Judging in the Time of a Pandemic:

The Impact of COVID-19 on Bail and Sentencing in Canada

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At "the end of 2019 the World Health Organization was alerted to several cases of pneumonia in Wuhan, China, caused by an unknown virus. On 7 January 2020, China advised the world that a new coronavirus was the cause, later labelled SARS-CoV-2. It causes the disease known as COVID-19. In mid-January 2020, the Public Health Agency of Canada activated the Emergency Operation Centre in support of Canada's response to COVID-19. On 22 January 2020, Canada implemented COVID-19 screening requirements for travelers returning from China. On 25 January 2020, Canada confirmed its first case of COVID-19 related to travel from Wuhan, China. On 9 March 2020, Canada recorded its first death related to COVID-19" (see ***Taylor v. Newfoundland and Labrador***, 2020 NLSC 125, at paragraphs 29 to 31).

One of the lesser impacts of COVID-19 was the closure of courthouses in Canada. Over time, however, matters began to be heard, many through remote appearances by video or audio conferencing for safety reasons (see ***R. v. Theodore***, 2020 SKCA 107). As noted in ***Attorney General of the Turks and Caicos Islands v Misick & Ors*** [2020] UKPC 30, the "Covid-19 pandemic has presented many challenges to justice systems around the world. Whilst it is essential to ensure that justice can continue to be both administered and accessed, means need to be found to enable this to be done safely and without endangering public health" (at paragraph 1).

Most Canadian courtrooms are now open, but remote appearances continue to occur. In ***R. v. Thomas***, 2020 MBCA 84, it was indicated that "[d]ue process is possible in the digital world; courts should not assume that is not the case" (at paragraph 28).

INTRODUCTION

In this column, I intend to consider judging in the time of a pandemic from the perspective of how COVID-19 has affected decisions by Canadian judges in the area of sentencing and judicial interim release. In ***R. v. J.A.***, 2020 ONCA 660, the Ontario Court of Appeal suggested that "there can be no reasonable debate that COVID-19 impacts directly on the incarceration of individuals. At the same time, the public's confidence in the administration of justice will be impacted by the manner in which both correctional officials and the courts address that impact" (at paragraph 107).

In the United States, it has been suggested that "[t]he nation's jails carry their own heightened risk. Unlike free people, detainees cannot engage in 'social distancing' and 'self-quarantine' and 'flattening the curve' of the epidemic—all of these things are impossible in jails . . . or are made worse by the way jails . . . are operated.' Inmates in jails are often housed in large dormitories or shared cells with poor ventilation. They are denied freedom of movement. They eat in large dining halls and share shower and toilet facilities. They lack access to adequate medical care, soap, cleaning supplies, and personal protective equipment like face masks or gloves" (see Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59 (2020), at 60).

Similarly, in Canada it has been suggested that the COVID-19 pandemic "affects our conception of the fitness of sentence. . . . As a result of the current health crisis, jails have become harsher environments, either because of the risk of infection or, because of restrictive lock down conditions aimed at preventing infection. Punishment is increased, not only by the physical risk of contracting the virus, but by the psychological effects of being in a high-risk environment with little ability to control exposure" (see ***R. v. Hearns***, 2020 ONSC 2365, at paragraph 16). However, in ***R. v. McLaughlin***, 2020 ONCJ 566, it was suggested that Canadian "jails have done a very good job of controlling and reducing risk" (at paragraph 43).

In ***J.A.***, Justice Nordheimer described the purported dangers of incarceration in a manner similar to Jenney Carroll's description in her essay (at paragraph 111):

> In my view, there can be no serious issue taken with the proposition that detention facilities are, by their very nature, places where persons will be at greater risk of contracting the virus, should it manage to get into such a facility. While the correctional officials have taken many steps to reduce that risk, the risk still exists. For example, correctional officers routinely move back and forth between public spaces and the detention facility. That reality means that there is an ever-present route for the virus to enter any detention facility. Further, the officers often cannot maintain physical distancing and still properly undertake their tasks. Consequently, the risk of a correctional officer contracting the virus and bringing it into the facility is a very real one.

As noted earlier, I intend to concentrate on two specific issues: sentencing and bail. I will start with sentencing.

SENTENCING IN THE TIME OF A PANDEMIC

In ***R. v. Pangon***, 2020 NUCJ 30, the key issue was clearly stated: "whether an offender who is about to be sentenced to a jail term should have time deducted from their sentence because of COVID-19. Put more bluntly, should time be shaved off an otherwise proper sentence because of the current pandemic?" (at paragraph 18).

In ***R. v. W.W.***, 2020 ONSC 3513, the sentencing judge refused to reduce the sentence he would have otherwise imposed based upon the impact of COVID-19, holding that "the sentence to be served must remain true to the overarching principle of proportionality" (at paragraph 52). It has also been held that the "effects of the pandemic cannot . . .serve to make an unfit sentence fit" (see ***R. v. Durance***, 2020 ONCJ 236, at paragraph 63). Likewise,

in ***R. v. Neasloss***, 2020 BCPC 161, it was held that "COVID-19 cannot be used to reduce a sentence to the point where it is no longer proportional to the seriousness of the offence or to the moral culpability of the offender" (at paragraph 67). In ***R. v. Anderson***, 2020 BCPC 70, it was suggested that that "the coronavirus is not a 'get out of jail free card'" (at paragraph 35). And in ***R. v. MacDougall***, 2020 ONSC 4989, it was held that "COVID-19 has minimal relevance to the sentence and does not serve to reduce the sentence further on this basis" (at paragraph 48). Finally, in ***R. v. McNichols***, [2020] O.J. No. 4874 (S.C.), the sentencing judge found no merit in the suggestion that the pandemic was a significant factor in sentencing, indicating that "[w]hilst I have every sympathy with Mr. McNichols fear of COVID-19, his fears and mental state are mirrored by society as a whole. It is equally the case that he might contract COVID-19 outside the prison as well as inside" (at paragraph 54).

