

Court of Queen's Bench of Alberta

Citation: R v Fischer, 2021 ABQB 345

Date: 20210430
Docket: 180431256Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

**Tyler Fischer, Skylar McGilvery,
Sterling McGilvery, Cougar Fafard**

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.31.

By Court Order, any information that could identify a witness or victim must not be disclosed in the course of these proceedings.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

**Oral Ruling
of the
Honourable Mr. Justice A.W. Germain**

Introduction

[1] Skylar McGilvery, one of four individuals charged jointly with murder applies for a stay of proceedings pursuant to Section 11(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) on the basis of trial delay. (A Jordan application, *R. v Jordan* 2016 SCC27). The other co-accused join in that application. The facts relating to the application are similar for each individual so my ruling covers all four individuals charged.

The Position of the Parties

[2] Crown and defence were able to agree on several matters. First, there is agreement that any delay which occurred in this trial process to date did not occur as a result of the defence. Second, both agree to adopt as fact the timeline schedule identified in paragraph 12 of the Crown's written brief. My intention is to mark a copy of that timeline as an administrative exhibit in this case and if my remarks today are formally published it will appear as a schedule. Third, both crown and defence agree that the COVID-19 pandemic constituted an exceptional circumstance as contemplated in the *Jordan* case. They part company on how much of the total delay in this case should be attributed to the pandemic.

[3] The position of the Defendants is that their trial by judge and jury, scheduled to commence before me, April 26 2021, is outside of the 30-month time period suggested by the Supreme Court of Canada in *Jordan* and therefore is presumptively out of time. In result, the Defendants are entitled to the remedy of a stay of proceedings. While defence is prepared to acknowledge some delay for exceptional circumstances, they submit that the COVID causing delay should be only three months. On this formulation, the 30-month trial time limit has been exceeded by about six months.

[4] Defence counsel submits that considering the entirety of the Alberta Court of Queen's bench handling of the COVID situation, the allowable COVID delay time would range from the last day of the first trial (June 26, 2020) and end on September 8, 2020. If this period of time (just over two months) is the entire COVID delay then the current case which is now in total to extend for 39 months exceeds the *Jordan* ceiling by over six months.

[5] The Defendants' fall-back position (if I excuse more delay time for COVID than they submit is appropriate) is that they have still established unreasonable delay.

[6] The Crown supplied an extensive, comprehensive and thoughtful written brief; however, their bottom line is that no *Charter* breach for delay has occurred here once adjustment is made for the unusual circumstance of the COVID pandemic. They submit that the entire time from the end of the adjourned trial to the end of the currently scheduled trial is all COVID related. On the defence fall-back position, the Crown asserts that there has not been unreasonable delay.

Legal Analysis

[7] I have decided in this case to deliver an oral decision. The reason is obvious as the trial is scheduled to start in one week's time. Secondly, defence counsel and the Crown, in their written materials and extremely sophisticated oral submissions, armed me with the necessary background to deal with an application both from the context of the jurisprudence and the case-related facts. However, I recognize my remarks may be transcribed for appellate review and therefore I do reserve the right to release them as a record of an Oral Decision of our Court, and also to fine tune them by correcting slips of the lip and grammar, adding case citations and adding headings not delivered orally in court. Beyond this amplification, I will not be changing the tone of my remarks or my reasoning.

[8] In *Jordan*, the Supreme Court of Canada set out to curb what they decried as a culture of complacency in advancing cases to trial. They did so by setting out guidelines: the essence of which is that barring exceptional circumstances any delay in concluding a trial that exceeds 30 months in the Court of Queens Bench, is presumptively unreasonable and the charge should be

stayed, unless the Crown can explain the delay satisfactorily. Even where the delay does not exceed 30 months, defence can still show that delay was unreasonable and potentially obtain a stay.

