Court of Queen's Bench of Alberta

Citation: R v Mella, 2022 ABQB 68

Date: 20220124
Docket: 171392731Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Francis Emmanuel Mella

Accused

Reasons for Sentence
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] This decision was delivered orally on January 21, 2022. I advised everyone at the time that I intended to file my reasons for decision, and that I reserved the right to edit my remarks on January 21 for grammar, but the substance would remain the same.

[2] After a five-day trial, on October 29, 2021, I convicted Francis Emmanuel Mella of fraud and theft under sections 322, 334 and 380 of the *Criminal Code*, as charged in the indictment against him. My reasons for decision were delivered orally.

[3] Sentencing was adjourned to December 15-17 as it was initially contemplated that further evidence would be called by Mr. Mella and potentially by the Crown as to conditions at

Maplehurst Correctional Facility in Ontario, the Edmonton Remand Center ("ERCC") and the Fort Saskatchewan Correction Centre ("FSCC") where Mr. Mella spent his pre-trial custody. Mr. Mella alleges that his section 7 *Charter* rights and section 12 *Charter* rights were violated because of Covid 19 conditions he has been subjected to since his arrest in Toronto, Ontario in May 2020.

[4] Many facts relevant to this sentencing are set out in my decision ***R v Mella***, 2021 ABQB 785, which was a decision on Mr. Mella's ***Jordan*** application based on the time that had passed from the date of the charges until the anticipated end of this trial. Some of the delay arose because of Covid 19 conditions experienced by Mr. Mella while at FSCC. I heard evidence from Mr. Mella and from Chris Gibson, acting head of security at FSCC during the ***Jordan*** application.

[5] While I denied Mr. Mella's application for a stay under ***Jordan***, it had been previously agreed that the evidence on the ***Jordan*** application would be used in connection with Mr. Mella's application under sections 7 and 12 of the *Charter* arising out of Mr. Mella's time on remand in Toronto, at ERC, and most recently at FSCC. This *Charter* application was agreed to be heard after trial in the event Mr. Mella was convicted and then in the context of his sentencing. I noted this at para 140 of the ***Jordan*** decision.

[6] For the purposes of the remaining *Charter* application, an Agreed Statement of Facts was entered describing conditions the Edmonton Remand Centre. That obviated the need for further evidence, and submissions were made on December 16. I reserved decision.

Victim Impact Statements

[7] Two Victim Impact Statements were read. The first was from Mr. Szybunka's wife. She detailed how her and Mr. Szybunka's lives had changed because of Mr. Mella's theft. She described her countless sleepless nights worrying about her husband, their livelihood, their employees, and the huge debts they faced. She felt inadequate as she did not know how to comfort her husband. She saw him change from being kind-hearted and soft-spoken into a very different person. Because of the shortage of money, they had to pinch on things and cancel things they would have otherwise done. She is obviously and justifiable very bitter about the harm Mr. Mella caused them.

[8] Mr. Szybunka outlined the impacts on him, including stress which caused him to drink too much to escape his burdens and woes. He is bitter that Mr. Mella lived a better life while he was stealing from Dave's Diesel than Mr. Szybunka ever did, or ever will. His bitterness is well justified. Because of the theft, Mr. Szybunka estimates he will have to work until he is 80. He torments himself by wondering what his life would have been like if he had never met Mr. Mella – essentially that he would not have suffered so much misery and distress. He estimates that apart from the theft itself, he spent another million dollars cleaning the books and pursuing Mr. Mella. His company was left near bankruptcy; his bank threatened foreclosure. The trauma from all of this will last for the rest of his life.

[9] I can only express my heartfelt sympathy for the Szybunkas. Having your life turned upside down by a greedy, devious and unrepentant criminal and left struggling to pay bills, salaries, and learning to do with much less than your labours entitle you to is something that a conviction and sentence will not fix. I hope it will at least help Mr. and Mrs. Szybunka to now focus on the future.

Background

[10] Mr. Mella was convicted of stealing or defrauding Dave's Diesel Repair, a division of 336239 Alberta Inc ("Dave's Diesel"). Dave's Diesel is a privately-owned corporation operating out of Winterburn, Alberta, and repairs diesel engines as its principal business. I would describe it as a medium sized business, as there were a 15 or more employees working there at the relevant time. Dave's Diesel is owned by David Szybunka.

[11] Mr. Mella was Dave Diesel's part time accountant and bookkeeper, although he performed services in the nature of a chief financial officer for the company. Mr. Mella had no professional designations in accounting, but had worked for his father's accounting business and had experience with computers and various computer programs including accounting programs.

[12] Mr. Mella was hired through his company, Matrix Consulting Ltd ("Matrix") in about 2008. Neither Mr. Mella nor Mr. Szybunka was sure when the business relationship began. It ended in October 2014 when Mr. Szybunka discovered that Mr. Mella had been stealing from him.

[13] In the interval, the two men became friends. Mr. Mella was the MC at Mr. Szybunka's wedding, they socialized together, and Mr. Szybunka developed a strong trust in Mr. Mella. They frequently discussed the difficulties Mr. Szybunka was having in the lengthy divorce proceedings with his first wife.

[14] Mr. Szybunka had no interest in accounting or financial management and focused his efforts on the business of repairing diesel engines and technical developments. As a result, Mr. Mella had almost total control of the financial side of the business.

[15] By July 2008, Mr. Mella was diverting funds from the Dave's Diesel's bank account to accounts he had set up as electronic payees. These accounts were his personal American Express Card, his personal Capital One Master Card, his personal CIBC VISA Card and a "Telpay" account linked to his personal bank account.

[16] Initially, he started with relatively small transfers, but was undoubtedly emboldened by not being questioned on any of the transactions for over seven years. The amounts stolen were:

2008 $41,763.59 through 10 transactions;

2009 $156,258.50 through 19 transactions;

2010 $216,191.08 through 58 transactions;

2011 $239,032.24 through 44 transactions;

2012 $755,435.42 through 68 transactions;

2013 $784,117.05 through 86 transactions; and

2014 $465,491.14 through 67 transactions.

[17] These amounts are taken from an agreed statement of facts entered at trial.

[18] Payments to Mr. Mella's American Express card totaled $1,300,000 over the relevant period. Payments to his Capital One Master card totaled $146,000. Payments to his CIBC VISA card were $100,000, and the Telpay account received $1,124,000.

[19] The credit card payments were all for personal purchases by Mr. Mella. The funds transferred through Telpay were used for personal purposes, including payments to Mr. Mella's mother, payments to support his failing businesses (a technology company, a coupon franchise company, and a fitness club franchise he inherited from his sister), condominium purchases for his own residential purposes, and generally to finance an extravagant lifestyle. The first condominium purchased was used initially as Mr. Mella's residence. When he purchased a larger one in the same building, he lived in that one and rented out the first one. Both were heavily mortgaged.

[20] 2014 was only a partial year, as Mr. Szybunka became concerned about the lack of profitability of his company, and called in MNP LLP, forensic accountants, to review the bank statements and company books. MNP immediately identified the electronic transfers to the four fake accounts. Mr. Szybunka knew nothing of these accounts.

[21] Before Mr. Szybunka shut down the accounts or stopped making payments to the four fake accounts, Mr. Mella got wind of his game being found out and removed the four accounts himself, but not before making tens of thousands of dollars of final payments to them before deleting them.

[22] MNP produced a report detailing the extent of the fraud, and Mr. Szybunka and Dave's Diesel fairly quickly commenced an action against Mr. Mella and a number of his corporations for the recovery of the amount stolen.

[23] Mr. Mella defended the civil action brought against him, but ultimately consented to judgment against himself in the amount of approximately $2,300,000, acknowledging in the judgment that the judgment amount had been obtained by him from Dave's Diesel through theft and fraud. Mr. Mella was represented by counsel to the point of the Consent Judgment.

[24] Mr. Szybunka testified that during the litigation, he went to Mr. Mella's condominium to confront him. When he rang the apartment to be let in, a male voice threatened him with "exposure" of his misdeeds if he didn't stop the action against Mr. Mella. Mr. Szybunka could not identify the voice and assumes it was someone Mr. Mella had put up to threaten him, if it was not Mr. Mella himself. Mr. Szybunka ignored this threat.

[25] Mr. Szybunka put in evidence an email he received from Mr. Mella threatening to tell Mr. Szybunka's ex-wife about the "scheme" to reduce the value of Dave's Diesel to reduce the value of her share of the matrimonial property if Mr. Szybunka did not back off the civil proceedings.

[26] I am satisfied beyond a reasonable doubt that the email as entered in evidence was created and sent by Mr. Mella. Mr. Szybunka ignored this email.

[27] Mr. Szybunka also testified as to the difficulties he had collecting on the Judgment. By the time of the discovery of the fraud and theft, it appears that Mr. Mella had little to show for his embezzlement. The businesses he had invested in were insolvent but for the gym franchise, but it went out of business when Mr. Mella was unable to pay its debts. In conjunction with the Consent Judgment, Mr. Mella paid Mr. Szybunka some $73,000 he had in his RRSPs.

[28] Evidence was led on the sentencing by way of a letter from Mr. Szybunka's lawyer that a total of $92,610.82 has been collected on the Judgment. There may be an additional $11,800 in court as a result of foreclosure proceedings on one of the condominiums Mr. Mella had purchased using Dave's Diesel funds.

[29] The civil proceedings were difficult. Mr. Mella was found in contempt of court on three occasions for breaching court orders issued in the collection proceedings. On the second contempt finding, he spent three months in jail. On the third contempt, he was sentenced to a year in jail.

[30] Mr. Szybunka eventually reported the crimes to the RCMP. The first Information was sworn on June 28, 2017. Mr. Mella was served with the Information on July 24, 2017 and was released pending trial.

[31] His trial was initially set for April 29, 2019. However, in the face of the collection proceedings and his pending criminal trial, Mr. Mella absconded to Belize in late 2018 or early 2019. Mr. Mella had learned that there was no extradition treaty between Canada and Belize.