In ***R. v. Doering***, 2020 ONSC 5618, the offender argued that "concern over COVID-19, and the increased risk of transmission in jails, militates against incarceration." The sentencing judge indicated that she was sympathetic to concerns about the risk of transmission of the virus in custodial settings, but held that "it cannot make an unfit sentence fit. It permits some deviation from proportionality, but cannot sanction that which is truly disproportionate" (at paragraph 82). The sentencing judge concluded that the presence of the pandemic has not placed "a moratorium on incarceration" (at paragraph 83):

> While COVID-19 is a serious consideration, it has not produced a moratorium on incarceration. Nor would such a result be feasible or desirable. The information note filed by the Crown reveals that Ontario institutions have taken very seriously their obligation to protect the health of persons in custody. I must presume that those efforts will continue. The virus is likely to increase restrictions on liberty within institutions, in order to keep people safe. Cst. Doering will also face protective restrictions given his former position in law enforcement. Whether a function of the virus, or Cst. Doering's status, restrictive measures increase the punitive impact of incarceration. This warrants a reduction in sentence, but does not take it out of the custodial context.

In ***R. v. Hazell***, 2020 ONCJ 358, the sentencing judge held that "there are cases in which the current pandemic justifies a lower sentence than might otherwise be appropriate, provided always, that public safety is not compromised" (at paragraph 20).

How much lower, however? What kind of reduction is required? It seems somewhat disingenuous to suggest that prison sentences should be reduced rather than eliminated if the concern is a health one. Is an offender sentenced to six months of imprisonment significantly safer than one sentenced to nine months?

Finally, in very blunt terms, Justice Bychok held in ***R. v. Kolola***, 2020 NUCJ 38, that there "is no lawful authority which permits sentencing judges to lessen appropriate and principled custodial sentences because of the current pandemic" (at paragraph 51).

COLLATERAL CONSEQUENCES

The consideration of "collateral consequences" in determining sentence is a well-accepted sentencing principle in Canada (see ***R. v. Pham***, 2013 SCC 15). Several Canadian judges have considered the collateral consequences caused by COVID-19. In ***R. v. MacDougall***, 2020 ONSC 4989, for instance, the sentencing judge indicated that a court "can recognize and consider COVID-19 implications in sentencing" (at paragraph 48). In ***MacDougall***, this was said to include "more restricted access to visitors" and any "programming" (at paragraph 47). The sentencing judge viewed these consequences as being similar to other "collateral consequences" in sentencing (such as restrictive bail conditions). In ***Neasloss***, it was noted that a collateral consequence for the offender was the "significant mobility restrictions to persons detained in correctional facilities" caused by the pandemic (at paragraph 65).

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The sentencing judge in ***MacDougall*** had concluded the appropriate sentence for the sexual assault committed in that case would have been 3½ years in prison. However, the sentencing judge held that "in view of the additional COVID-19 and collateral consequences identified, the sentence shall be 3 years and one month in jail" (at paragraph 53). Unfortunately, the sentencing judge provided little explanation as to how he came to this conclusion, and it is difficult to see how a reduction of five months achieved any recognizable sentencing goals.

In contrast, in ***R. v. Stevens***, 2020 BCPC 104, the sentencing judge concluded that the collateral impact of COVID-19 on an offender sentenced to a further period of custody "is not of sufficient force to warrant a significant reduction of custody to maintain proportionality" (at paragraph 66).

In ***R. v. Hazell***, 2020 ONCJ 358, the sentencing judge, in considering the impact of COVID-19 on sentencing, compared ***Hazell*** with an earlier decision he rendered (***R. v. Yzerman***, 2020 ONCJ 224). He noted that in ***Yzerman*** he had "stated that there are cases in which the current pandemic justifies a lower sentence than might otherwise be appropriate, provided always, that public safety is not compromised. This is not one of those cases. Unlike Mr. Yzerman, the defendant does not have health issues that make him more susceptible to the virus. Moreover, any concern the defendant may have about contracting the illness in a close environment is outweighed by the need to denounce and deter" (at paragraph 20).

The concentration of the requirement for evidence specific to the impact on the specific offender has become a consistent theme in sentencing in Canada when a reduction based upon the pandemic is proposed. This will be considered in detail later. At this point, for comparison purposes, let us look briefly at what is occurring in the United Kingdom.

THE UNITED KINGDOM

In ***R. v. Manning*** [2020] EWCA Crim 592, the Court of Appeal for England and Wales suggested that the "impact of [the] emergency on prisons is well-known. We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and

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has engaged successfully with the Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence" (at paragraph 41).

The Court of Appeal held that "[i]n accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case—currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19" (at paragraph 41).

The Court of Appeal concluded in ***Manning*** that "[a]pplying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended" (at paragraph 43).