[9] The *Jordan* analysis framework can be set out as follows:

- Step 1 - calculate the total delay from the date of the charge to the end of trial;
- Step 2 - deduct any defence delay;
- Step 3 - depends on whether the total delay is below or above the presumptive ceiling;
 - Step 3(a): If the delay is above the presumptive ceiling the delay is presumptively unreasonable and the Crown bears the burden of justifying the delay based on exceptional circumstances,
 - Step 3(b): If the delay is under the presumptive ceiling then the burden shifts to the defence to establish unreasonable delay by establishing:
 - i) first that the defence took meaningful steps that demonstrate a sustained effort to expedite the proceeding, and;
 - ii) the case took markedly longer than it reasonably should have.

This is the framework that I intend to apply.

[10] The Defendants fairly agreed to accept the timeline established by the Crown and this timeline (in the event of appellate review) has been marked as an administrative exhibit. I view this as an Agreed Statement of Fact in the context of this application and while it is open to a trial judge to reject agreed facts this rarely occurs and I have no reason to do so here. In result, my ruling is based on Schedule 'A' filed in the application, and in the event that that this oral judgment is filed, that timeline will also be attached.

[11] Despite the incorporation of an extensive schedule, it is appropriate for me to review some of the key timeline points. The information was first laid on February 14, 2018, and after various processes in the court, the trial was scheduled to conclude on June 26, 2020. This period of time is approximately 29 months, or under the *Jordan* time limits. By contrast, the time period measured to the end of the currently scheduled trial is closer to 39 months.

[12] On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. This led to various orders of the Court of Queen's Bench to deal with the threat of COVID to the courts and the vulnerable men and women who serve on the front line of our court system. On April 21, 2020, our Chief Justice issued a master order (Master Order number 3) which adjourned all jury trial scheduled from June 1 to September 7 of 2020. The Applicant's jury trial fell into this group. The September 7th date was chosen in part because it was the return date for the fall term of the Court after the summer recess, and it was expectational that COVID would abate and that we would have health guidance and direction on how to safely conduct jury trials. Certainly, on April 21 2020, we did not have in place facilities that could handle a jury trial safely but had some hope mixed with a dose of pragmatic expectation that we could start jury trials on September 8, 2020.

[13] Hundreds of other jury trials were adjourned, into an already crowded fall of 2020 court calendar. If I used only the time period from the end of the June scheduled trial to our September 7, 2020, potential reopening date, the COVID delay would be approximately two months.

Defence in fact urges that interpretation. Accepting this argument would put the *Jordan* delay over 30 months by about six months.

[14] Let me continue to amplify the timeline. Master Order #3, prescribed that on August 14, 2020, this case was returned to court with many others into a docket court to set new trial dates. Although the COVID restrictions had not yet ended and although we did not have a full plan in place for the re-commencement of jury trials, the August 14th date was to serve as an attempt to reschedule the cases that had been adjourned. The Defendants had not yet reached a date consensus at that point so the case was set over one more month.

[15] On August 20, 2020, the Alberta Court of Queen's Bench announced that judge and jury trials would resume in Edmonton on September 8, 2020. The assigned case management and trial Justice, the Hon. Mr. Justice L. Ackerl, already had a full schedule and to further advance the case I was reassigned to take over the trial. On September 18, 2020, in Queens Bench appearance court this trial date of April 26 to May 21, 2021 was confirmed based on preferred dates selected by defence counsel.

[16] Now, only one week before the trial, we are still in a serious COVID crisis in Canada and in the courts. Many leading health experts are describing our situation as being in the third wave. Our premier and our provincial health director have continued to urge caution: distancing, frequent cleaning, and mask wearing. In short, even when this trial starts next week full COVID mitigation will still be in effect.

[17] For this reason, I must unequivocally reject the narrow timeline proposed by defence for the COVID 19 delay. I find instead that the COVID delay commenced on the date the June trial was to have ended and continues up to and including the end of the currently scheduled trial on May 21, 2021. In result, since the first trial as scheduled in June 2020 did not exceed the presumptive *Jordan* timelines; by inference neither can the new trial if the entire delay is attributed to the unexpected and unusual circumstance of the COVID 19 pandemic. That is my ruling which concludes the main argument of the defence.

[18] However, I must still deal with the defence fall-back position which is that they have shown that there was unreasonable delay even in a delay calculation of 29 months. Three submissions were made on this point.