[32] I heard evidence at trial that while in Belize, Mr. Mella emailed Mr. Szybunka telling Mr. Szybunka that he had created a website that would detail all of Mr. Szybunka's financial misdeeds for the world to see. Mr. Mella threatened Mr. Szybunka that unless he paid Mr. Mella $350,000 by a certain date, he would launch the website.

[33] I am satisfied beyond a reasonable doubt that the threatening email was created and sent by Mr. Mella. Mr. Szybunka ignored the email.

[34] Mr. Mella also sent an email to Mr. Szybunka with a veiled threat of physical harm to Mr. Szybunka. I am satisfied that Mr. Mella created and sent this email to Mr. Szybunka. Mr. Szybunka ignored this email as well.

[35] The Crown had learned that Mr. Mella was in Belize in March 2019 and became concerned that Mr. Mella would not return to Alberta for his upcoming trial. On March 21, 2019, a Canada-wide warrant was issued for Mr. Mella because he failed to personally attend a bail review hearing on March 14, 2019.

[36] I heard evidence on the pre-trial ***Jordan*** application that Mr. Mella was deported from Belize in May 2020. Belize authorities were aware that there was an outstanding all-Canada warrant for Mr. Mella, and they appear to have notified Canadian authorities about Mr. Mella's pending arrival in Canada. He was arrested at Toronto airport on May 8, 2020, as he got off his flight from Belize.

[37] Mr. Mella was on remand in Toronto from May 8 until he was transported to Edmonton on May 28. As soon as Mr. Mella was returned to Edmonton, he began to serve the one-year civil contempt sentence. Bail was not spoken to until April 22, 2021 when Mr. Mella had nearly completed serving his civil contempt sentence. Bail was denied.

[38] By the time Mr. Mella returned to Canada, the Covid 19 pandemic had begun. A new trial was set for January 11, 2021. That trial had to be cancelled because Mr. Mella was quarantined at FSSC. According to Mr. Mella, an infected inmate had been transferred from the Edmonton Remand Centre to FSSC and had not been isolated. When his infection was discovered, this inmate had been exposed to all of the inmates in the unit Mr. Mella was in. Mr. Mella contracted Covid 19 himself at the time.

[39] The trial was rescheduled to October 18, 2021, and September 7-10 were also scheduled for pre-trial applications, including the ***Jordan*** application.

[40] As noted above, I dismissed the ***Jordan*** application and the trial commenced on October 18.

[41] At trial, Mr. Mella testified and gave an incredible account of how Mr. Szybunka impliedly agreed to all of the transfers and transactions as part of a scheme to devalue Dave's Diesel to reduce Mr. Szybunka's matrimonial property obligations to his former spouse. According to Mr. Mella, he had a completely free hand to remove whatever amounts he wanted from Dave's Diesel to invest them in investments to be in Mr. Mella's name. Once Mr. Szybunka's matrimonial property action was settled, Mr. Mella would repay Mr. Szybunka from these investments minus a 25% share for him.

[42] In my decision on conviction, I held that Mr. Mella was neither a believable or reliable witness. I characterized Mr. Mella's evidence as to the "scheme" as being fanciful and that there was a total absence of an air of reality to it.

[43] I had no hesitation in finding that the Crown had proven beyond a reasonable doubt that Mr. Mella stole and defrauded Dave's Diesel of over $2,000,000 over a seven-year period.

[44] The most telling aspects of the case was Mr. Mella's greed and complete disregard for Mr. Szybunka. When the business appeared to be failing and needed funds to stay in operation, Mr. Szybunka cashed in RRSPs and injected the proceeds into the business. Mr. Mella says he discouraged Mr. Szybunka from doing that. Yet Mr. Mella quickly stole whatever Mr. Szybunka had put into the company. Why Mr. Mella was intent on killing the golden goose is an unanswered question. There was no evidence of any motive other than greed, presumably a desire to live a style of life Mr. Mella was incapable of providing for himself by legitimate means. Mr. Szybunka must certainly ask himself constantly, what did I do to him to have him try his best to ruin my life?

[45] I found no fault on the part of Mr. Szybunka, and the evidence of any "misdeeds" on Mr. Szybunka related only to the alleged scheme to reduce his ex-wife's share of the matrimonial property, and some questionable business expenses written off for tax purposes. Mr. Szybunka emerged from trial as a man who had trusted his friend too much, paid too little attention to the financial aspects of his business, and was frustrated by divorce proceedings. No air of reality was created by Mr. Mella in his attempts to disparage his former friend and employer.

Positions

[46] The Crown seeks a sentence of between 8 and 10 years, a DNA order section 487.051(3) of the *Criminal Code*, a restitution order under section 738 of the *Criminal Code* in the amount of $2,564,840.02, and a fine in lieu of forfeiture in the amount of $2,564,840.02 of the *Criminal Code*.

[47] The 8 to 10-year sentence is comprised of 8 years for the fraud/theft and additional sentences for uncharged offences, being failing to appear, extortion, and money laundering.

[48] The Crown acknowledges that Mr. Mella is entitled to credit for pre-trial custody on a 1.5 to 1 basis. It opposes credit beyond that, noting that Mr. Mella has not suffered markedly more than the general public as a result of Covid.

[49] Ms. Quinlan, on Mr. Mella's behalf, argues that Mr. Mella should receive a sentence of between 5 and 6 years, before consideration of pre-trial custody and *Charter* considerations relating to the section 7 and section 12 *Charter* applications brought on Mr. Mella's behalf.

[50] Mr. Mella acknowledges that a restitution order may be imposed but questions the need to do so having regard to the civil judgment. If a restitution order is imposed, Ms. Quinlan argues that it should have time to pay set at 10 years.

[51] Ms. Quinlan submits that forfeiture or a fine in lieu is not available in this case, and argues that a DNA order serves none of the purposes of sentencing.

[52] Mr. Mella argues that the harsh conditions in remand along with operational failings by Ontario correctional staff, at FSCC, and at ERC, amount to breaches of his section 7 rights, and also amount to cruel and unusual punishment, in violation of his section 12 rights. He argues that even if I do not find *Charter* breaches, the hardships faced by Mr. Mella while on remand warrant a reduction in sentence. Ms. Quinlan argues that pre-sentence hardships in custody warrant constitute mitigating circumstances

[53] Ms. Quinlan argues a number of specific breaches on the part of correctional staff:

1. That the state failed to protect Mr. Mella from contracting Covid 19, contrary to section 7 of the *Charter*; and
2. Mr. Mella was subjected to harsh conditions while in quarantine or lockup, violating Mr. Mella's section 7 and 12 rights.

[54] Ultimately, Mr. Mella submits that he should be given significant credit against his sentence

Case Law

[55] Both parties submitted a large number of cases to support their positions:

Crown:

R v Perez, 2012 ABCA 393
R v Johnson, 2010 ABCA 392
R v Stirling, 2010 ABCA 338
R v Ambrose, 2000 ABCA 264
R v Bracegirdle, 2004 ABCA 252
R v McKinnon, 2005 ABCA 8
R v Fulcher, 2007 ABCA 381
R v Drabinksy, 2011 ONCA 582
R v Boyes, 2013 ABPC 105
R v Neilson, 2020 ABQB 556
R v Reeve, 2020 ONCA 281
R v Shrivastava, 2019 ABQB 663
R v Rideout, 1990 CarswellNfld 92 (Nfld SC)
R v Zenari, 2012 ABCA 279
R v Davis, 2014 ABCA 115
R v Bertram, (1990) 11 WCB (2d) 233 (ONCA)
R v Thomas, 2014 ABPC 280
R v Jaasma, 1976 CarswellAlta 190 (ABCA)
R v Cameron, 2020 ABCA 405
R v Scherer, 1984 CarswellOnt 79

R v Waxman, 2014 ONCA 256
R v Dunkers, 2018 BCCA 363
R v Cowan, 1987 CarswellBC 1317
R v Liknaitzky, 1981 CanLII 1129 (ABQB)
R v Gruson, 1963 CanLII 729 (ONCA)
R c Larche, 2006 SCC 56
R v Shin, 2015 ONCA 189
R v Barna, 2018 ONCA 1034
Sheck v Canada (Minister of Justice), 2019 BCCA 364
R v Shaw, 2017 ABCA 203
R v Shandro, 1985 ABCA 304
R v P(DK), [1991] BCJ No 2998 (BCCA)
R v Windrum, [1992] SJ No 143 (SKCA)
R v JT, 2021 ONSC 1532
R v Sharpe, 2008 MBQB 227
R v B(MO), 1995 CarswellBC 774 (BCSC)
R v Thompson, 1989 ABCA 409
R v Bean, 2020 ABCA 409
R v Eizenga, 2011 ONCA 113
R v Schoer, 2019 ONCA 105
R v Chung, 2021 ONCA 188
R v Angelis, 2016 ONCA 675
R c Lavigne, 2006 SCC 10
R c S(A), 2010 ONCA 441
R v McLean, 1996 CarswellNB 599 (NBCA)
R v Khatchatourov, 2014 ONCA 464, and
R v B(RL), 1992 CarswellAlta 504

[56] Additional Crown authorities:

R v Lloyd, 2016 SCC 13
Munoz v Alberta (Director, Edmonton Remand Centre), 2004 ABQB 769
R v Munoz, 2006 ABQB 901
R v Barrett, 2020 ABPC 81
R v Chan, 20056 ABQB 615
R v Walters, 2012 ABQB 83, and
R v Cardinal, 2020 ABCA 376

[57] Further cases were provided at the hearing:

R v Pete, 2019 BCCA 244

R v Ceasor, 2021 ONCA 54

R v Patrick, 2006 ABPC 124

R v Gagnon, 1992 CarswellAlta 532 (ABQB)