Interestingly, the Scottish High Court of Justiciary in ***Crown Appeal Against Sentence by Her Majesty's Advocate Against Ian Lindsay*** [2020] HCJAC 26, distinguished ***Manning*** on the basis that the Crown was seeking to have the accused imprisoned nine months after having had his sentence suspended. The High Court referred to ***Manning*** as "a 'threshold' decision, about whether custody should be imposed immediately or not" (at paragraph 25).[1]

The High Court held that "in cases where that threshold issue is in a very fine balance, and where any ensuing sentence would be a very short one, then we accept that the fact that prisons may not currently be operating normally may be a factor to weigh in the mix. However, beyond that we do not consider that it has a role to play, and we do not accept that, once the custody threshold has been crossed, it has any role to play in the selection of the eventual sentence" (at paragraph 25):

> As we have noted above, there is already a generous discount scheme applicable to those who plead guilty. Adding another layer, which would presumably have to apply whether or not there had been a plea with utilitarian value, would merely add confusion. The current situation as a whole may be unprecedented, but that the regimes within penal establishments may from time to time have to be enforced with greater rigour than at others is not. As with the issue of backlog, it is something which may vary in intensity from time to time for a raft of reasons. What would be the threshold for taking these into account? It would be impossible to identify. It is reasonable to anticipate that in the short to medium term the Scottish Prison Service will find ways of adapting to the requirements imposed by the prevalence of Covid 19 and find reasonable ways of improving the situation for those in their care. To take account of the current emergency as a reason for discounting a custodial sentence would discriminate unfairly against prisoners who may have been given a short term sentence shortly before the lockdown, in favour of those upon whom such sentences are imposed now. Furthermore, short term prison sentences are subject to both automatic early release and discretionary early release. The latter in particular provides an administrative method by which the most serious consequences of imprisonment in the short term may be mitigated.

However, in ***Randhawa, R v*** [2020] EWCA Crim 1071, the Court of Appeal considered its ruling in ***Manning*** and described it in much broader terms. It indicated that ***Manning*** "requires consideration to be given to the adverse impact of the restrictions when considering a sentence of imprisonment" (at paragraph 15). Subsequently, in ***Scothern v R*** [2020] EWCA Crim 1540, the Court of Appeal considered ***Manning*** again. In that case it upheld the jail sentence imposed by the trial judge, but indicated that it was "of course cognisant of the increased difficulties faced by all offenders, including the appellant, who serve custodial sentences in the current situation" (at paragraph 33). Finally, in ***Whitting, R***

Footnotes

1. In ***Lyndsay***, the offender had been convicted of an offence, contrary section 76 of the Criminal Procedure (Scotland) Act 1995, as a result of coughing in the faces two police constables. On sentencing, the offender argued that his lack of "Covid 19 symptoms" was a mitigating factor. In rejecting this proposition, the High Court indicated that this was not a mitigating factor because the virus can "be transmitted by those who are asymptomatic carriers of it" (at paragraph 17):

   > We cannot see that the fact that the respondent was not displaying Covid 19 symptoms is a factor in his favour: there appears to be a real risk that the condition may be transmitted by those who are asymptomatic carriers of it, even if the risk may be a small one. As the sheriff correctly states, the emergency services deserve and require the protection of the courts as they perform their duties. Assaults upon them, or other behaviour culpably and recklessly endangering their health or lives in the execution of their duties, require to be treated with appropriate severity. The sheriff did not take sufficient account of the fact that the charge to which the respondent pled guilty was of culpably and recklessly endangering the lives of the officers, even if that endangerment was, as is often the case, potential rather than actual. The alarm and distress suffered by the officers was certainly real. Had the sheriff taken full account of the appellant's record, his deliberate and calculated actions, the nature of the offence, and the general risk involved, we cannot see that she could have selected a starting point of less than 15 months. We therefore consider that the sentence selected was unduly lenient, in being outwith the range of reasonable sentences available to the sheriff.

v [2020] EWCA Crim 1560, the Court of Appeal stated that "the impact of the pandemic on prisoners can be taken into account during the sentencing process because of the general sentencing principle that the particular impact of a prison sentence on a prisoner must always be taken into account when a sentence is being determined" (at paragraph 27).

LEAVE IT TO THE PAROLE BOARD?

Who should decide whether the prison environment is unsafe? Unless a generalized approach is taken in which it is accepted that prison is at present inherently unsafe, then it is difficult for a sentencing judge in a specific case to reach any conclusion. One of the approaches adopted by Canadian judges to this quandary has been to suggest that it is up to the Parole Board to release prisoners if the prison environment is unsafe.

In ***R. v. Audet***, 2020 ONSC 5039, for instance, the sentencing judge indicated that he could "comfortably take judicial notice of the fact that most experts expect the pandemic to last into 2021, although none are prepared to say that with certainty. That being the case, the only sentence I could impose that would allow Mr. Audet to avoid the experience of being in custody during any part of the COVID-19 pandemic would be one of time served." The sentencing judge indicated that he was "not prepared to impose such a sentence as, in my view, it would simply not be a sentence that is proportional to the gravity of the offence and the moral blameworthiness of Mr. Audet" (at paragraph 41). The sentencing judge also indicated that the "National Parole Board will be in a much better position, some months down the road, to decide what to do about the COVID-19 problem, as it relates to Mr. Audet, than I am today. That being the case, I will not make a COVID-19 reduction" (at paragraph 42).

In ***R. v. Morgan***, 2020 ONCA 279, the Ontario Court of Appeal pointed out that the failure to reduce a sentence because of the pandemic "does not mean that there is no potential remedy for the appellant respecting the impacts arising from the COVID-19 pandemic. We expect that the Ontario Parole Board will take into account those impacts in deciding whether the appellant should be granted parole. If the Parole Board fails to do so, the appellant has other remedies available to him to redress that failure" (at paragraph 12). Similarly, in ***R. c. Baptiste***, 2020 QCCQ 1813, it was pointed out by Justice Galiatsatos, that "[u]nlike the sentencing judge who lacks a crystal ball, the Parole Board will be in a position to make a fully informed assessment based on current and accurate data. If inmates are already being granted earlier parole on account of COVID-19 factors, it would amount to improper 'double-dipping' if these same factors also justified a reduction of sentence on the front end" (at paragraph 244).

