] Ms. Quinlan relies on the dissent by Cromwell J in ***R v Kokopenace***, 2015 SCC 28. There, Cromwell J discussed responsibility for the Crown for the actions or inactions of "government actors". He stated at paras 251-254:

> 251 The *Charter* protects against interference by the state with guaranteed rights: s. 32. In order to establish a breach of the *Charter*, the claimant must therefore show not only that there has been a limitation of his or her guaranteed rights but that the limitation can be attributed to state action. The question is whether there is a sufficient connection between the conduct of the state and the limitation of the right such that the limitation can fairly be attributed to the state… This does not require that the state action be "the only or the dominant cause" of the limitation provided that there is a "real, as opposed to a speculative, link" between the alleged limitation and the state action: Bedford, at para. 76. While the threshold of sufficient connection has been considered mainly in the context of s. 7 of the Charter, a similar causal threshold has also been used in respect of other provisions of the Charter and under provincial human rights legislation and, in my view, this threshold applies in the context of this case.
>
> 252 For example, in *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695, an equality case under s. 15 of the *Charter*, Iacobucci J. explained that claimants must demonstrate that the state either "wholly caused, or contributed to", the adverse effects (pp. 764-65). More recently, in *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, Abella J. took a similar approach to the causal link, stating that "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory" (para. 332). Importantly, she also rejected an approach which would internally limit equality rights by looking at the reasonableness of state action, concluding that this was a matter best left for the justification analysis under s. 1 of the Charter (para. 333).
>
> 253 A similar requirement of sufficient connection also underlies this Court's jurisprudence on the s. 11(b) Charter right to be tried within a reasonable time. In these cases, any action of the Crown which contributes to delay, including systemic problems, such as limits on institutional resources, will be weighed against the Crown: *R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199; *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771, at pp. 795-96. In other words, every delay which has a sufficient connection to state action will be taken into consideration when deciding whether the state has breached the accused's right to be tried within a reasonable time.
>
> 254 A similar approach is also evident under provincial human rights legislation. In *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, an adverse effects discrimination case under British Columbia's Human Rights Code, R.S.B.C. 1996, c. 210, this Court stated that a prima facie breach exists when state action had the result of denying a student meaningful access to the mandated objectives of public education based on a protected ground (para. 36). Whether the claimant has established the necessary link between the state action and the limitation of a Charter right is essentially a question of fact

[130] That case dealt with under-representation of Indigenous jurors on trials of Indigenous accused persons, not delays.

[131] In ***R v KJM***, 2019 SCC 55, one of the delaying events was the failure of the trial judge to obtain a transcript in a timely manner, likely the result of an administrative error. One of the main issues in that case was whether there should be a shorter maximum period for youth court proceedings than the 18 months for trial in provincial court. The case ultimately turned on other ground, but the majority commented that there had been no evidence that "actors within the youth criminal justice system" were not taking their ***Jordan*** responsibilities seriously (at para 63).

[132] The reference to state actors was in the context of delays in diversion programs that had been endorsed by the State (at para 229). Karakatsanis J's dissent concluded that it would be unfair to attribute such delays solely to the defence "when it might in fact be a constellation of factors that results in the inefficacy and ultimate failure of an EJS program. These factors may well include inefficiencies within the justice system itself."

[133] It seems to me that the sort of state action referenced in ***Jordan*** is the complacency of police, prosecution, court administration and judges, not everyone connected with both levels of government responsible for the prosecution of accused persons.

[134] I note that the Crown has not been held responsible for delays in the Legal Aid system, which is an important participant in the justice system and is partly funded by the province. See ***R v Berard***, 2020 ABQB 345.

[135] There is certainly a connection between the prison system and the justice system. As argued by Ms. Quinlan and confirmed by Mr. Gibson, FSCC's acting director of security, that FSCC had a duty to care for its inmates but for a failure of some person or entity not involved in the prosecution of an accused to be considered to be state action for ***Jordan*** purposes, I think there needs to be something more than a negligent or careless act on the part of a peripheral player.

[136] FSCC had nothing to do with the prosecution of Mr. Mella other than to house him. Finding them (and thus the prosecution) responsible for the resulting delay because Mr. Mella could not get to court in these circumstances would be akin to finding the sheriffs responsible for the resulting delay if one of their drivers negligently caused an accident that injured Mr. Mella and prevented him from attending court.