R v Law, 2021 ABCA 326

R v Matthiessen, 1998 ABCA 130

R v Freake, 2018 ABPC 106

R v Pammett, 2016 ONCA 979

R v Wilson, 2008 ONCA 510

R v Rusnak, 2001 ABPC 173

R v Walker, 2016 ABQB 695

R v Patrick, 2006 ABPC 124

[58] Defence:

R v Mella, 2021 ABQB 785

R v Byron, 2021 ABQB 883 and 884

R v Prystay, 2019 ABQB 8

R v Morgan, 2020 ONCA 279

R v McDonald, 2021 ABCA 262

R v Malmo-Levine, [2003] 3 S.C.R. 571

Trang v. Alberta (Edmonton Remand Centre), 2007 ABCA 263

R v Blanchard, 2017 ABQB 369

British Columbia Civil Liberties Association v. Canada (Attorney General), 2019 BCCA 228

British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCSC 62

Bedford v Canada (Attorney General), 2013 SCC 72

R v Boudreault, 2018 SCC 58

R v Smith, [1987] 1 SCR 1045

Canadian Civil Liberties Association v Canada (Attorney General), 2019 ONCA 243

Ogiamien v Ontario (Community Safety and Correctional Services), 2017 ONCA 667

R v Monney, [1999] 1 SCR 652

R v Robinson, 2020 ABCA 222

R v Tabor, 2003 SKCA 59

*R v Tag El D*in, 2020 ABPC 188

R v Adams, 2016 ABQB 648, aff'd 2019 ABCA 149

British Columbia Civil Liberties Association v Canada (Attorney General), 2018 BCSC 62 (CanLII) ["BCCLA (Sup Ct)"], aff'd 2019 BCCA 228

Brazeau v. Canada (Attorney General), 2020 ONCA 184

Francis v. Ontario, 2020 ONSC 1644, aff'd 2021 ONCA 197

R v Aqqiaruq, 2009 NUCJ 26

United Nations Standard Minimum Rules for the Treatment of Prisoners

R v Nasogaluak, 2010 SCC 6 at 747

R v Roberts, 2020 ABPC 99

R v Summers, 2014 SCC 26

R v Adams, 2019 ABCA 149

R v Mullen, 2017 SKQB 237

R v Gordey, 2020 ABQB 425

R v Duncan, 2016 ONCA 754

R v Macindoe, 2020 ABPC 120

R v Shivak, 2021 ABQB 72

R v Gaudrault, 2021 ABQB 461

R v Julom, 2021 ABPC 137

R v Zhu, 2021 ABPC 252

R v Bell, 2020 ONSC 2632

R v Joshua Barreira, 2020 ONSC 6558

R v Campbell, 2020 NUCJ 28

R v Bah, 2020 QCCQ 2199

R v Suter, 2018 SCC 34

R v Pham, 2013 SCC 15

R v EF, 2021 ABQB 639

R v Hearns, 2020 ONSC 2365

[59] Additional Defence cases:

R v Davis, 2014 ABCA 115

R v Davatgar-Jafarpour, 2019 ONCA 353

R v Thiel, 2021 ABPC 288

R v Dobis, [2002] OJ No 646 (ONCA)

R v Lacasse, 2015 SCC 64

R v Samji, 2016 BCPC 301

R v Macleod, 2017 ABQB 722

R v Troung, 2013 ABCA 373

R v Larche, 2006 SCC 56

R v Neilson, 2020 ABQB 556

R v Zelensky, 1978 CanLII 8 (SCC)

R v Briggs, 2001 CanLII 24113 (ONCA)

R v Rafilovich, 2019 SCC 51

R v Cameron, 2017 ABQB 554, 2020 ABCA 405, and

R v Dwyer, 2013 ONCA 34

Analysis

[60] I do not intend to review in this decision all of the cases I was referred to in argument. This decision turns on only a few of them, mainly cases from the Alberta Court of Appeal. Pre-2004 cases are of limited assistance as the maximum penalty for fraud was increased to 14 years from 10 years that year and new aggravating factors were added.

Basic Sentence

[61] Mr. Mella was convicted of fraud and theft. The necessary elements for each offence have been made out. However, I am of the view that the ***Kienapple*** principles apply such that Mr. Mella should be sentenced on only one of the convictions. The convictions are the result of the same acts. Since the potential sentences are more severe for fraud, I will sentence Mr. Mella on the fraud conviction and stay the theft conviction.

[62] This is an area where the parties are not very far apart. Both Crown and defence recognize that denunciation and deterrence are the most important elements in a sentence for embezzlement. Theft from an employer "is a very serious crime and carries a high degree of moral blameworthiness" (***R v Perez*** at para 21).

[63] There is no starting point sentence mandated in Alberta for fraud or theft. The closest thing to a starting point is ***R v Davis***, which categorizes fraud and theft and suggests ranges for each category.

[64] The Alberta Court of Appeal described three categories of fraud and theft. The first is non-lawyer fraud and theft; the second is fraud or theft committed by dishonest lawyers; the third is non-lawyer frauds where the amount stolen exceeds $1,000,000.

[65] The first category suggests sentences of up to two years, depending on the aggravating and mitigating factors.

[66] The second category, dishonest lawyers, suggests a very broad range depending on the amount stolen: mid six figures of 3 to 4 years, and over a million dollars 7 to 8 years.

[67] The third category, thefts over $1,000,000 by non-lawyers had a range of between 3 and 6 years. That is the category applicable here. The amount involved is over $2,000,000.

[68] It is not necessary for me to recite or review here the legion of cases that emphasize the need to denounce this type of crime. Employers are vulnerable to their trusted employees. Those who commit these types of offences need to be treated severely to deter them from future crimes and to deter others who may be tempted to take advantage of their positions and knowledge to steal from their vulnerable employer.

[69] The identified sentencing range depends on the aggravating-mitigating circumstances analysis. Here, the aggravating circumstances are overwhelming:

1.The theft was from his employer;

2. The theft was motivated solely by greed;

3. Mr. Mella had worked himself into a position of great trust with Mr. Szybunka and betrayed that trust to the fullest extent he could;

4. The amount stolen exceeded $2,000,000;

5. The fraud took place over a period of over 7 years. It was continuous. It appears that whenever Mr. Mella wanted money he took it. His greed grew as his thefts went undetected.

6. The fraudulent scheme was carefully planned, although not particularly sophisticated in this era of electronic banking;

7. The harm inflicted on Mr. Mella's victim was significant. Mr. Mella diminished the profits of the business over a lengthy period, depriving Mr. Szybunka of the fruits of his labours, greatly diminishing the value of his business, leaving his business in a financial mess and in debt to Canada Revenue Agency, and depriving Mr. Szybunka of his retirement savings.

8. The fraud only ended when Mr. Mella's thefts were discovered. Even after he was found out, he made a last grab at the bank account before trying to cover his tracks.

9. Additional crimes were committed after Mr. Mella was found out, including absconding to Belize and failing to appear pursuant to a court order. These are not aggravating factors with respect to the basic sentence as they are dealt with in the context of uncharged offences. The consequences of his leaving the jurisdiction and failing to appear for trial caused the April 2019 trial to be adjourned. I will deal with these aggravating sentences separately.

[70] Mitigating factors are few:

1. Mr. Mella has no prior criminal record;
2. Mr. Mella has community supports and in particular has provided a number of letters of reference. This is unsurprising, as embezzlers are essentially Jekyll and Hyde personalities. They work their way into positions of trust, donate to charity, help family and friends, all at the expense of the employer they are secretly stealing from. I note the Court of Appeal's comments in ***R v Felix***, 2019 ABCA 458 at para 77:

> [77] In 17 reference letters, family and friends attested to Mr. Felix's generosity and reliability. These testimonials are of little mitigating value. They contain inaccurate assumptions about Mr. Felix's character and contribution to the community. Simply put, the authors of these letters did not know Mr. Felix as well as they thought. The testimonials illustrate the breach of trust inherent in Mr. Felix's crimes: he was undermining the health of his community while pretending to be a responsible and supportive member of it. They also show that Mr. Felix was not driven to his illegal activities by unfortunate social or economic circumstances. He was simply motivated by greed.

   The same can be said of the support for Mr. Mella.

3. Mr. Mella has not accepted any responsibility for his crimes. This is not an aggravating factor per se, but since one of the objectives of sentencing is to promote the taking of responsibility by the offender, the absence of any acceptance of responsibility is a factor that demonstrates that the sentence should be at the high end of the scale as it may take some time for him to appreciate the magnitude of his wrong. Instead of accepting any

responsibility, Mr. Mella attempted (very unsuccessfully) to deflect blame onto Mr. Szybunka and concocted an incredible story to try to justify his actions.

4. Mr. Mella has made some restitution. It is mitigating that he eventually consented to judgment in favour of Dave's Diesel and paid over his RRSP funds. Those may have otherwise been difficult to obtain. Beyond that, all other attempts to collect have been met with opposition and defiance. The civil contempt convictions speak to the difficulties in collection. Mr. Mella has already been punished for his behaviour in the collection proceedings but there remains some mitigation in the voluntary restitution that hasn't been negated by his subsequent behavior.

5. Remorse is frequently a mitigating factor. Lack of remorse is not aggravating. Mr. Mella has shown no signs of remorse over the past seven years since he was found out. There is no mitigation here. If anything, I would characterize Mr. Mella as unrepentant.

6. Collateral consequences are mentioned such as loss of reputation, employment and professional designation. Nothing was really argued in Mr. Mella's favour about these things. He appears to have been mainly self-employed through his adulthood and obviously has some entrepreneurial skills. He has no professional designations, and apart from the letters of reference provided, I heard little about his reputation. Absent taking responsibility and being truly remorseful, I see no mitigating circumstances here. Mr. Mella would be a danger to any employer who might choose to hire him in a position where he could steal from that employer.

[71] Of the convictions for fraud by a non-lawyer of substantial amounts of money, there are several Alberta cases that are somewhat close to these circumstances. after trial. These all involved investor fraud. The most recent, ***R v Cameron*** 2020 ABCA 405 8.8M dealt with both fraud on investors and tax evasion. Mr. Cameron, who had no previous criminal record, defrauded his victims of millions of dollars and did not report any of the income to Canada Revenue Agency. He was convicted of both fraud and tax evasions.