In ***R. v. D.B.***, 2020 ONCA 512, the offender submitted that the Court of Appeal should take steps to facilitate the offender's early release because of the health risks flowing from being incarcerated during a pandemic. In rejecting this submission, the Ontario Court of Appeal held that "[w]hether or not the appellant should be granted early parole because of COVID-19 considerations is a matter strictly within the jurisdiction of the Parole Board. While he remains in custody, the primary responsibility for his welfare and safety lies with the federal government and Corrections Canada" (at paragraph 12).

DOES THE PANDEMIC REQUIRE A SPECIAL CREDIT FOR PRE-SENTENCE CUSTODY?

"Is an enhanced or 'COVID-19 pre-sentence credit' appropriate because of the impact of the pandemic on prisons?"

Section 719(3) of the *Criminal Code of Canada*, R.S.C. 1985, indicates that a sentencing judge "may take into account" any time spent in pre-sentence custody. As a result of ***R. v. Summers*** [2014], 1 S.C.R. 575, this will generally be a credit of one and one-half days for each pre-sentence custody day, though "harsh" conditions can result in a greater credit being granted (see ***R. v. Brown***, 2020 ONCA 196).

Is an enhanced or "COVID-19 pre-sentence credit" appropriate because of the impact of the pandemic on prisons? In ***R. v. O.K.***, 2020 ONCJ 189, it was held that it was not necessary to have specific evidence of additional mental and physical hardship on an offender to give an additional pre-sentence credit on the basis of the impact of the pandemic on prisons.

In ***R. v. Bah,*** 2020 QCCQ 2199, an additional 0.5 credit was granted to reflect being detained during the pandemic. Similarly, in ***R. v. Campbell***, 2020 NUCJ 28, the sentencing judge reduced the sentence that would have otherwise been imposed by sixty days to reflect the "harsher conditions of [the offender's] incarceration" caused by the pandemic. The sentencing judge suggested that if "incarceration has a deterrent effect, then surely more harsh incarceration should be considered to have a stronger deterrent effect" (at paragraph 28).

In ***Hayden v R*** [2020], NZCA 369 57, a case involving the sentencing of an Australian offender in New Zealand, an "eight percent" credit was provided to "reflect the fact that the appellant has been imprisoned overseas in circumstances where, unlike other cases involving Australian citizens, he [could not] be visited by relatives, as a result of the travel restrictions in place" (at paragraph 57). In ***Neasloss***, the sentencing judge refused to provide a COVID-19 pre-sentence credit because "the evidence does [not] establish anything unique to Mr. Neasloss's particular circumstances of incarceration, or personal vulnerability, that would justify shortening an otherwise fit sentence. The fundamental principle of proportionality prevails and the indirect consequences of COVID-19 cannot be used to reduce a sentence to the point where it is no longer proportional to the seriousness of the offence or to the moral culpability of the offender" (at paragraph 67).

A different approach was adopted in ***R. v. Abdella***, 2020 ONCJ 245. In that case, the sentencing judge held that it was not necessary to have specific evidence of additional mental and physical hardship on an offender to give credit on the basis of the impact of COVID-19 on offenders in pre-sentence custody. The sentencing judge inferred that hardship was caused by the pandemic and granted a credit greater than he otherwise would have. Similarly, in ***R. v. Hussein***, 2020 ONCJ 408, the sentencing judge granted an enhanced credit because of the "uncertainty about the pandemic and the likelihood of it spreading in close conditions like jails was more uncertain, and more worrying, than it may have become by now" (at paragraph 101).

This issue was considered by an appellate court in ***R. v. Cardinal***, 2020 ABCA 376. In this case, the accused, in appealing from

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sentence, argued that he "should have been given more than the maximum allowable 1.5/1 credit for his pretrial custody. The request for extra credit was related partly to the appellant's compromised medical condition, as well as circumstances in the Edmonton Remand Centre apparently related to the Covid 19 pandemic. The appellant advised that he had been on 23 hour lockdown for much of his pretrial custody" (at paragraph 3).

The Alberta Court of Appeal noted that the "trial judge dealt with this issue as follows" (at paragraph 4):

> I accept that it is difficult to be in imprisonment and to be isolated as a result of the pandemic. It is also difficult to be in the community and to be isolated. These are circumstances faced by all of us. It is not limited to the Remand Centre. Of course, the Remand Centre is not as comfortable as home, but the isolated aspect is no different. I have no evidence before me that there is increased risk at the Remand Centre than elsewhere or that Mr. Cardinal suffered any particularly harsh conditions that would justify mitigation in sentence and giving more credit than statutorily allowed. I am not prepared to take judicial notice of what may be faced in the Remand Centre or correctional facility without any evidence.

The Court of Appeal dismissed the appeal from sentence, holding that while "evidentiary standards on a sentencing hearing are lower, the sentencing judge was obviously not satisfied that the appellant had demonstrated exceptional circumstances that would justify departure from the maximum credit allowed by s. 719(3.1) of the *Criminal Code*, or otherwise reduce the sentence" (at paragraph 4).