[137] FSCC policy and procedure had nothing directly to do with court process or procedures or the prosecution of Mr. Mella. They were aimed at keeping him and others safe and healthy. I do not see that a failing in that regard should see delayed prosecutions stayed because of their failings. In my view, the types of failings alleged might be more appropriately dealt with under other sections of the *Charter* such as section 7.

[138] The entire population has endured COVID risks and restrictions. Despite following government advice and directions from all levels of government, residents continue to be infected with COVID. Many people have lost their jobs and their businesses. They have been confined to their residences and have been unable to interact face-to-face with friends and family. Perhaps when the dust settles on this COVID pandemic experts will know how to more effectively manage the next one. But in my view, it is too early to be able to define a standard of care let alone actions or inactions that fail to meet the standard of care.

[139] I conclude that in the context of managing a global pandemic and attempting to ensure the health of safety of inmates, neither the prison system nor the government health authorities should be considered to be "government actors" for whose conduct delays should be attributed to the Crown for ***Jordan*** purposes.

[140] If there is a remedy for COVID-caused delays and hardships in *Charter*-protected situations I very much doubt that a stay of proceedings would be something that a reasonable member of the public informed of the circumstances and aware of *Charter* values would find acceptable. The appropriate remedy would more appropriately be dealt with as part of the consequences of conviction.

[141] There may be situations, such as wilful violations of accepted procedures and protocols or malicious acts that might be treated differently, but I do not see that FSCC or AHS or any level of government should be viewed as a guarantor of the health of its residents, even those who are detained. And I am not convinced that they are "government actors" whose failings should be visited on the prosecution.

[142] I thus conclude that in the context of managing a global pandemic and attempting to ensure the health of safety of inmates, neither the prison system nor the government health authorities should be considered to be "government actors" for whose conduct delays should be attributed to the Crown for ***Jordan*** purposes for good faith actions or inactions. Individual as opposed to systemic failings should not be visited on the Crown for ***Jordan*** purposes.

[143] My conclusion is that the defence has failed to prove that the delay consequent on Mr. Mella's unit being shut down, or him contracting COVID should not be treated as an extraordinary event and not counted towards ***Jordan*** time.

[144] As a result, the delay between the second trial which was set to conclude on January 15, 2021 and the anticipate conclusion of the fourth trial scheduled to conclude on October 22, 2021 is the result of the extraordinary circumstance, namely the COVID pandemic. That nine-month period is not to be included in any delay calculations.

Defence Unavailability

[145] Ms. Rosborough notes that in the search to find a new trial date following the COVID cancellation in January, Ms. Quinlan was not available for trial from August 23-27. Ms. Rosborough was available, and the Court could accommodate that period. That resulted in a delay from August 27, 2021 to the end of the currently-scheduled trial, October 22. That roughly two-month delay should be treated as defence delay, according to Ms. Rosborough.

[146] I am mindful of the potential conflict occasioned by two competing *Charter* rights: the right to a speedy trial and the right to counsel of choice. In the context of a lawyer-client relationship that had existed on this matter since February 2018 (although interrupted by the time Mr. Mella failed to appear in March 2019 until he was re-retained in May 2020), it would have made no sense to force Mr. Mella to change counsel and find someone who was available in August 2021 when she was available within two months from the proposed August dates.

[147] As has been noted in many cases, counsel is not expected to have only one file, and be available for trials on demand. Ms. Quinlan was fully cooperative in rescheduling this matter and I do not see the delay as unreasonable or as something that would normally be attributed to the defence. Perhaps in a close case this might be significant, but here, the difference in total time would only have been reduced to 50 months.

[148] I do not need to make a decision on this as I have already characterized the affected period as part of an extraordinary event, the COVID pandemic. If characterizing this period were to make the difference between a 32-month total time and a 30-month total time, I might well be inclined to attribute it to the defence. The rationale for that decision would be that having regard to Mr. Mella's new-found

interest in a speedy trial, and the dates offered up were some six months away, that would be plenty of time to find new counsel and if he wanted to continue to have Ms. Quinlan represent him after she had previously ceased to act, he would have to waive the ***Jordan*** delay. That may be unduly harsh on the defence, but would be in keeping with the week-by-week characterization of delays that seems to dominate the cases.