[72] The fraud took place over a five-year period. The amount lost by the investors was over $8,000,00. There was no explanation as to where the stolen money had gone and while Mr. Cameron appears to have obtained social assistance, he continued to live a life that included golfing at a private golf course and living in a luxury home. There had been limited restitution over five years. The trial judge sentenced him to 10 years for fraud and four years consecutive for tax evasion. The Court of Appeal found no error with the fraud sentence, but reduced the overall sentence to 11 years based on totality.

[73] In ***R v Iyer***, 2016 ABQB 680, Mr. Iyer had no previous criminal record. He was convicted of fraud on a number of investors over a multi-year period. The amount stolen was $2,464,000. He received a sentence of seven years.

[74] ***R v Johnson***, 2010 ABCA 392 was also a fraud case. There, the fraudster, a pastor, defrauded some 50 investors of $2,430,000 in a Ponzi scheme he conducted over a five-year period. His 13-year sentence following trial was reduced to 10 years by the Court of Appeal. Many of the victims gave Victim Impact Statements outlining how they had lost their retirement savings and had to keep working after normal retirement age to support themselves.

[75] By way of example from other jurisdictions, in ***R v Waxman***, 2014 ONCA 256 the Ontario Court of Appeal imposed an eight-year sentence in a fraud scheme by an employee. The

employer was defrauded of over $15,000,000. A fine in lieu of forfeiture was imposed along with a restitution order.

[76] In ***R v Reeve***, 2020 ONCA 381, the Ontario Court of Appeal substituted a 10-year sentence for the 14-year sentence imposed following trial. This was a fraud that involved over $10,000,00.

[77] The high point in sentencing for fraud appears to be the 12-year sentence imposed on a thieving insurance underwriter and investment advisor who stole nearly $2,000,000 from the Salvation Army and 14 individuals in ***R v Rideout***, 1990 CarswellNfld 92 (NFSC).

[78] It would appear from the three recent Alberta cases that the "range" for non-lawyer fraud involving over $1,000,000 has now increased to 7-10 years where significant mitigating factors such as a guilty plea and significant restitution are absent. This is a case that would certainly be at the top of the ***Davis*** range, and that range has been widened in recent years.

[79] I note that Eidsvik J did a similar review of fraud cases in ***R v Neilson***, 2020 ABQB 556l and concluded at para 103:

> [103] In terms of ranges of sentences, I note that the recent 2020 Ontario Court of Appeal case, ***Reeve***, reviewed many serious fraud cases (including ***Johnson*** from our Court) and summarised that very serious frauds, with serious breaches of trust, were landing sentences in the 8 to 12 year range.

[80] We have come to the same basic conclusion. Mine focuses on Alberta decisions instead of Ontario, which appears to treat fraud more harshly than Alberta.

[81] Frankly, the rest of the cases cited are generally unhelpful. They deal with different circumstances, different aggravating circumstances and different mitigating circumstances. Many are sentencing decisions following a guilty plea.

[82] As a result, I have no disagreement with the Crown's submission that the fraud portion of the sentence should attract an eight-year sentence.

Add-ons for Uncharged Offences

Section 725

[83] Ms. Quinlan did not dispute the basic principles under section 725, nor that the evidence at trial was sufficient to convict Mr. Mella of threatening Mr. Szybunka, extortion and failing to appear. She disputed the money laundering allegation. Ms. Quinlan's position was that section 725 did not apply to the circumstances of this case, citing ***R v Truong***, 2013 ABCA 373.

[84] In ***Truong***, the offender pled guilty to a charge of voyeurism by way of videotaping sexual activity between himself and the complainant. The resulting video showed the offender sexually assaulting the complainant. For some reason, the accused was never charged with sexual assault.

[85] The trial judge sentenced Mr. Truong to 15 months less three months for time served. The trial judge declined to apply section 725 on the basis that it would be unfair to the accused and would elevate his sentence to the three-year starting point for a major sexual assault if they did.

[86] The Court of Appeal noted that the appropriate sentence for voyeurism would have been five months but for the evidence of sexual assault. It acknowledged that the trial judge was correct in stating that the sexual assault would increase the voyeurism sentence even though it was uncharged. The Crown had made it clear that it was seeking a minimum of three years.

[87] On the Crown's appeal, the Court of Appeal increased the sentence to 18 months. Both the majority and the minority recognized that the fact of the sexual assault should be an aggravating factor on sentencing. The majority stated at para 17:

> [17] Section 725(1) (c) vests a broad discretion in the trial judge, who is in a preferred position to determine if its application may result in unfairness. We are not persuaded that the trial judge unreasonably exercised his discretion not to apply section 725(1) (c) in the circumstances of this case. As the Crown appropriately conceded that it would not be pursuing its second ground of appeal, should the first ground fail, the appeal must be dismissed.

[88] The law is clear that a court can impose a sentence for an uncharged offence where the offence has been proven beyond a reasonable doubt in the trial on other matters. That comes from section 725(1)(c) of the *Criminal Code*:

> **725 (1)** In determining the sentence, a court
>
> **(a)** shall consider, if it is possible and appropriate to do so, any other offences of which the offender was found guilty by the same court, and shall determine the sentence to be imposed for each of those offences;

[89] The Supreme Court of Canada applied section 725 in ***R v Larche***, 2006 SCC 56, noting at paragraph 47:

> 47 Section 725(1)(*c*) has three components, which may be broken down this way: "In determining the sentence, a court . . . [1] may consider any facts [2] forming part of the circumstances of the offence [3] that could constitute the basis for a separate charge." The use of the word "may" signifies that the provision is discretionary, as I have already mentioned. The requirements of "forming part of the circumstances of the offence" and the necessity that these facts be capable of constituting "the basis for a separate charge" are two necessary preconditions for the exercise of that discretion.

[90] There is certainly a connection between the failing to appear and the offence and I do not see that it would be unfair to sentence Mr. Mella on that charge in the context of his conviction on the underlying charges. The threats to Mr. Szybunka, the extortion attempts, and the failing to appear are all after the fact conduct. Mr. Mella was steadfast in denying guilt. His after the fact conduct, in consenting to a judgment in fraud, threatening Mr. Szybunka, extorting him and fleeing the country to avoid prosecution, are all admissible evidence as part of the narrative in this case. His evidence in particular needed to be put in the context of his actions instead of just his words in court.

[91] Had this been a jury trial, I have little doubt that the evidence of the threat to go to the ex-wife with the "scheme", the website threat, and the absconding to Belize would all have been allowed to go to the jury as evidence supporting guilt.

[92] ***Larche*** notes that there is a benefit to the accused in the application of section 725 in that the accused's sentence will be subject to the totality principle, and any sentence for the uncharged offences may as a result be less than it would have been if charged separately.

[93] I am also mindful that I must be careful to avoid any double-counting in sentencing. If additional time is imposed because of uncharged offences that have been proven during the trial, that conduct cannot also be considered as aggravating to the sentence under section 718.

[94] My task here is to determine if the Crown has proven the un-charged offences, and if so if there is any unfairness to Mr. Mella in being sentenced for them at this time.

Failing to appear

[95] It is beyond any doubt whatsoever that Mr. Mella knowingly and willfully failed to appear for his trial. He was well aware of the trial date and deliberately chose not to return to Canada to stand trial. It was not proven that Mr. Mella had actual knowledge of the March date ordered by Belzil J when it became clear that Mr. Mella might not return to Canada for his trial. Mr. Mella did not confirm that he had received the email notification before the appearance date.

[96] Ms. Quinlan did not dispute that the Crown had met the burden with respect to this offence. Ms. Rosborough seeks a one-year sentence for that offence, reduced to 6 months for totality; Ms. Quinlan suggests a 30-day sentence would reflect parity with other cases of failing to appear.

[97] Ms. Rosborough cites ***R v Shaw***, 2017 ABCA 203. In that case, Mr. Shaw failed to show up in court to attend his murder trial. He changed his name and moved to British Columbia, where he evaded detection for 18 months. He received an 18-month sentence for failing to appear, plus two concurrent four-month sentences for breaching other release conditions.

[98] In ***R v JT***, 2021 ONSC 1532, the accused did not show up on the second day of his trial for sexual assault. He fled to another province where he lived under an assumed name for over a year. He received a sentence of 12 months plus three months probation for the failing to appear charge. That court referred to ***Shaw*** favourably.

[99] In ***R v Sharpe***, 2008 MBQB 277, the accused fled after the Crown closed its case in a robbery trial. He lived undetected for nearly 10 years. He received a six-month consecutive sentence for failing to appear.

[100] A one-year sentence for failing to appear was imposed in ***R v B(MO)***, 1995 CarswellBC 774 (BCSC). There, the accused was eventually extradited from the Philippines after failing to appear for trial.

[101] Ms. Quinlan notes that most sentencing for this offence occurs in Provincial Court and frequently in conjunction with other offences. She cited a range of 1 to 3 months as being common sentences.

[102] I note that there are there are relatively few written decisions on failing to appear sentences.

[103] From the cases cited, I conclude that the range of sentences for failing to appear for trial in a major case is 6 to 12 months.

[104] Here, this was not a simple failing to appear for a docket appearance or a scheduling appearance. It was failing to appear for a week-long trial, involving multiple witnesses.

Fortunately, because of the March Order and Mr. Mella's failure to appear for that, the Crown was able to call off witnesses so there was less inconvenience. Nevertheless, the victim, Mr. Szybunka, had to wait a further two and a half years to have the trial hanging over him.

[105] It was a planned and deliberate failing to appear. Mr. Mella chose to go to Belize because he understood it to be a non-extradition country. He would be safe from Canadian authorities there. Mr. Mella made a conscious choice to evade prosecution. He appears to have deceived his lawyer as to his intentions to return to Alberta for trial. He had ample opportunity to change his mind.