THE REQUIREMENT OF A FACTUAL FOUNDATION

Canadian and other courts have been quick to take judicial notice of the impact of COVID-19 (see ***R. v. Morgan***, 2020 ONCA 279 and ***Barton v R*** [2020] NZSC 24). Thus, in ***Lariviere***, the Ontario Court of Appeal held that "it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission" (at paragraph 16). However, Canadian courts have also generally required that a supporting factual foundation be established when the pandemic is pleaded as the basis for a reduction in sentence. In ***Lariviere***, for instance, the offender appealed his sentence arguing that the impact of COVID-19 justified a reduction of his sentence. In dismissing the appeal, the Ontario Court of Appeal observed that there was nothing unique to the offender's situation that justified reducing an otherwise fit sentence (at paragraph 17):

> . . . there is nothing about the particular circumstances of the appellant's incarceration, nor any indication of a unique or personal vulnerability, that would justify shortening the fit sentence that was imposed.

In ***R. v. Cunningham***, 2020 ONSC 4489, in rejecting a similar argument, the sentencing judge noted that there was "no evidence of any COVID-19 cases in the institution in which the applicant resides" (at paragraph 38). In ***J.A.***, a majority of the Ontario Court of Appeal held that "the absence of particular risk is relevant in assessing whether the evidence relating to the pandemic is 'relevantly material'" in a specific case (at paragraph 76).

In ***R. v. Young***, 2020 ONSC 578, the sentencing judge also rejected a submission seeking a reduction in sentence "to reflect the increased risk to prisoners from Covid-19." The judge indicated that in "this case there is no evidence that Ms. Young has any particular health issue that makes prison especially dangerous for her. That is in contrast to *R. v. Studd*, 2020 ONSC 2810, where Justice Davies reduced the sentence to time served because of Mr. Studd's 'compromised immune system'" (at paragraphs 15 to 17). Likewise, in ***R. v. Spencer-Wilson***, 2020 BCPC 140, in rejecting the request for a lower sentence, the sentencing judge indicated that the "evidence does not point to anything unique to Mr. Spencer-Wilson's particular circumstances of incarceration, or personal vulnerability, that would justify shortening an otherwise fit sentence" (at paragraph 86).

Similarly, in ***R. v. Yusuf and Ahmed***, 2020 ONSC 5524, it was held that "in the absence of any evidence as to current conditions in correctional facilities, much less a reliable prediction as to the manner in which the pandemic will unfold over the next months or years (and thus might affect future conditions in correctional facilities), the calculation of any such 'Covid 19 credit' would be little more than speculation and guesswork. I have not been provided with any reasoned basis upon which such a Covid 19 credit could be calculated" (at paragraph 92).

In ***R. v. Niyongabo***, 2020 ONSC 4752, the sentencing judge accepted that the offender was "at an increased risk of infection while incarcerated because it is difficult if not impossible to maintain social distancing," but held that "in the absence of any evidence of unique vulnerability to the virus, there is no basis to reduce what would otherwise be a fit sentence" (at paragraph 83). Having said this, the sentencing judge then gave the offender a one month "credit" against the sentence imposed because the offender may have missed some programming because of the pandemic.

In ***Lindsay***, the High Court in Scotland held that though "the impact of the sentence on the individual offender is of course a relevant factor" it "is necessary to distinguish between circumstances which are permanent and inevitable . . . and those which are transitory and likely to change" (at paragraph 24):

> The conditions which arise as a consequence of Covid 19 are unlikely to be permanent, and one can expect that in the short to medium term prisons will find better ways of adapting to the conditions dictated by the virus. There are already signs that this may be happening. We were given information about the current regime in Inverness Prison which suggests that efforts are being made to provide structured activities, recreation, fresh air and exercise. It is

said that steps have been taken to facilitate contact between prisoners and their families by phone, and in writing. Visits from solicitors can take place. It is anticipated that a form of "virtual" family access will be made available within the prison from late June. 24.

AN EXAMPLE

An example of the importance of a factual foundation is illustrated by the decision of the British Columbia Court of Appeal in ***R. v. McKibbin***, 2020 BCCA 337. In this case, the accused was convicted of the offence of trafficking in a controlled substance. At his sentence hearing, evidence was presented establishing that the accused was suffering from chronic obstructive pulmonary disease (COPD).

A period of six months of imprisonment was imposed. The accused was granted bail, pending the hearing of his appeal from sentence.

On appeal, the accused presented evidence indicating that were he "to contract COVID-19, his vulnerability would accelerate, thereby worsening his health," possibly causing him "early death compared to other people without respiratory problems."

The appeal was allowed and the sentence varied to a six-month suspended sentence.

The British Columbia Court of Appeal indicated that if "it were not for the unusual global circumstances currently existing" there would have been "no basis upon which to interfere with that sentence" (at paragraph 1). However, the Court of Appeal concluded that it made no sense "to require that he be re-incarcerated, particularly when the numbers of infections are reaching an all-time high in this province" (at paragraphs 24 and 25):

> The evidence before us is that not only would serving the sentence be harsher, but if he contracted COVID-19, it could well lead to an early death, which in my view does amount to circumstances justifying a suspended sentence. Normally, the prison authorities would be delegated the responsibility of managing a prisoner's illness in the prison, and they are usually equipped to do so. However, given that Mr. McKibbin faces a significantly higher risk of death if he contracts COVID-19 because of his serious pre-existing respiratory disease, and given that he has a very short time left to serve in his sentence, it makes no sense to me to require that he be re-incarcerated, particularly when the numbers of infections are reaching an all-time high in this province. If he is at home, Mr. McKibbin can control who he has contact with, something that he cannot do in the prison setting.
>
> This is an unusual case. The sentence imposed by the sentencing judge was without error, and but for the fresh evidence, I would not interfere with the sentence. It is also unusual in the sense that it is not just the COVID-19 pandemic that has changed the sentencing landscape, but the pandemic in the context of Mr. McKibbin's serious respiratory illness, which makes him much more susceptible to serious COVID-19 symptoms, including death.