Court Unavailability

[149] Ms. Quinlan notes that in February 2021, she and Ms. Rosborough were available to reschedule the trial to August 23-27 when the August 30-September 4 trial date had to be cancelled because of the unavailability of a Crown witness. The Court, however, did not have those dates available.

[150] Ms. Quinlan argues that irrespective of COVID, that is a delay that should not be forgiven by the extraordinary circumstances of COVID but rather should be treated as Crown delay.

[151] Court scheduling is a complicated matter even in times unaffected by pandemics. The courts have limits in their resources at the best of times, and in Alberta have been chronically plagued by staff shortages. COVID exacerbated that as not all courtrooms were COVID friendly and staff shortages (especially with clerks) were very significant. The availability of judges was not a problem. With few courtrooms and few clerks available, there were at this time far fewer criminal trials being scheduled. Additionally, the Court of Queen's Bench in Alberta has traditionally (for at least the 15 summers I have been a judge) scheduled only emergency matters for July and August so there would be no reasonable expectation for counsel to expect that there would be a summer trial date available for a matter such as this, especially with its history.

[152] Had this case been identified as being ***Jordan***-threatened and in circumstances where a trial date had to be adjourned for the extraordinary circumstance of witness unavailability, in normal times within-***Jordan*** dates might have been found in the event the two-month delay between August and October would make a difference and the defence was unwilling to waive the delay. However, in the context of COVID and the Court Order, I consider this delay to be subsumed within the COVID extraordinary circumstance.

Failure of FSCC to Accommodate

[153] Ms. Quinlan also argues that some of the delay should be attributed to the Crown because of the refusal or failure of FSCC to accommodate Mr. Mella and allow him to appear at his trial by video conference. Both Ms. Quinlan and Ms. Rosborough attempted to salvage the January 11 trial date by offering to employ technology to allow for the fact that Mr. Mella could not physically attend the trial initially because of the unit lockdown and then because Mr. Mella himself had COVID. Ms. Rosborough offered to have her office provide Mr. Mella with a laptop computer and funds for additional staff to supervise Mr. Mella. FSCC indicated that it was unable to facilitate a supervised process "as the office is used by admin staff and officers coming and going on a regular basis."

[154] On the evidence before me, I am not satisfied that FSCC's position on the joint request from Ms. Rosborough and Ms. Quinlan was unreasonable. It is clear that the prosecution had no control over how FSCC ran its operations, and I am not in a position to question whether FSCC should have changed its processes and procedures and facilities to accommodate an unusual request in unusual times.

[155] I do not attribute this issue as something that amounts to delay for which the prosecution should be responsible. As noted above, I do not think that FSCC is a "government actor" for Jordan purposes, perhaps excluding actions or inactions not in good faith.

Conclusion

[156] From charge to the anticipated conclusion of the trial will take approximately 52 months. To be completely accurate, June 28, 2017 to October 22, 2021 is 51 ¾ months, if that, nine months (the COVID time) is deducted as being consequent on extraordinary circumstances. Defence delay relating to Mr. Mella absconding to Belize is determined to be 22 months. That leaves total time as being 21 months. Essentially, that was the total unadjusted time as if Mr. Mella had not absconded and the first trial proceeded.

[157] Additionally, if the 21 months to the completion of the first trial were in issue, I find that four months was defence delay because of the delay in Mr. Mella obtaining counsel to be in a position to make his election and plea.

[158] On a full ***Jordan*** analysis, the total time would in this analysis be 17 months, well below the ***Jordan*** maximum for superior court trials, and actually within the 18-month maximum had the matter remained in provincial court for trial with no preliminary.

[159] Ms. Quinlan on Mr. Mella's behalf acknowledged that the Belize event should reduce the total time by 16 weeks to 36 months. Any time attributed to extraordinary circumstances or additional defence delay brings the total down to or below the ***Jordan*** ceiling. Mr. Mella's arguments on the remaining time taken have the Belize time start when the first trial would have ended, rather than when it was cancelled as a result of Mr. Mella's absconding to Belize (about six weeks). As well, the arguments attribute compliance with the Court's Amended Master Order 3 (four months from the potential early September 2020 date to the second scheduled trial date of January 11, 2021) to the Crown, rather than as part of the exceptional circumstances created by COVID. If I am correct in my analysis of these issues, the COVID delay from January 15-October 22, 2021 (10 1/4 months) does not need to be considered at all as the resulting total time including the COVID delay would essentially be 30 months. Ultimately, even if I attributed all of the COVID delay (but for complying with the Amended Master Order 3) to the Crown, the maximum would not have been exceeded.