[106] This was a crime against the administration of justice. Denunciation and deterrence are the most important, if not the only considerations on this type of offence. There are no mitigating factors. Mr. Mella only returned to Canada because his behaviour in Belize caused him to be deported. This offence is at the high end of the scale.

[107] I cannot distinguish this case from the Alberta Court of Appeal decision in ***Shaw***, and consider a one-year sentence appropriate.

[108] I see no unfairness to Mr. Mella in dealing with this uncharged offence in this sentencing. It would be a waste of everyone's time and spend valuable court time dealing further with this matter. Mr. Mella will benefit from totality concessions made by Ms. Rosborough if he is sentenced at this time. He will also benefit from the fact that having been sentenced for this, he cannot be charged.

[109] I will deal with totality further on in this decision.

[110] Ms. Rosborough argues that the circumstances of the offence include money laundering under section 462.31 of the *Criminal Code*. That section provides:

> **462.31 (1)** Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that, or being reckless as to whether, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of
>
> **(a)** the commission in Canada of a designated offence; or
>
> **(b)** an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

[111] Here, the Crown argues that the elements of this offence have been made out: that Mr. Mella deliberately defrauded Dave's Diesel. He converted the proceeds of his crime to his personal use. He concealed a large portion of the stolen funds using Telpay to "layer" the theft and put the stolen funds into his own corporations or converted them to cash.

[112] The Crown relies particularly on the recent decision in ***R v Neilson***, 2020 ABQB 556. At para 106, Justice Eidsvik stated:

> [106] With respect to the money laundering, this action can be distinguished from the fraudulent misrepresentations that incentivised the victims to invest. Once Mr. Neilson had the funds, he then took steps to conceal and convert them – especially with respect to the Grenville funds where a large amount appears to have gone directly to the Philippines. This

> behaviour aggravates the fraud here. The separate theft convictions have been stayed by the Crown in order not to double count this criminal behaviour. Considering their distinct nature in this situation, the money laundering counts warrant sentences on a consecutive basis with the fraud counts.

[113] In that case, Mr. Neilson had been specifically charged with money laundering and had been convicted at trial of that offence.

[114] I am not convinced that the elements of money laundering have been made out other than perhaps in the context of how Mr. Mella committed the fraud against Dave's Diesel. His method was to electronically create payees in the Dave's Diesel bank accounts. The names of the payees were clearly identified. It took only minutes for MNP to uncover the fraud once they looked at the banking records and made a few inquiries of Mr. Szybunka about payees he did not recognize.

[115] In a general way, I view offences like money laundering and possession of the proceeds of crime as ones where the person dealing with the funds or who has possession of the funds cannot be proven to have been the thief or the person who committed the criminal act that obtained the funds. Otherwise, anyone who steals money and puts it in their own bank account would be guilty of theft and money laundering. That raises the ***Kienapple*** principles, and in this case I would apply them.

[116] I recognize that there are other situations, such as in ***Neilson***, where theft and money laundering may be separate and distinct, but I do not see this case as one of them. In any event, the application of section 725 is a discretionary one and I consider that it would be unfair to Mr. Mella to increase his sentence on account of this.

[117] I note that the Crown argued the complexity of the scheme and concealment as aggravating factors in the fraud and theft, and it would by double-counting to further increase Mr. Mella's sentence for money laundering.

Extortion

[118] The Crown seeks a one-year sentence for extortion, relying on the four incidents described above. In applying section 725 to these uncharged offences, I am satisfied that the undenied threats made to Mr. Szybunka form part of the circumstances of the underlying offences of fraud and theft. Mr. Mella was seeking to limit the consequences to him of having stolen over $2 million dollars from Mr. Szybunka. In taking a somewhat broad view of the "circumstances of the offence" I rely on ***R v Shin***, 2015 ONCA 189, where the offender's long history as a drug dealer was considered as an aggravating factor on sentencing.

[119] I do not need to spend any time on the veiled threat over the intercom system at Mr. Mella's condominium. It was not proven beyond a reasonable doubt that it was Mr. Mella who made the threat. While it is a logical presumption that if it was not Mr. Mella who did so, he was behind it. But proof beyond a reasonable doubt is not satisfied by logical presumptions.

[120] The second event was still in Canada and was Mr. Mella's threat to tell Mr. Szybunka's ex-wife about the "scheme" to devalue Dave's Diesel and reduce her matrimonial property entitlement. The facts are clearly made out in Mr. Mella's email to Mr. Szybunka.

[121] The other two circumstances are made out in emails from Mr. Mella to Mr. Szybunka from Belize. In one, Mr. Mella essentially says that if Mr. Szybunka tries to have anything done

to Mr. Mella while he is Belize, he has people or contacts who will do the same to Mr. Szybunka.

[122] The last extortion was Mr. Mella's threat to launch a website detailing Mr. Szybunka's misdeeds if he did not pay him $350,000.

[123] Extortion is dealt with in section 346 of the *Criminal Code*:

> **346 (1)** Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

[124] The threat to go to Mr. Szybunka's ex-wife with Mr. Mella's so-called scheme falls squarely in that section. Mr. Mella was attempting to pressure Mr. Szybunka into backing off on trying to collect what had been stolen from him. His threat was without reasonable justification. On his own evidence, which I rejected, he was the author of the scheme and had no reason to go to the ex-wife other than to cause difficulties for Mr. Szybunka. His testimony as to a change of heart after trying to defraud the ex-wife after seven years of supposedly trying to reduce the value of her matrimonial property was incredulous. The elements of extortion on this threat have been proven beyond a reasonable doubt.

[125] I find that the veiled threat to do harm in an email sent to Mr. Szybunka from Belize is capable of non-extortionary interpretations. I can understand why Mr. Szybunka might be concerned about receiving such an email as there is no evidence that he ever threatened, or had anyone threaten, Mr. Mella with any physical harm. But Mr. Mella's evidence as to what he intended by his email had an air of reality to it: if you try to do me harm I will reciprocate. It threatens a reciprocal response and does not suggest that he will go further than what might be done to him. There has never been a suggestion that Mr. Mella has been physically violent. I do not see that these facts make out the offence.

[126] The final threat was the threat to launch a website to publicize Mr. Szybunka's misdeeds unless Mr. Mella was paid $350,000. This in my view is a classic extortion. Pay or else I will do something to cause you harm. There was no evidence that Mr. Szybunka's supposed misdeeds were anything he might be concerned about if they became public. But in the face of a threat by a thief, Mr. Szybunka could expect that Mr. Mella was capable of and willing to publish falsehoods. Mr. Mella had no reasonable excuse or justification to do so. Extortion is made out by these circumstances beyond a reasonable doubt.

[127] Another offence that fits this situation is defamatory libel under section 302:

> **302 (1)** Every one commits an offence who, with intent
>
> > **(a)** to extort money from any person, or
> >
> > **(b)** to induce a person to confer on or procure for another person an appointment or office of profit or trust,
>
> publishes or threatens to publish or offers to abstain from publishing or to prevent the publication of a defamatory libel.

[128] I need not consider that section as I am satisfied that the circumstances amount to extortion under section 346.

[129] Accordingly, Mr. Mella has been shown to be guilty of two incidents of extortion. They are connected, related to the same matter with the same people involved. The Crown argues that an appropriate sentence would be 12 months, reduced to 6 months for totality.

[130] As with the failing to appear offence, I see no unfairness to Mr. Mella in dealing with these extortions now. He will benefit from totality and he will benefit from not having the prospects of further charges hanging over him

[131] The basic one-year sentence as argued for by the Crown is reasonable in the context of two separate threats made to the same victim separated by a period of some years. If tried together, they would likely have received consecutive sentences having regard to the lengthy gap between threats. A first offence sentence would be in the range of three months; the website extortion being a repetition of earlier threats to do harm and being somewhat more serious would likely attract a 6 to 12-month consecutive sentence.

[132] I will deal with the totality effect later.

Consecutive vs Concurrent

[133] It would be meaningless to have the sentences for these uncharged offences run concurrently with the sentence for the underlying conviction for fraud. The Court of Appeal considered this issue in ***R v Roberts***, 2020 ABCA 434 and was very sensitive to the offender's moral blameworthiness and the need to recognize and deal with separate offences in their own context.

[134] With uncharged offences, this issue may not arise as it would appear that sentences for uncharged offences are treated as "aggravating factors" and simply increase the sentence for the underlying conviction. I will consider the issue in any event.

[135] Here, there were essentially separate victims for each of these offences. The victim in the underlying fraud was Dave's Diesel, corporation. The victim of the extortions was Dave Szybunka. The victim of the failing to appear was the public. Each is entitled to separate consideration.

[136] The uncharged offences were committed at separate times. The fraud was committed over a seven-year period ending in 2014. The extortions were committed during the civil proceedings in 2015 and then while Mr. Mella was in Belize in 2019. The failing to appear was earlier in 2019.

[137] There is really no argument in favour of concurrent sentences and I would if necessary direct that all sentences be served consecutively.

Ancillary Orders

DNA

[138] The Crown seeks a DNA order under section 487.051(3). It is discretionary for these offences. Ms. Quinlan opposes the order, noting that Mr. Mella has no previous record and DNA is generally unhelpful for financial crimes such as the ones Mr. Mella has been convicted of.

[139] I agree with Ms. Quinlan in this case. DNA orders should not become routine and should only be ordered where appropriate. There is no basis here to believe that having Mr. Mella's DNA on file will be of future benefit as there is no reason to believe that Mr. Mella is likely to commit a crime of violence. I decline to grant the order sought.

Restitution

[140] The Crown seeks a restitution order in the amount of $2,564,840.02 being the amount it calculates Dave's Diesel was defrauded of less the amount actually collected through the civil proceedings totaling $93,449. This is under section 738 of the *Criminal Code*.