CONDITIONAL SENTENCES

Section 742.1 of the *Criminal Code* allows a Canadian judge to impose a period of imprisonment that can be served in the community under conditions. This is often referred to in Canada as "house arrest" (in New Zealand as "home detention" see ***R v. S*** [2020] NZCA 522).

"'. . . not only would serving the sentence be harsher, but if he contracted COVID-19, it could well lead to an early death.'"

In ***R. v. Parsons***, 2020 ONSC 5412, the presence of COVID-19 was seen as a significant factor in favour of a conditional sentence being imposed upon an elderly offender. The sentencing judge suggested that "[i]f sentenced to a term of incarceration, based on the COVID-19 virus, his age and underlying health conditions . . . he likely would not survive his sentence" (at paragraph 25). The sentencing judge indicated that though "a conditional sentence, in normal circumstances, would not sufficiently address the need for general deterrence and denunciation when dealing with offences of this sort," based upon the offender's "age and his underlying health conditions" a conditional period of imprisonment was appropriate (at paragraph 31).

In ***R. v. C.J.J.***, 2020 BCPC 201, it was held that a conditional sentence was preferable to a prison sentence "because of the impact of COVID-19 on this Province's ability to manage the ingress and egress of inmates to and from correctional facilities, the public would be better served by keeping C.J.J. confined in the remote northern community in which he now lives" (at paragraph 87). The sentencing judge held that courts should not "turn a blind eye on the impact of COVID-19 on the community and correctional system, when considering whether to impose a custodial sentence" (at paragraph 85). In ***R. v. J.S.***, 2020 ONSC 1710, it was suggested that "the greatly elevated risk posed to detained inmates from the coronavirus, as compared to being at home on house arrest is a factor that must be considered in assessing" whether the *Criminal Code* requires detention (at paragraph 18).

However, in ***R. v. Barrett***, 2020 ONCJ 487, a different conclusion was reached. In that case, the offender sought the imposition of a conditional period of imprisonment, arguing that his asthma made him more "susceptible to COVID if he [was] sent to jail". In rejecting the request for a conditional sentence, the sentencing judge held that though "the COVID-19 pandemic represents a collateral consequence which may be considered at sentencing" it does not allow for a reduction of sentence "beyond what would otherwise be fit in the circumstances" (at paragraph 20).

A SUMMARY

As we have seen, the pandemic has been extensively considered in sentencing by Canadian judges, but it has not had a significant impact (other than the granting of a COVID-19-enhanced credit in a limited number of cases). Canadian judges have generally concluded that in the absence of evidence specific to the offender, the impact of COVID-19 on offenders sentenced to periods of imprisonment is a matter for the prison authorities to consider (see ***R. v. D.B.***, 2020 ONCA 512, at paragraph 12). Thus, in ***R. v. Baptiste***, 2020 QCCQ 1813, it was pointed out that "the Parole Board will be in a position to make a fully informed assessment based on current and accurate data. If inmates are already being granted earlier parole on account of COVID-19 fac-

". . . pretrial detention determinations raise more than the possibility of confinement . . . these decisions raise the possibility that a person will be exposed . . . "

tors, it would amount to improper 'double-dipping' if these same factors also justified a reduction of sentence on the front end" (at paragraph 244).

Finally, we may, as judges, find some guidance in a statement issued by the Sentencing Council for England and Wales on June 23, 2020: *The Application of Sentencing Principles During the Covid-19 Emergency* (see https://www.sentencingcouncil.org.uk/).

The Sentencing Council indicated that it was "aware of and understands the concerns that many people have about the effect the Covid-19 emergency is having on conditions in prisons and the potentially heavier impact of custodial sentences on offenders and their families." The Council indicated that there "are well-established sentencing principles which, with sentencing guidelines, are sufficiently flexible to deal with all circumstances, including the consequences of the current emergency" and that "[e]ach case must of course be considered on its own facts, and the court has an obligation to protect the public and victims of crime. Judges and magistrates must make their independent decisions as to what sentence is just and proportionate in all the circumstances of each individual case."

The Sentencing Council concluded that throughout "the sentencing process, and in considering all the circumstances of the individual case, the court must bear in mind the practical realities of the effects of the current health emergency. The court should consider whether increased weight should be given to mitigating factors, and should keep in mind that the impact of immediate imprisonment is likely to be particularly heavy for some groups of offenders or their families."

What about the denial of bail during a pandemic?

THE PANDEMIC'S IMPACT ON THE LAW OF BAIL

In ***Barton v R*** [2020], NZSC 24, the Supreme Court of New Zealand, in denying bail pending appeal, indicated that "[n]one of the other matters raised, including Covid-19, would justify bail and Mr Barton's history suggests there is a real risk he would not comply with bail conditions" (at paragraph 19). Interestingly, however, the Supreme Court also indicated that this "is not to say that issues relating to Covid-19 would not be a valid consideration in other cases, especially with regard to those seeking bail before trial" (see footnote 9). In Canada, it has been indicated that it "is common ground that the COVID-19 pandemic is a factor to be considered on an application for judicial interim release pending appeal, though the weight given to this factor depends on the particularities of the case" (see ***R. v. Cole***, 2020 ONCA 713, at paragraph 17).