[160] This is one of those cases where the defence has not met the onus of showing that the prosecution has failed to proceed in a reasonable and expeditious fashion and it is not one of the situations contemplated by ***Jordan***. Additionally, Mr. Mella has not demonstrated that he took any steps to expedite the matter. However, when you analyze this case, it is not one of the "clear cases" referenced in para 48 of ***Jordan***.

[161] Mr. Mella's application is dismissed. I am grateful to counsel for their excellent written arguments and their able oral presentations.

Heard on the 7th – 10th days of September, 2021.
Dated at the City of Edmonton, Alberta this 29th day of September, 2021.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Megan Rosborough, Alberta Justice
for the Queen

Kathryn A. Quinlan, Dawson Duckett Garcia & Johnson
for the Accused, Francis Mella

Appendix I - Table of Events

Date	Event Description
June 28, 2017	Original Information Sworn
July 24, 2017	Mella is served with Information
August 9, 2017	Mella applies for Legal Aid
September 6, 2017	Mella is denied Legal Aid
September 15, 2017	*First Provincial Court Appearance* Accused adjourned to obtain Legal Aid Crown prepared to set a trial date.
October 3, 2017	*Provincial Court Docket Appearance* Adjourned for Mella to make *Rowbotham* application on October 31, 2017 Crown emails Mella in the afternoon of October 3 and advises that he cannot get Rowbotham counsel for Preliminary Inquiry. Mella agrees to have the matter brought forward to October 10, 2017 to address this issue on the record and set a Preliminary Inquiry date. The matter is brought forward to October 10, 2017.
October 7, 2017	Mella emails the Crown to advise that he can no longer attend court on October 10 to set a date due to medical issue. Suggests perhaps October 17.
October 10, 2017	Crown emails Mella to advise the matter was marked "entered in error" and asked Mella to advise of a date prior to October 31 for him to attend court to make an election.
October 19 & 23, 2017	Mella emails the Crown and agrees to appear on October 27, 2017 in courtroom 267 to make an election.
October 27, 2017	*Provincial Court Docket Appearance* Preliminary Inquiry booked for March 26-28, 2018 with Mella self-represented.

November 28, 2017	Direct Indictment Filed
December 8, 2017	*Queen's Bench Appearance Court* First Appearance. Mella given deadline of December 21 to file his Rowbotham materials. Crown prepared to set a trial date.
January 26, 2018	*Queen's Bench Appearance Court* Consent Order for Rowbotham filed. Adjourned for appointment of counsel.
January 30, 2018	Kathryn Quinlan is appointed to the file
February 23, 2018	*Queen's Bench Appearance Court* Kathryn Quinlan assigned (Designation of Counsel filed February 16, 2018). Matter adjourned by defence.
March 23, 2018	*Queen's Bench Appearance Court* Trial dates set for April 29-May 3, 2019 (first available dates for the Court)
December 17, 2018	*Pre-Trial Conference*
March 14, 2019	*Queen's Bench Bail Review* Crown application for s. 521 review of Mella's conditions after finding out that Mella is in Belize. Mella not present. Justice Ouellette ordered Mella to attend in person on March 21, 2019
March 21, 2019	*Queen's Bench Bail Review* Crown applied for a Canada-wide warrant for Mella's apprehension when Mella failed to attend the hearing. Warrant granted by Justice Henderson pursuant to s. 521(5).
April 29-May 2, 2019	*Trial Date* Mella did not attend. Ms. Quinlan gets off the record. Warrant continues.
March 20, 2020	World Health Organization declares Covid a world-wide pandemic.
March 25, 2020	QB Master Order #1 QB Master Order #2