[141] Mr. Mella consented to judgment against him in March 2015 in the amount of $2,269,757. The additional $300,000 represents what MNP calculated as being the amount fraudulently transferred from the Dave's Diesel bank account to Mr. Mella's accounts. That amount would not make Mr. Szybunka whole as he estimates that he spent another $1M pursuing Mr. Mella, paying accounting fees to recalculate and restate Dave's Diesel financial statements over the years Mr. Mella stole from it, and further amounts he or Dave's Diesel had to pay to CRA as a result of refiled statements and tax returns.

[142] I am satisfied that the amount sought by the Crown has been proven and there should be an order for restitution in that amount.

[143] Frankly, the amount is likely academic as there is, on the evidence before me, no reasonable prospect that Mr. Szybunka and Dave's Diesel will recover much more than they have over the last seven years. Mr. Mella is not a young man. He will spend some considerable time in prison for these offences. When he is released, he will have a criminal record for financial crimes, which will make many types of jobs unavailable.

[144] From a moral perspective, he should spend the rest of his life working hard to repay the debt. Time will tell. He has accepted no responsibility yet, and has shown no remorse. He has not accounted for the stolen funds other than in a general way. He may have squirreled away some of the money.

[145] I consider it appropriate that there be a restitution order in the amount of $2,564,840.02. If necessary, I would agree to Ms. Quinlan's request to set 10 years as time to pay.

Fine in lieu of forfeiture

[146] The Crown also seeks a fine in lieu of forfeiture under section 462.37(3) of the *Criminal Code*. That section states:

> **Fine instead of forfeiture**
>
> **(3)** If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, instead of ordering the property or any part of or interest in the property to be forfeited, order the offender to pay a fine in an amount equal to the value of the property or the part of or interest in the property. In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property
>
> **(a)** cannot, on the exercise of due diligence, be located;

> **(b)** has been transferred to a third party;
>
> **(c)** is located outside Canada;
>
> **(d)** has been substantially diminished in value or rendered worthless; or
>
> **(e)** has been commingled with other property that cannot be divided without difficulty.

Imprisonment in default of payment of fine

(4) Where a court orders an offender to pay a fine pursuant to subsection (3), the court shall

> **(a)** impose, in default of payment of that fine, a term of imprisonment
>
> > **(i)** not exceeding six months, where the amount of the fine does not exceed ten thousand dollars,
> >
> > **(ii)** of not less than six months and not exceeding twelve months, where the amount of the fine exceeds ten thousand dollars but does not exceed twenty thousand dollars,
> >
> > **(iii)** of not less than twelve months and not exceeding eighteen months, where the amount of the fine exceeds twenty thousand dollars but does not exceed fifty thousand dollars,
> >
> > **(iv)** of not less than eighteen months and not exceeding two years, where the amount of the fine exceeds fifty thousand dollars but does not exceed one hundred thousand dollars,
> >
> > **(v)** of not less than two years and not exceeding three years, where the amount of the fine exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars,
> >
> > **(vi)** of not less than three years and not exceeding five years, where the amount of the fine exceeds two hundred and fifty thousand dollars but does not exceed one million dollars, or
> >
> > **(vii)** of not less than five years and not exceeding ten years, where the amount of the fine exceeds one million dollars; and
>
> **(b)** direct that the term of imprisonment imposed pursuant to paragraph (a) be served consecutively to any other term of imprisonment imposed on the offender or that the offender is then serving.

[147] As with restitution, this is a discretionary order. At the sentencing hearing, I confessed that I was unfamiliar with this remedy and sought Alberta authority as the Crown was relying on several Ontario cases: ***R v Schoer***, 2019 ONCA 105, ***R v Angelis***, 2016 ONCA 675, ***R v Waxman***, 2014 ONCA 256, and ***R v Chung***, 2021 ONCA 188 in its written submissions.

[148] ***R v Lavigne***, 2006 SCC 10 recognizes the remedy but notes that the remedy is discretionary and "may" should not be interpreted broadly. The remedy should be used to satisfy

two objectives: deprive the offender from the proceeds of crime, and to deter offenders and others from committing these types of offences.

[149] Ms. Quinlan opposes the order, arguing that it is not appropriate in the circumstances of Mr. Mella who has nothing of value and has very limited prospects of earning more than enough to support himself in a modest way let alone make substantial payments on a massive debt.

[150] The Crown advised that the section has been applied in Alberta on a number of occasions and cited ***R v Matthiessen***, 1998 ABCA 130, ***R v Gagnon***, [1992] AJ No 842 (ABQB), ***R v Freake***, 2018 ABQC 106, ***R v Rusnak***, 2021 ABPC 173, ***R v Patrick***, 2006 ABPC 124, and ***R v Walker***, 2016 ABQB 695. It notes that a fine in lieu of forfeiture was imposed on Mr. Neilson when sentenced by Justice Eidsvik in 2020. Her decision contains an excellent discussion of this somewhat new remedy.

[151] It seems to me that the intent of the section is to aid victims of financial crimes recover their losses in circumstances where the offender has made collection impossible or impractical by transferring assets out of the jurisdiction, transferring them to third parties, converting them into non-exigible assets, or not accounting for where the proceeds of crime have gone. If specific assets are identifiable, forfeiture orders can be made. If forfeiture is not possible, a fine may be considered. If assets are not accounted for, or cash is not accounted for, a fine may be considered.

[152] This is one of the latter situations. Mr. Mella stole over $2,000,000 over a seven-year period. Some of the funds are traceable through his various credit cards, but a large number of the credit card transactions were obtaining cash advances on the credit cards. I am not satisfied that all of the money is gone. The sum stolen is what many people earn over a lifetime. Squandering it all in seven years is undoubtedly possible, but seems unlikely.

[153] I am satisfied from the authorities that there is a jurisdiction to impose such an order in the circumstances of this case. The amount and time to pay are discretionary.

[154] It would be futile to speculate on what Mr. Mella may have stashed away or given to others. It would also be futile to speculate on what Mr. Mella may be able to earn once released from prison. He may be able to live in such a way as to avoid collection activities. But it would be appropriate to have him accountable to make some repayment to Dave's Diesel. It would be unrealistic to use the same number as for restitution, as that would be crushing and impractical. I am also mindful that debtors' prison was abolished in the 19th Century.

[155] In this case, I will impose a fine in lieu of forfeiture of $125,000, and in default of payment two years imprisonment. Mr. Mella will have 10 years to pay this fine. In the circumstances of this case it is appropriate to have Mr. Mella remain accountable to the Court for payment of this fine and to face consequences if he does not do so. I consider this amount to be within Mr. Mella's capabilities if he treats this obligation seriously when he is released from prison.

[156] As directed by Ackerl J in ***R v Walker***, the restitution order should take priority of the fine, but any amount collected on the restitution order should also go to reduce the fine. This adopts the Ontario process as articulated in ***R v Dhanaswar***, 2016 ONCA 229. I do not see it necessary to direct that any sentence for non-payment of the fine be served consecutively to any other sentence Mr. Mella is serving for the fraud as he will likely have many years after being

released on parole before the 10-year payment deadline expires. But I would make the sentence consecutive if necessary.

[157] As discussed in argument, if Mr. Mella has difficulties satisfying this obligation, he may apply to the Court for an extension of time to pay at the appropriate time.

Other Ancillary Orders

[158] My recollection is that the mandatory victim fine surcharge is not applicable to crimes committed during the period 2007 to 2014. That was confirmed when I delivered this decision on January 21, 2022. The Crown in any event did not seek such an order.

[159] The Crown has not asked for any other ancillary orders and I am not aware of any mandatory ones I have to deal with. Anything seized shall be forfeited to the Crown on the expiry of the appeal period.

Credits against Sentence

Time Served

[160] Exhibit 7 on sentencing is a letter from FSCC outlining Mr. Mella's time in custody. From the time of his arrest in Toronto to December 15, 2021, Mr. Mella had served 588 days. 365 of those days were credited against his one-year sentence for civil contempt. It is interesting to note that sentences of imprisonment for civil contempt are not subject to remission.

[161] To December 15, 2021, that left a "net" 223 days. From December 15 to today's date, January 21, is another 37 days, which now totals 260 days. In my decision on the ***Jordan*** application, I indicated that I would consider any *Charter* remedies in the context of sentencing.

Charter Issues

[162] In addition to the evidence I heard on the ***Jordan*** application in September, Mr. Mella filed an affidavit sworn December 16, 2021. In the affidavit, he outlines his treatment and circumstances while incarcerated following his return from Canada in May 2020. The circumstances described by Mr. Mella undoubtedly constitute "hard time".

[163] In Ontario on arrival, he was quarantined for 14 days. During quarantine, he was double bunked in a small room with no window. The bathroom was in the cell, and meals were taken in the cell. He was allowed out for 20 to 30 minutes daily. The Ontario cell had no phone, television or radio. Showers were limited to time out of cell, as were phone calls.

[164] After the initial quarantine, Mr. Mella spent six days in similar conditions, but he was not allowed outside the cell.

[165] He was then returned to Edmonton where he spent the first two weeks in quarantine at ERC. During quarantine, he was detained on conditions similar to that in Ontario. When finished quarantine at ERC, Mr. Mella complains that the cells were not cleaned other than by him and his cellmate, but there were no cleaning materials or disinfectants. Only soap was provided in the cell.

[166] Mr. Mella spent some two further months at ERC. He was then transferred to FSCC, where he again spent two weeks in quarantine. Quarantine there allowed him to be outside his cell for an hour at a time with half of his fellow unit mates. The other half of the unit mates

would be let out together for the next hour, and this process continued through the day. They had to be masked while out of the cells. In quarantine, there were cleaning materials and hand sanitizer for inmate use. The inmates were responsible for cleaning their own cells and washrooms.