In ***J.A.***, the Ontario Court of Appeal held that the "impact of the pandemic does not mean that detention orders will not still be warranted" (at paragraph 110). Similarly, in ***JD and BK Against Her Majesty's Advocate*** [2020], ScotHC HCJAC 15, the Scottish High Court of Justiciary pointed out that despite the "present Covid-19 crisis," the "statutory provisions . . . continue to apply to the refusal of bail" (at paragraphs 11 to 13):

> In the present COVID-19 crisis, it is not known when accused persons are likely to be tried. In solemn cases, it may be several months before jury trials can be resumed. Meantime there may be an increasing number of those remanded in custody. The length of time during which a person is likely to remain on remand is a factor in deciding whether to grant bail. This factor must be given greater weight than hitherto.
>
> The statutory provisions (1995 Act, s 23B) continue to apply to the refusal of bail. In the ordinary case, bail must be granted except where, having regard to the public interest, notably public safety, there is a good reason to refuse bail. The court must consider the extent to which the public interest could be protected by the use of bail conditions. A good reason may arise if there is a substantial risk of the accused: absconding or failing to appear for trial; committing further offences; and interfering with witnesses or otherwise interfering with the course of justice (1995 Act, s 23C) . . .
>
> As always, each case has to be judged on its own merits by the judge at first instance. In the current crisis, the emphasis must be, albeit not exclusively, on whether bail should be refused on the grounds of public safety. The primary question is whether the accused, if at liberty, will pose a substantial risk of committing further offences; particularly violent (including sexual and domestic abuse) offences.

IS THE POTENTIAL DANGER POSED TO PRISONERS BY THE PANDEMIC GROUNDS FOR BAIL?

In her essay, Jenney Carrol notes that "[d]etention in the face of a pandemic skews the calculation of the liberty interests at stake and alters incentives for pretrial actors. In the midst of a public health crisis, pretrial detention determinations raise more than the possibility of confinement, indignity, and the downstream consequences described above; these decisions raise the possibility that a person will be exposed to a known fatal contagion as a result of an accusation" (at page 65).

Justice Nordheimer, in a dissenting opinion in ***J.A.***, adopted a very similar approach. He rejected the proposition that for the pandemic to be a factor in determining if bail should be granted that a specific factual foundation was required. He adopted a very broad approach in which the existence of the pandemic was, in and by itself, sufficient. He indicated in startlingly broad terms that because of the pandemic, "the detention of every person needs to be reviewed, in light of the extraordinary situation that the pandemic poses, to ensure that the continued incarceration of a person pending trial will not result in a disproportionate impact. It also means that, going forward, the impact of the pandemic must properly be considered in every bail hearing when determining whether a detention order is warranted" (at paragraph 110).

The pandemic has had an impact on bail in Canada, though not in such a broad manner as Justice Nordheimer proposes, at both the pretrial stage and the post-conviction stage. Let us start with bail at the pretrial stage.

PRETRIAL

In Canada, pretrial bail can only be denied on one of three grounds: (1) to ensure the accused appears in court; (2) to protect

the public; and (3) to maintain the public's confidence in the administration of justice (see sections 515(10)(a) to (c) of the *Criminal Code*). These are often referred to as the "primary," "secondary," and "tertiary" grounds.

In ***R. v Leppington***, 2020 BCSC 546, the bail judge suggested that because of the pandemic the denial of bail is now "only justified as the option of last resort" and that "the health risks of the COVID-19 pandemic, and the institutional response, are matters that are certainly relevant to the impact of detention on the physical and mental well-being of Mr. Leppington as an accused person. This does not mean Mr. Leppington should be released if it is determined that his detention is required on any of the grounds specified in s. 515(10) of the *Criminal Code*. It does however heighten the court's concern about the impact and potential implications of ordering Mr. Leppington's detention" (at paragraph 32).

The impact of the pandemic has been considered in relation to each of the three grounds upon which bail can be denied at the pretrial stage in Canada. Let us start with section 515(10)(a), ensuring the accused appears in court.

515(10)(A)-TO ENSURE THE ACCUSED APPEARS IN COURT

In ***R. v. GTB***, 2020 ABQB 228, it was held that the "possibility of a health risk to an accused through continuing detention in a correctional facility is not a relevant consideration under s 515(10)(a) of the *Criminal Code*. The health risk does not address an accused's propensity to attend court in the future. . . . Whether an accused might be exposed to an increased health risk during detention generally has no bearing on protecting the public, including victims and witnesses, from that accused. Moreover, a heightened health risk caused by COVID-19 while in detention does not typically mitigate the risk of offending if released" (at paragraphs 57 and 60).

In ***J.A.***, the Ontario Court of Appeal accepted the proposition that "depending on the circumstances, the COVID-19 pandemic may also be a factor to be considered when considering the primary ground: that is, whether detention is necessary to ensure this accused's attendance in court." The Court of Appeal indicated that the "pandemic may give rise to new considerations respecting an accused's health and safety and his flight risk and thereby constitute a material change in circumstances in respect of the primary ground" (at paragraph 64).

515(10)(B)-TO PROTECT THE PUBLIC

In ***R. v. Anderson***, 2020 BCPC 70, it was held that the "the risk posed to inmates by the coronavirus while incarcerated in detention centres is a valid factor when considering the secondary ground for detention" (at paragraph 33). However, it was also pointed out in ***Anderson*** that "the coronavirus is not a 'get out of jail free card'. It is a serious factor to consider and may tip the scales in some cases. But if an accused's risk is truly unmanageable, it remains unmanageable notwithstanding the greater risks posed by the coronavirus inside an institution" (at paragraph 35).