April 21, 2020	Amended QB Master Order #3
May 6, 2020	Mella is arrested on his Canada-wide warrant in Toronto after being deported from Belize.
May 7, 2020	*Queen's Bench Appearance Court* Mella is brought before the Court via videolink to speak to bail. He declines.
May 8, 2020	*Queen's Bench Appearance Court* Mella is brought before the Court via videolink. Matter is adjourned to July 17, 2020 per Covid Adjournment protocol (2 months) (Amended Master Order #3). Mella wished to adjourn to retain counsel.
May 28, 2020	Mella is transported back to Alberta, where his warrant for committal for civil contempt is executed and he begins serving his 1-year prison sentence.
June 2, 2020	Ms. Quinlan involved in scheduling activities before being retained.
July 17, 2020	*Queen's Bench Appearance Court* Dates of January 11-15, 2021 are held. Defence needs to confirm election so matter is adjourned. September 2020 trial dates not available because of QB policy in Master Order #3 (Mr. Mella not "bail denied"). Crown and Court both available for September 28-October 2, 2020, not defence.
July 31, 2020	*Queen's Bench Appearance Court* Dates of January 11-15, 2021 are held. Cannot be confirmed because Ms. Quinlan is quarantined and cannot meet with her client.
August 7, 2020	*Queen's Bench Appearance Court* Dates of January 11-15, 2021 are confirmed for trial.
October 7, 2020	Pre-trial Conference
January 8, 2021	*Queen's Bench Appearance Court* Trial to start on January 11 is adjourned due to Mella's mandatory quarantine after Covid exposure. Third trial date of August 30-Sept 3, 2021 set.
January 11, 2021	Mr. Mella tests positive for Covid.

January 11-15, 2021	*Second trial date*
January 15, 2021	*Queen's Bench Appearance Court* *Brought forward for new date: Crown witness not available for August 30-Sept 3, 2021. Trial dates of August 30-Sept 3, 2021 released (third trial date).* *Adjourned to February 5, 2021 to set a new date.*
February 5, 2021	*Queen's Bench Appearance Court* *New trial date of October 18-22 set.* *Crown and Court available May 25-28, 2021. Defence and Court available August 23-27, 2021.*
April 22, 2021	*Provincial Court Bail Hearing* *Mella is denied bail on these matters.*
June 11, 2021	*Case Management* *Crown learns of Charter notice. Defence advises no admissions.*
June 17, 2021	*Case Management* *Crown requests that the Sept 7-10 dates be used for the trial. Defence declines; used for Jordan application.*
September 7-10, 2021	*Trial/pretrial applications.*
October 18-22, 2021	*Fourth Trial Date*

[162]

Appendix II – Applicant Mella's Cases

1 *R v Jordan*, 2016 SCC 27

2 *R v Teeti*, 2018 ABPC 207

3 *R v Park*, 2016 SKPC 137

4 *R v Keyes* 2017 ONCJ 5

5 *R v Berard*, 2020 ABQB 345

6 *R v Cody*, 2011 SCC 31

7 *R v Morgan*, 2020 ONCA 279

8 *R v Cunningham*, 2020 ONSC 2724

9 *R v Loblaws*, 2020 ABPC 250

10 *R v Harker*, 2020 ABQB 603 (CanLII), 2020 ABQB 603

11 *R v KGY*, 2020 ABPC 171

12 *R v Ellis*, 2020 NSCA 78 (CanLII)

13 *R v Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771

14 *R v KJM*, 2019 SCC

15 *R v Kokopenace*, 2015 SCC 28 (CanLII), [2015] 2 SCR 398

16 *R v DH*, 2020 ABQB 358

17 *R v Thanabalasingham*, 2020 SCC 18

18 *R v Schenkels*, 2017 MBCA 62

19 *R v Bulhosen*, 2019 ONCA 600

20 *R v Carter*, 2020 ABQB 481

21 *R v Wilson*, 2017 ABQB 6

22 *R v Cabrera*, 2016 ABQB 707

23 *R v Jones*, 2016 ABQB 691

24 *R v Nasery*, 2017 ABQB 564

Appendix III - Respondent Crown's Cases

1. *R v Jordan*, 2016 SCC 27
2. *R v Mamouni*, 2017 ABCA 347
3. *R v Morgan*, 2020 ONCA
4. *R v Cunningham*, 2020 ONSC 2724
5. *R v Harker*, 2020 ABQB 603
6. *R v Cathcart*, 2020 SKQB 270
7. *R v Drummond*, 2020 ONSC 5495
8. *R v Gharibi*, 2021 ONCJ 63
9. *R v Ali*, 2021 ONSC 1230
10. *R v Venne*, 2021 ONCJ 80
11. *R v Wilson*, 2021 ONSC 1080
12. *R v Pettitt*, 2021 ABQB 24
13. *R v Khattra*, 2020 ONSC 7894
14. *R v Ofiaza*, November 4, 2020, unreported (ABQB) Action No. 180360893Q1
15. *R v KGY*, 2020 ABPC 171
16. *R v K.J.M.*, 2019 SCC 55
17. *R v Berard*, 2020 ABQB 345