[19] I would first observe that some part of that argument is gently undercut by the position taken by the defence on November 15 of 2019 during a pretrial conference before Justice Ackerl where it was conceded that there were no *Charter* section 11(b) issues that could reasonably be raised at that point. While I accept that this does not stop the defence from looking at the entire picture afresh in light of the COVID delay, it means that those items that they now say should be looked at with deep scrutiny must be somewhat muted. So, what are those arguments?

[20] The first of these arguments is the Crown handling of the direct Indictment in this case. The Crown started with an Information and advanced to an expedited preliminary inquiry to lock in the evidence of a witness in failing health. After that witness was heard from, there was an extensive preliminary inquiry delay. Defence conceded that the preliminary inquiry started on August 17 and 23 of 2018. At that point, there was also an expectation that the preliminary inquiry would continue on June 3 to 28, 2019.

[21] This did not happen because on January 2, 2019, a direct indictment was filed. In effect, this meant from the point of view of trial management on the part of the four individuals charged

with the serious charge that the time period from August 23 (the last date of the start of the preliminary inquiry), and the direct Indictment on January 2 was wasted time. However, this is offset by the fact that the direct Indictment advanced the matter to the Court of Queen's Bench more expeditiously than a preliminary inquiry continuing on June 3 of 2019. Between early January and June 2019, the case was advanced nearly five months faster to the Court of Queen's Bench.

[22] The second element of this argument is laid at the feet of the Court. It is the contention of the defence counsel that the setting of the first trial for June 1, 2020, was much delayed in its setting because the Court refused to make available additional earlier blocks of time. In other words, counsel accepted the first block of time available but the Court was not proactive in generating other time slots.

[23] This is a speculative argument which assumes infinite resources. To this I can only say that we are aggressively overbooking in the Court of Queen's Bench and the reality is that to find a single block of time on short notice moves past the platform of difficult to the nearly impossible. The *Jordan* framework must be based on what is pragmatic and proactive within the 30 months, not the absolute best performance on the part of all players. The defence speculates that other quicker time slots should have been made available but file no evidence to support this. It would flow against my common sense understanding of how aggressively we overbook trial time in this court. In result, I must assess this argument as not one which would give rise to *Charter* relief.

[24] The third issue raised by learned defence counsel relates to an email (responding to a request to bring the case forward to get earlier trial dates), sent to the lawyers by our then Trial Coordinator dated May 11, 2020, in which she indicated:

'no trial dates are being set at this time and no matters can be brought forward to speak to trial dates if they already have a QBAC date. Hopefully we will be hearing something soon in regards to the rescheduling of dates.'

[25] The Trial Coordinator (since retired) was a long-term court employee with a high level of expertise and an amazing reputation and ability for filling and using every single available court room and judicial availability. Further, she was directly responding to directions from the Chief Justice that where an appearance date had been set (as this one had for August 14, 2020) we were not going to be able to bring forward cases on a requested basis for the practical reason that we had, at that time, no jury facilities that were COVID safe, extensive backlog in the system, and no complete appreciation of how much remediation the courthouse or offsite facilities would require.

[26] It was not until much later and after the date of that email that we were able to move forward with developing additional space in the Bonaventure Centre in Edmonton for the purpose of conducting trials in a COVID safe environment. Therefore, to bring something forward in May that had been scheduled for August was counterproductive as in May there was no fully-executed plan in effect and tentative plans made still required execution and implementation.

[27] It is speculative to believe that if the Trial Coordinator had obtained an earlier appearance date after the May 11, 2020 request any earlier trial date could have been achieved. The earliest possible date that could ever have been achieved in this matter was September 8, 2020, and the

courts have no requirement that this particular case be guaranteed that first starting position. After all, this was a four-week judge and jury trial. Second, we already had a full array of scheduled trials that had not been adjourned due to the COVID delay.

[28] In short, while I respect the courageous argument of learned defence counsel, it is clear that once the presumptive 30 months is not exceeded his fall-back position is much weaker even if I ignore the position taken on November 15 of 2019 (by which time the June trial had already been scheduled) that there were no section 11 (b) *Charter* breaches.