[167] Once through quarantine in late October or early November 2020, Mr. Mella was transferred to a regular unit in FSCC. Shortly after he was transferred there, he says that five inmates were transferred into his unit directly from Peace River Correctional Centre, without quarantining. Shortly after that, there was an outbreak of Covid on his unit. The inmates who tested positive were not transferred off the unit and instead everyone on the unit was restricted to their cells other than one 15 to 30-minute period during which they were allowed to use the common areas. There was no access to the canteen or the library. Meals were delivered to the inmates' cells. The inmates were responsible for cleaning. There were cleaning materials for the washroom and telephones, and the inmates had hand sanitizer available to them.

[168] Mr. Mella complains that during his period, he found conditions to be difficult due to limited time out of his cell, lack of opportunity to use the shower or telephone, and limited bathroom availability. He felt there was insufficient staff to meet the needs of the unit.

[169] Inmates were allowed books, the radio and adult colouring books. There were no additional resources or programming, no access to exercise equipment, the outdoors or programming. He found daily visits from mental health nurses very helpful to help him deal with the isolation.

[170] He expressed concerns to AHS that the other inmates were not keeping the common areas (including washrooms) clean. Those concerns were unheeded.

[171] Just before his trial in January 2021 was to commence, another group of inmates arrived on his unit, some of whom had not been through a quarantine period when they came to FSCC. These inmates interacted with everyone with no additional safety precautions. Shortly after this, the unit was locked down because of fears of a Covid outbreak.

[172] From January 7 until January 21, the unit was on lockdown and on quarantine in conditions similar to those described earlier. Mr. Mella was symptomatic. He had been exposed to one of the transferred-in inmates and tested positive on January 11. His symptoms were brain fog, cough, breathing difficulties, ear ache, sort throat, mild nausea and general weakness. He lost his sense of taste and smell. He was only provided with Tylenol and Motrin despite asking for flu medication.

[173] He swears that he continues to experience smells and tastes differently from before contracting Covid. He has some short-term memory problems and still has brain fog. Mr. Mella says that the Covid diagnosis and symptoms have had a detrimental effect on his mental health, including anxiety because of pre-existing high blood pressure and sinus problems, and the lack of control over his environment.

[174] He maintains that he complied with all of his Covid protocol obligations, but despite that was directed by guards to violate them by serving meals to other inmates, and other things.

[175] Mr. Mella complains that even during "normal" times meals are rarely hot, there is no in-person learning, and there are no in-person services such as access to religious services in group format. He does note that a Chaplain visits his unit.

[176] The complaints in the December 16, 2021, affidavit mirror Mr. Mella's testimony in September 2021 at the ***Jordan*** application, where he focused on FSCC failings that caused his unit to be locked down and quarantined, and for him to have caught Covid himself, resulting in the loss of his January 2021 trial and the ensuing 10-month delay.

[177] Mr. Mella was cross-examined on some of his allegations of inadequate medical attention with reference to the nurses' notes recording their observations on each of their visits to him. The notes do not substantiate Mr. Mella's health concerns, but were not particularly detailed. Mr. Mella was not a particularly credible nor reliable witness, but I do accept that his time in custody has been very difficult due almost completely to the institutions' attempts to control Covid.

[178] An agreed statement of facts entered on the sentencing detailed some of the measures implemented by ERC during Mr. Mella's pre-conviction time there, which confirmed that inmates on quarantine were allowed out of their cells twice a day for 15 minutes at a time. It confirmed that inmates were responsible for cleaning their own cells. As for entertainment, it confirmed there are no televisions or telephones in cells, but there are radios. Inmates can get entertainment items from the canteen if they had funds and access to the canteen and there were activity packages.

[179] During the ***Jordan*** hearing, Mr. Gibson from FSCC provided information on the various quarantine protocols, cleaning protocols, time out of cells, entertainment options and Covid protocols in general.

Section 7 and Section 12

[180] The burden is on Mr. Mella to demonstrate on a balance of probabilities that his *Charter* rights have been violated. ***R v McDonald***, 2021 ABCA 262 is the latest word from the Alberta Court of Appeal on the subject. It says at para 33 that "whether a sentencing judge retains residual discretion to provide enhanced credit, directly or indirectly, for harsh remand conditions absent a proven *Charter* breach is best left for another day." The same approach has been taken in Saskatchewan with ***R v AB***, 2021 SKCA 119.

[181] That deals with the non-*Charter* issue of harsh conditions.

[182] Had Mr. Mella been incarcerated under the conditions described in his oral evidence and his affidavit evidence absent Covid conditions, it seems to me that a *Charter* violation would have been made out. The circumstances described: isolation, minimal time out of the cell, very limited time to get fresh air, limited showers and limited access to the telephone have been found to violate section 7 and or section 12 in the context of administrative segregation: ***British Columbia Civil Liberties Association v Canada (Attorney General)***, 2018 BCSC 62, ***R v Prystay***, 2019 ABQB 8, ***R v Blanchard***, 2017 ABQB 369.

[183] ***R v Smith***, [1987] 1 SCR 1045 sets guidelines for considering whether punishment offends section 12. ***R v Boudreault***, 2018 SCC 58 is also cited, but I note that it deals with the constitutionality of a mandatory victim fine surcharge and is not particularly applicable here.

[184] ***Canadian Civil Liberties Association v Canada (Attorney General)***, 2019 ONCA 243 considers the differential treatment between inmates in general population and inmates in lockdowns.

[185] None of the other cases cited are particularly helpful, as the challenged conditions and correctional institute conduct here relate to well-intentioned attempts to keep inmates safe from a pandemic, not to punish them. Covid measures were not implemented for any reason other than health concerns for everyone in the relevant institution.

[186] I certainly recognize that I am entitled to and should look at the conduct of all state actors involved in Mr. Mella's incarceration. This is a different analysis as to the delay responsibility analysis conducted under a ***Jordan*** application. I outlined that distinction in my earlier decision in this matter where I held that negligence on the part of prison staff would not necessarily be charged to the Crown on a ***Jordan*** application for delay.

[187] I recognize Mr. Mella's argument that the Minister responsible for correctional facilities is responsible for the safe custody and detention of inmates (s 2, *Corrections Act*, RSA 2000, c 29). That does not mean that the Minister is a guarantor of safe custody and detention.

[188] ***R v Robinson***, 2020 ABCA 222 speaks of the duty to "take the reasonable steps necessary to reduce the risks that vulnerable inmates like Mr. Robinson are exposed to the virus within the prison" (at para 13). ***R v Tabor***, 2003 SKCA 59 references the responsibility for an inmate's safety in the institution resting with prison authorities who "must take all steps necessary to ensure that the appellant is not harmed when he is in the institution". That statement was made in the context of an inmate who had been threatened with serious bodily harm by other inmates.

[189] Mr. Mella cites ***R v Tag El Din***, 2020 ABPC 188, a decision where an accused had been bitten by a police dog and his requests for medical attention for his injuries went unheeded. Mr. Mella's complaints and requests that were not resolved to his satisfaction are a far cry from the deliberate denials of needed medical care found by Lamoureux PCJ in that case.

[190] Mr. Mella points to inadequate staffing leading to delays in facilitating prisoners leaving their cells to go to the washroom. He also points to inadequate mental health services to alleviate the impact on his mental health while in quarantine, lockdown and during his own battle with Covid.

[191] ***R v Adams***, 2016 ABQB 648, aff'd 2019 ABCA 149 dealt with an assault by a peace officer against an inmate at ERC. That involved deliberate and petty discipline measures against an inmate. A significant sentence reduction resulted. That is a very different case from the situation here.

[192] As a result of the conditions, especially in quarantine and during lock down and while suffering from Covid, Mr. Mella seeks credit for the time spent during those conditions similar to the credit given to Mr. Prystay by Justice Pentelechuk: 3.75 to 1 (***R v Prystay*** at para 165).

[193] Mr. Mella argues that "good intentions" do not absolve the state of the responsibility to honour the *Charter* rights of its inmates", citing the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, https:/www.unode.org/documents/Justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

[194] He argues that as a result of all of this, his security of the person was infringed and he was subjected to cruel and unusual punishment.

[195] The Crown responds arguing that credit for pre-trial custody conditions is limited by section 719(3.1) of the *Criminal Code*, citing ***R v Summers***, 2014 SCC 26. As noted above, the issue of pre-trial custody impacted by Covid has been left open by the Alberta Court of Appeal.

[196] The Crown references the high bar set under section 12 of the *Charter*, requiring the impugned treatment to be grossly disproportionate, shocking the conscience, and being so high as to outrage standards of decency. It cites ***R v Smith,*** [1987] 1 SCR 1045 and ***R v Lloyd***, 2016 SCC 13.

[197] Of particular note in the *Charter* context is ***R v Smith***, where Lamer J (as he then was) identified a number of questions that would be appropriate to be asked to determine whether treatment is cruel and unusual. These are described at para 45:

1. Is the treatment such that it goes beyond what is necessary to achieve a legitimate penal aim?
2. Is it unnecessary because there are adequate alternatives?
3. Is it unacceptable to a large segment of the population?
4. Is it such that it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards?
5. Is it arbitrarily imposed?
6. Is it such that it has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution?
7. Is it in accord with public standards of decency or propriety?
8. Is the punishment of such a character as to shock general conscience or as to be intolerable in fundamental fairness?
9. Is it unusually severe and hence degrading to human dignity and worth?

[198] The Crown cites a number of cases that have rejected that long hours in administrative segregation, lack of programming/entertainment, and cleanliness issues create a section 12 breach.

[199] I do not intend to go through very many of the myriad of cases cited as each turns on its unique facts and almost none address Covid.

[200] I agree with Justice Pentelechuk's conclusions in ***R v Prystay***, those of Justice Macklin in ***R v Blanchard***, and those of Justice Clackson in ***R v Adams***, 2016 ABQB 648. I see little difference between being incarcerated in a small cell, with no access to programming, exercise, entertainment, education, fresh air, socialization, communication and the like, and the conditions prevalent in third world dungeons.