Appendix IV – Amended Master Order 3

COURT	COURT OF QUEEN'S BENCH OF ALBERTA
CENTRE	JUDICIAL CENTRE OF EDMONTON

DOCUMENT AMENDED MASTER ORDER #3
RELATING TO COURT'S RESPONSE TO THE COVID-19 VIRUS

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF THE PARTY FILING THIS DOCUMENT	Clerk of the Court of Queen's Bench of Alberta Judicial District of Edmonton Law Courts Building, IA Sir Winston Churchill Square Edmonton, Alberta T5J OR2

DATE ON WHICH ORDER WAS PRONOUNCED: April 21, 2020

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Chief Justice M.T. Moreau

---

UPON the COURT'S own motion;

AND UPON it appearing that the WORLD HEALTH ORGANIZATION (WHO) has declared COVID-19 (also known as the "novel coronavirus") a public health emergency as an international pandemic;

AND UPON the Government of Alberta having declared a state of Public Health Emergency on March 17, 2020;

AND UPON it appearing that agencies of the Governments of Canada (CANADA) and Alberta (ALBERTA) have issued public health recommendations and directives, under their legislation and powers, in response to COVID-19, including restricted travel and periods of self-isolation in certain circumstances;

AND UPON the COURT determining that, in these exceptional circumstances, it must continue to alter its operations, policies and procedures in exercising its statutory, regulatory or inherent jurisdiction in face of and during the emergency arising from this international pandemic of COVID-19, with a view to helping to contain or prevent the spread of COVID-19 and minimizing the risk to, and taking reasonable steps to protect, the health and safety of persons working in or attending the Court in balance with maintaining, as much as possible, access to justice within the Court, under the rule of law;

AND UPON IT APPEARING that accused persons listed on the arraignment lists and detention review lists ("the Lists") in each of the Judicial Centres in which the Court of Queen's Bench holds sittings throughout

Alberta are required to appear before this Honourable Court on the dates and at the times set out in the Lists;

AND UPON IT APPEARING that pursuant to s. 715.23(1) of the *Criminal Code*, the Court may order the accused to appear by audioconference or videoconference if the Court considers it would be appropriate after considering all of the circumstances;

AND UPON it appearing that pursuant to s. 485(1.1) of the *Criminal Code*, jurisdiction over an accused is not lost if an accused does not appear personally, as long as the accused was permitted to appear remotely by a provision of the *Criminal Code* or a rule made under ss. 482 or 482.1;

AND UPON it appearing that this MASTER ORDER is necessary, in the exceptional circumstances of this emergency situation, for the proper administration of justice within the Court's jurisdiction within Alberta;

AND UPON the authority of the Court, pursuant to, *inter alia*: the *Court of Queen's Bench Act*, RSA 2000, c. C-31, including, but not limited to, s. 22; *Criminal Code*, RSC 1985, as amended, c. C-46 (CC), including, but not limited to, ss. 474, 485, 571, 645, 669.1, 715.23 and 824; *Alberta Rules of Court*, AR 124/10, as amended, including, but not limited to, Rules 1.3, 1.4, 1.8, 3.2 - 3, 3.26, 6.10 and 13.5; and the COURT'S inherent jurisdiction, under the authority of the *Judicature Act*, RSA 2000, c. J-2, including, but not limited to, ss. 2 and 5, and at common law;

IT IS HEREBY ORDERED THAT:

1. This Master Order replaces Master Order #1 of March 15, 2020 and Amended Master Order #2 of March 20, 2020 which are no longer in force or effect. This Master Order shall remain in full force and effect until further Order of the Court.

2. All Court of Queen's Bench of Alberta Orders received via email or fax have the same force and effect as if they contain an original signature.

3. The requirement to gown for an appearance at the Court is suspended. Counsel and parties are expected to dress in appropriate business attire.