Conclusion

[29] My conclusion, therefore, is that the entire period of time from the date of the adjourned June 2020 trial to the end of the April 26, 2021 trial must all be deducted from a *Jordan* time analysis because it relates solely and totally to court restraint brought about by the exceptional circumstances of the COVID pandemic. It is thus a delay caused by unusual circumstances. Therefore, the delay in this case is 29 months. Second, the defence has not established to an appropriate requisite standard that the 29 months has embedded within it, unreasonable delay.

[30] The application is dismissed. This criminal trial by judge and jury will start before me on April 26 and run to May 21, 2021, with the jury selection on April 22, 2021.

[31] I should advise learned counsel that there is a possibility that the trial will take place in courtroom B201 at the courthouse because of its length and not at the Bonaventure Centre. Counsel should be diligent, therefore, in inquiring closer in time where the trial will actually take place. The jury selection process, however, will take place at the Bonaventure Centre unless counsel are otherwise notified.

Heard on the 15th day of April, 2021.

Dated at the City of Edmonton, Alberta this 16th day of April, 2021.

A.W. Germain
J.C.Q.B.A.

Appearances:

Breana Smith and Lawrence Van Dyke
for the Crown

G. Johnson,
for the Accused, Skylar McGilvery

W. Rapponi,
for the Accused Tyler Fischer

A. Jarrah
for the Accused Sterling McGilvery

N. Sissons
for the Accused Cougar Fafard

Schedule A – Timeline of Dates and Events in the Present Case

The following table outlines the chronology of relevant events, court appearances and correspondence in relation to this prosecution.

<u>Date</u>	<u>Event Description</u>
February 14, 2018	Original Information Sworn
February 15, 2018	Arrested
February 22, 2018	First Provincial Court Appearance Adjourned to obtain counsel
March 19, 2018	Provincial Court Appearance Adjourned to obtain and review disclosure
April 13, 2018	Replacement Information Sworn adding charge of Kidnapping pursuant to s. 279.1(1.1)(b)
April 16, 2018	Provincial Court Docket Appearance Process Transferred and original Information withdrawn. First Appearance for Counsel.
April 20, 2018	Correspondence: Crown Counsel requests split preliminary hearing due to ill witness
April 27, 2018	Form A filed: Counsel requests to hear from 20 witnesses at preliminary inquiry.
April 30, 2018	Provincial Court Docket Appearance Split preliminary hearing scheduled: - August 17 & 23, 2018 - June 3 – 28, 2019
July 31, 2018	Assigned prosecutor appointed as Judge to Provincial Court of Alberta
August 17 & 23, 2018	1 st Portion of Preliminary Hearing Proceeded with temporarily assigned Crown
August 31, 2018	Lawrence Van Dyke assigned as prosecutor
January 2, 2019	Direct Indictment Filed
January 18, 2019	Queen's Bench Appearance Court (QBAC) Appearance Mistake re: advising defence counsel - Adjourned one week to remedy
January 25, 2019	QBAC Appearance

	Counsel adjourn 2 weeks for purpose of coordinating trial dates.
February 8, 2019	QBAC Appearance trial Dates Set June 1 – 26, 2020 Jury Selection: May 28, 2020 Pre-trial Conference (PTC): April 29, 2019
April 29, 2019	PTC Adjourned
May 10, 2019	PTC proceeded
September 20, 2019	PTC proceeded
November 15, 2019	PTC proceeded
December 9, 2019	Pre-trial Motions Booked January 10, 2020 March 9 - 13, 2020
January 10, 2020	Pre-trial motion for s. 714.1 Application proceeded before Justice Ackerl.
January 15, 2020	Pre-trial motion for disclosure proceeded – In-camera Hearing with CCTV testimony.
March 9, 2020	Week of Pre-trial motions no longer required: 1) due to decision on January pre-trial motions, and 2) Crown advises that application to tender Accused statement will not be made and statement should be excluded.
March 11, 2020	World Health Organization (WHO) declares the novel coronavirus (COVID-19) a global pandemic.
March 15, 2020	Master Order re: COVID-19 Issued All criminal matters scheduled March 16-March 27, 2020 are adjourned. The Court of Queen's Bench limits hearings to urgent or emergency matters.
March 17, 2020	The Province of Alberta declares a State of Public Health Emergency due to COVID-19.
March 20, 2020	Master Order #2 Issued Court of Queen's Bench continues to only hear emergency and urgent matters. All criminal matters from March 26 – May 1, 2020 adjourned.
March 27, 2020	Alberta Courts restricted access to courthouses.
April 21, 2020	Master Order #3 Issued