[201] The Crown argues that "being bored from time to time is not abhorrent or intolerable, nor is not having a television in one's cell". I observe that requiring inmates to be isolated 23 ½ hours a day goes far beyond boredom, and the absence of television and other forms of entertainment (and education) resulted from mean-spirited decisions by politicians to demonstrate to the public that time in jail should be hard time. All of Mr. Mella's time has been hard time.

[202] I do not intend to deal with all of the cases submitted, nor all of the submissions. I do conclude that Mr. Mella has failed to satisfy me that his treatment in Ontario, at ERC, and at FSCC violated either his section 7 rights or his section 12 rights.

[203] Section 12 is easy to deal with. Mr. Mella was not subjected to any punishment. He appears to have been treated exactly the same as every other inmate in each of the correctional facilities he has been held in. There is no evidence that Mr. Mella was singled out for differential treatment. I realize that does not mean that there can be no section 12 breach. But here, the reality is that none of the questions posed by Lamer J in ***R v Smith*** have been shown to have a "yes" answer, on a balance of probabilities.

[204] I heard or received no evidence to suggest that any of the correctional facilities were not acting in good faith, or following to the best of their abilities the guidelines received from health officials, and doing their best to keep their inmates (and staff) from contracting Covid.

[205] I was taken by a quote from a University of Minnesota scientist in a recent New York Times article on Covid-19: "we still are really in the cave ages in terms of understanding how viruses emerge, how they spread, how they start and stop, why the do what they do."

[206] Covid has proven to be unpredictable on many occasions; scientifically approved precautions have been changed numerous times. There is no consensus within Canada let alone the world as to how to deal with it, how to prevent people from getting it, or even how to treat it. It is too early to hold authorities to standards of care since none really exist at this time.

[207] Mr. Mella's treatment, along with the treatment of every other inmate, has not shown to be negligent, or in bad faith. Some of the decisions made, such as not segregating arriving inmates from other institutions, can be questioned, but absent expert evidence, cannot be shown to be wrong. Mr. Mella has not established on a balance of probabilities how he obtained Covid, or from whom. He has not established that conditions in FSCC caused or contributed to him getting Covid. In any event, from his account, he appears to have recovered quickly with no serious long-lasting effect.

[208] I am compelled to contrast the situation of inmates in correctional facilities with residents in nursing homes, continuing care facilities, and seniors residences. I can take judicial notice of the vast amount of public information as to the conditions they have faced, and continue to face. They too are confined to their unit. They too have their meals in their rooms. They too have to clean their own space. They may have no ability to leave their room at all, as contrasted with inmates having at least 30 minutes a day. They cannot have visitors; they have no programming. While their living space may be larger and more comfortable, and they may have the benefit of their own library, television, music, and the internet, they face very similar conditions to those who are incarcerated.

[209] Staff shortages are a common impact on the entire population as various public health mandates have shut down businesses, limited services, and forced people to work from their homes.

[210] I do not think a case for cruel and unusual punishment or treatment can be made out when a significant portion of the population, although not incarcerated, face similar restrictions and limitations on their liberties.

[211] As for section 7, the Government is not a guarantor of prisoner's health. Could more have been done to minimize risks in correctional facilities? Perhaps. That will be for the experts to

figure out when the pandemic is over. Perhaps more staff could have been hired; perhaps more people could have been employed to make the facilities cleaner and more virus proof. But all health experts have been promoting isolation and distancing from others, and it is very difficult to see how that can be accomplished in an institutional setting other than by keeping people in their rooms, and limiting their contact with other people and items that may have become infected. At this stage, Mr. Mella has not demonstrated to the necessary standard of proof that the Government has done something that it should not have done, or that it has not done something that it should have done. All is speculation, without proof.

[212] Ultimately, Mr. Mella has failed to prove that his security of the person has been harmed by unconstitutional government action.

[213] I find no *Charter* violations. As a result, there are no *Charter* remedies that are appropriate here.

Harsh Conditions

[214] There is no doubt that incarceration has been harsher during Covid than before. Mr. Mella spent some of his time before conviction on remand as someone presumed innocent. 365 days of that time, however, were spent as a serving prisoner.

[215] The Crown argues that I should not grant any additional time to Mr. Mella for the 365 days he spent as a serving prisoner. I essentially agree with that position but for one thing. My understanding is that the accused gets a say in how to credit their time served when some of it is on remand and some is as a serving prisoner.

[216] Mr. Mella did not really start serving his civil contempt sentence until he returned to Alberta. His time in Ontario, from May 7 to May 28, was extremely harsh, involving quarantine and then a complete lockdown. He then had two weeks of quarantine at ERC on being transferred to Edmonton, in similar conditions.

[217] I am inclined to treat those five weeks as remand time, as well as the time Mr. Mella spent at ERC before being transferred to FSCC which I estimate to be an additional eight weeks. It is, I believe, appropriate to start his serving prisoner time as at the time he arrived at FSCC. This characterization merely adjusts the start and end time to the 365-day sentence, and still leaves 260 days of pre-sentence custody.

[218] The second issue is the future issue, as Mr. Mella will continue to be incarcerated in Covid conditions, which impose novel and unusual hardships on all inmates.

Pre-sentence Hardship

[219] Covid was not in anyone's contemplation when section 719(3.1) was enacted. It was enacted because Parliament was concerned that prisoners were opting to stay on remand because of the 1.5 or more credit they were earning for each day spent on remand. The section says what it says, and appears to prohibit granting greater credit than 1.5 for 1. The Ontario Court of Appeal recognized in ***R v Rajmoolie***, 2020 ONCA 791 that "a higher credit may be given for particularly harsh conditions".

[220] My experience has been that many Crown counsel do not object to greater pre-sentence credit being given for Covid hardships. In a recent sentencing following trial, ***R v Adair*** dated September 28, 2021, I heard from Mr. Adair as to the hardships he faced in ERC during his remand time. Much of that time was during Covid. I granted enhanced credit of 2 for 1 for each

day spent during Covid times, and an additional 1 day for each day spent during isolation, referencing Justice Lema's decision in ***R v Leblanc***, 2021 ABQB 230 with which I fully agree. Mr. Adair's isolation was the result of others having Covid, not himself.

[221] The Crown argues that this approach would be unfair, as serving prisoners face the same conditions without any prospect of a sentence reduction. I recognize the inequality here, but contrast a serving prisoner's time in custody from that of a person on remand awaiting trial and who has not yet been convicted of anything. As well, it seems to me that the National Parole Board has a broad jurisdiction to deal with serving prisoners. That was noted in ***R v Morgan***, 2020 ONCA 279.

[222] Other Alberta cases include ***R v Gordey***, 2020 ABQB 425 where Gates J gave the "normal" 1.5 for one but added another 112 days for the 90 days the accused was subject to the institution's Covid restrictions. ***Gordey*** was followed in ***R v Shivak***, 2021 ABQB 72, a decision of Renke J, where the offender received an additional credit of six months for the Covid-impacted period of pre-sentence custody.

[223] In ***R v Gaudrault***, 2021 ABQB 461, Eidsvik J applied a 2 for 1 credit for pandemic remand conditions. Friesen J gave a significant discretionary credit for Covid circumstances in ***R v Byron***, 2021 ABQB 884.

[224] Using another route, Kraus J considered harsh remand conditions resulting from Covid as a "collateral consequence" in ***R v EF***, 2021 ABQB 639.

[225] My conclusion on pretrial custody is to grant Mr. Mella 2 for 1 credit for the 260 days he was on remand to January 21. I consider the period in Ontario to be very hard time and I consider the quarantine time at ERC immediately on his transfer to Alberta to be very hard time. I would add an additional day for day credit for that five-week period (35 days). I am not inclined to make any further adjustment for time he spent as a serving prisoner. While there is a connection between the civil and criminal matters, absent any proven *Charter* violations, I see no reason to treat Mr. Mella differently from other serving prisoners at the same time.

[226] I do consider the time he spent on lockdown because of transfer prisoners in January 2021 and the time he spent recuperating from Covid to be exceptionally hard, and not resulting from anything he did or did not do. For the month of January, 2021, I would grant an additional 30 days. Mr. Mella has spent 260 days in custody so he is thus entitled to 585 days credit (19.5 months).

Post-conviction

[227] Mr. Mella will remain in custody for some time. Covid restrictions will undoubtedly continue indefinitely. This is a relevant consideration in sentencing, recognizing that at least some of the time to be served will be under harsher than normal conditions. That was recognized in ***R v Hearns***, 2020 ONSC 2365, where Pomerance J equated harsher than usual conditions to parity. I agree with that approach.

Totality and Parity

[228] Before consideration of pretrial custody, totality, and parity, I have concluded that a sentence of eight years, plus one year for failing to appear and one year for extortion would be fit

and proper. That needs to be reduced by 555 days, or 19.5 months because of my conclusions on pre-trial custody.

[229] The Crown concedes that totality should reduce the additional time for the uncharged offences by a total of one year.

[230] For parity purposes, and recognizing that Mr. Mella's time in custody will continue to be harsher than during normal times, I grant a further reduction of six and one-half months.

[231] By my calculation, that leaves a net remaining sentence of 6 years 10 months.

Conclusion

[232] Mr. Mella is sentenced to a remaining sentence of 6 years 10 months. He is ordered to pay restitution to Dave's Diesel Repair in the amount of $2,564,840.02. If there needs to be a time to pay ordered, that shall be 10 years from January 21, 2021.

[233] Mr. Mella shall also pay a fine in lieu of forfeiture in the amount of $125,000. He shall have 10 years from January 21, 2021 to make that payment. In default, he is sentenced to an additional two years imprisonment, consecutive to the sentenced pronounced on January 21. The Restitution Order shall take priority as to receipt of any payments, but any amount received shall also be credited against the fine in lieu amount.

[234] I am grateful to counsel for their assistance in this matter. They prepared excellent written materials and gave excellent focused oral submissions. No more could be expected from counsel.

Delivered orally at Edmonton, Alberta on January 21, 2022.
Dated at the City of Edmonton, Alberta this 24th day of January, 2022.

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

Appearances:

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for the Crown

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