Criminal Matters

4. All criminal matters, where the accused is not in custody, coming for hearing from March 16, 2020 to May 31, 2020, unless otherwise specified by a Justice presiding in an individual court proceeding, are adjourned to the locations and dates set out in Appendix A to this Order, with a warrant to hold in each case to the date set out in Appendix A. Subject to paragraph 6 of this Order, if the hearing date has been pre-booked by counsel, no appearance at the location and date set out in Appendix A will be required, and the warrant to hold shall continue until the pre-booked hearing date.

5. Where a designation of counsel has been filed, and upon the attendance of counsel at the location and on the date set out in Appendix A, the warrant to hold may then be canceled.

6. Where a designation of counsel has been filed, and the matter is proceeding by direct indictment, counsel may pre-book a hearing date but will be required to attend at the location and on the date set out in Appendix A to confirm the pre-booked hearing date, and the warrant to hold shall continue until the pre-booked hearing date.

7. In cases where no designation of counsel has been filed, the appearance of the accused at the location and on the date set out in Appendix A will be required, and the warrant to hold may then be canceled.

8. Weekly arraignments will continue for accused in custody at the locations designated in Appendix B. Unless otherwise specified by a Justice presiding in an individual court proceeding, all matters involving an accused in custody and set for hearing from March 16, 2020 to May 31, 2020 are further adjourned to the arraignment court dates and locations set out in Appendix A, with a warrant to hold in each case until their next appearance date in arraignment court.

9. For all criminal matters where the accused is in custody, the Directors of correctional facilities or pre-trial detention centres in which an accused is held who is required to appear for Arraignment or a Detention Review and whose case has not been marked "PRE-BOOKED", are authorized and directed to arrange for the appearance of the accused before the Court of Queen's Bench of Alberta by CCTV at the arraignment sittings and detention review hearings in the locations set out in Appendix B, to be dealt with according to law. If CCTV is not available in the correctional facility or pre-trial detention centre in which an accused is housed, arrangements shall be made for the accused to appear by audioconference.

10. Criminal jury selections and criminal jury trials scheduled to proceed between June 1, 2020 to September 7, 2020, for all in custody and out of custody accused are adjourned to the locations and dates set out in Appendix C, with a warrant to hold in each case until their next appearance date in arraignment court. Where a designation of counsel has been filed and the matter is not proceeding by direct indictment, if the hearing date has been pre-booked by counsel, no appearance at the location and date set out in Appendix C will be required, and the warrant to hold shall continue until the pre-booked hearing date. Where a designation of counsel has been filed and the matter is proceeding by direct indictment, counsel may pre-book a hearing date but will be required to attend at the location and on the date set out in Appendix C to confirm the pre-booked hearing date, and the warrant to hold shall continue until the pre-booked hearing date. Where no designation of counsel has been filed, the appearance of the accused at the location and on the date set out in Appendix C will be required, and the warrant to hold may then be canceled.

Civil and Family Matters

11. All civil and family matters scheduled for hearing from March 16, 2020 to May 31, 2020 are adjourned *sine die*, unless otherwise directed by the Court.

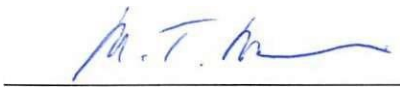
12. All filing deadlines under the *Alberta Rules of Court*, including Rule 13.41(4) are suspended until May 31, 2020, with the exception of those Rules applicable to the commencement of proceedings, including originating applications.

13. The Court will hear only emergency and urgent matters as set out in Appendix D to this Order, unless otherwise directed by the Court in future Notices to the Profession and Public and Announcements. The Court has a discretion to hear matters other than those listed, and to decline to hear a matter listed.

14. Parties and/or Counsel who believe that their matter is an emergency or is urgent are directed not to attend at the courthouse. Parties and/or Counsel who believe that their matter is an emergency or is urgent are directed to submit a request through the online Emergency/Urgent hearing request form at the following link: https://www.albertacourts.ca/qb/court-operations-schedules/urgent.

15. Parties and/or Counsel who do not have access to the Court's online link for Emergency/Urgent hearings may contact the Court by telephone as follows:

Calgary, Drumheller, Grande Prairie: 403.297.6267
Edmonton, St. Paul, Hinton, Peace River, Fort McMurray, High Level: 780.427.0629
Red Deer, Wetaskiwin: 403.340.7908
Lethbridge, Medicine Hat: 403.382.4156



Chief Justice M.T. Moreau
Court of Queen's Bench of Alberta