	All Jury trials scheduled from June 1 – September 7, 2020 Adjourned. trial adjourned to August 14, 2020 as per Appendix C of Master Order #3. *Judge Alone criminal trial matters where the Accused is in custody may proceed.
April 22, 2020	Correspondence: Crown Counsel advised all counsel that he would consent to re-election to a Judge Alone trial if all Accused agreed. At least one Accused promptly advised of his intention to maintain the Judge & Jury election.
May 11, 2020	After discussions with defence counsel, Crown writes to the QB Criminal Trial Coordinator requesting that the matter be brought forward to set a new trial date.
	Correspondence from the Court: Bring forward request is denied with the explanation that “no trial dates are being set at this time and no matters can be brought forward to speak to trial dates if they already have a QBAC date set”.
August 14, 2020	QBAC Appearance Matter adjourned for all counsel to coordinate common dates for new trial. At this time, Justice Ackerl is still assigned as the trial Justice. Court coordinator advises that “we are still looking for 20 days for a judge and jury which is going to be very difficult to find at all and this then likely will be into the fall, but if counsel could provide their dates that would be very helpful”.
	Email correspondence from counsel begins that same day and outlines efforts to determine what dates are common between counsel with an intention to then provide them to the Court. No common dates are arrived at. Mr. Raponi advises that he is not available until July 2021. Counsel for the Applicant advises he is available March 4, 2021. No discussion of court availability.
August 20, 2020	Alberta Court of Queen’s Bench announces that Judge & Jury trials will resume in Edmonton on September 8, 2020. Jury Selection and Jury trials will be held at an off-site location in order to comply with public health requirements ordered by Alberta Health Services.
August 26, 2020	Mr. Raponi advises that he has made efforts to have earlier availability and proposes April 26 –

	May 21, 2021 for the new trial dates. Crown counsel is available. Counsel for the Applicant advises that he will make himself available for the dates. All other defence counsel are available and agree to dates.
August 27, 2020	Mr. Raponi emails the QB Trial Coordinator and provide the proposed trial date of April 26 – May 21, 2021. He advises that “all counsel have worked to provide the earliest common dates”. Crown counsel and all defence counsel are cc’d on email correspondence.
	Counsel are advised by the Trial Coordinator that Justice Ackerl is not available. Counsel are advised to write to Justice Henderson to determine whether a new trial Justice can be assigned or whether Justice Ackerl must remain seized. She also advises that the proposed dates are already “overbooked”.
	Mr. Raponi emails Justice Henderson on behalf of all counsel and requests that the trial be reassigned to another justice in order to set the proposed trial dates.
August 30, 2020	Justice Henderson responds to counsel and advises that a new trial judge can be appointed “so that the earliest possible new trial dates can be booked”.
September 1, 2020	Mr. Raponi emails the Trial Coordinator and requests the proposed dates be held until the QBAC appearance and advises that Justice Ackerl is no longer seized.
	Trial Coordinator advises that dates will be held so they can be confirmed at next QBAC appearance.
September 18, 2020	<p>QBAC Appearance</p> <p>New trial dates confirmed on the record April 26 – May 21, 2021 Jury Selection: April 22, 2021</p> <p>Justice Ackerl is no longer seized. New trial is scheduled as an overbook and without consideration of his schedule. All counsel and their agents confirm the dates.</p>
November 25, 2020	The Province of Alberta declares a second state of public health emergency due to COVID-19.

March 1, 2021	<i>Charter</i> application re: s. 11(b) rights filed by defence counsel for Skylar McGilvery
March 5, 2021	Pre-trial phone conference conducted with new trial Justice Germain and all counsel. <i>Jordan</i> application scheduled to be heard April 15 - 16, 2021.
April 26 – May 21, 2021	4 Week QBJJ trial scheduled to proceed