In ***R. v. CKT***, 2020 ABQB 261, it was suggested that "while the pandemic is undeniably an unprecedented and globe-shaking phenomenon, it is not a factor in the secondary-ground exercise i.e. gauging whether detention is necessary to protect the public, with one exception. . . . The exception is where Covid-19 concerns bear on an accused's willingness to comply with release conditions" (at paragraphs 6 and 7). It was also pointed out, however, that if the presence of the pandemic is utilized as an argument in favour of release because of concerns for the accused's health, it will "not achieve lift-off" because it would be seeking "to introduce a 'protection of the accused' element i.e. to rewrite the secondary ground" (at paragraph 7).

"'a person does not become less of a risk because of COVID-19 . . . the protection of the public from a dangerous person . . . remains uppermost and supersedes the threat [of] COVID-19 to inmates.'"

A stricter approach was adopted in ***R. v. Syed***, 2020 ONSC 2195. In ***Syed***, the bail judge held that "[i]f an accused should be detained for the protection of the public, the risk of contracting the virus in jail does not alter that fact. A person does not become less of a risk because of COVID-19 . . . the protection of the public from a dangerous person mandated by the secondary ground must remain uppermost and supersedes the threat posed by COVID-19 to inmates" (at paragraphs 49 and 50).

In ***R. v. Chester***, 2020 BCPC 194, in denying bail based upon section 515(10)(b), the bail judge accepted that the accused was "enduring living conditions that are emotionally and physically difficult. In his affidavit, he stated that he is asthmatic and contracting the virus could have serious implications for him" (at paragraph 67). However, the bail judge concluded that in "the circumstances of this case, those difficulties must give way to the concern for public safety if he were released and, in my view, his detention is necessary for the protection of the public on the secondary grounds" (at paragraph 77).

At the appellate level, the Ontario Court of Appeal indicated in ***J.A.***, that, "depending on the circumstances, the COVID-19 pandemic may be a factor to consider on the secondary ground, that is, whether the accused's detention is necessary for the protection and safety of the public, including any substantial likelihood that if released, the accused will commit a criminal offence or interfere with the administration of justice" (at paragraph 65).

515(10)(C)-TO MAINTAIN THE PUBLIC'S CONFIDENCE IN THE ADMINISTRATION OF JUSTICE

In ***R. v. Cunningham***, 2020 ONSC 4489, it was held that it "is clear that the pandemic is a factor to be considered but does not override the main considerations set out in s. 515(10)(c) of the *Code*" (at paragraph 37). However, the bail judge noted that the accused did not "have any underlying health issues which would have more deleterious effects if he were infected" (at paragraph 38).

In ***GTB***, it was held that "a material health risk to an accused caused by detention is relevant in considering the public's confidence in the administration of justice. . . . The presence of a material health risk, however, does not automatically invite release or determine the balancing of interests contemplated by the third ground. The nature and gravity of the risk to an accused must be weighed against other relevant considerations, including the non-

"'COVID-19 constitutes a material change in circumstances with respect to every detention order that was made prior to the . . . pandemic.'"

exhaustive factors listed in s 515(10)(c)" (at paragraphs 65 and 66).

In ***R. v. J.R.***, 2020 ONSC 1938, a very broad approach to section 515(10)(c) was adopted. In ***J.R.***, in considering the impact of the pandemic on judicial interim release, the bail judge indicated that "while this pandemic is ongoing, where a person's detention is not required on the primary or secondary ground, detention on the tertiary ground alone will rarely be justified" (at paragraph 47). Justice Schreck reasoned that "reducing the inmate population does not only benefit the inmate being released but, rather, the community as a whole" (at paragraph 50). However, this broad proposition has been rejected by the Ontario Court of Appeal. In ***R. v. T.S.D.,*** 2020 ONCA 773, the Court of Appeal held that the "COVID-19 pandemic is . . . a factor that may be considered as part of the public interest criterion, though the weight to be given to it depends on the particular circumstances of each case" (at paragraph 59).

Similarly in ***R. v. Boudreau***, 2020 SKQB 88, it was indicated that "as serious as it is, COVID 19 is not a determinative factor. It cannot be, or we would essentially clear the jails of any and all remand prisoners. This ignores other cogent factors" (at paragraph 31).

The impact of the pandemic on the tertiary ground for the denial of bail was also considered by the Ontario Court of Appeal in ***R. v. Jaser***, 2020 ONCA 606. In ***Jaser***, Justice Doherty held that the "presence of COVID-19 is a factor to be balanced," but he rejected "the contention that post-COVID-19 detention on the tertiary ground will 'rarely be justified'. Like all other factors in the tertiary ground balancing, the significance of the pandemic depends on the individual case and the evidence provided to the court. On the evidence I have, COVID-19 concerns are relevant in the tertiary ground assessment. They are far from determinative" (at paragraph 103).

BAIL REVIEW

The *Criminal Code* allows for the granting or denial of bail to be reviewed. This requires a "change in circumstances." Does the impact of the pandemic constitute such a change? There have been differing views in Canada.

In ***J.A.***, for instance, it was argued that "in the case of all bail decisions rendered before the COVID-19 pandemic struck Ontario, the onset of the COVID-19 pandemic constitutes a material change in circumstances for all grounds for detention. As such, reviewing judges are permitted, as a matter of course, to conduct fresh bail hearings *de novo*" (at paragraph 53). A majority of the Court of Appeal, per Doherty J.A., rejected this argument, holding that the pandemic must be considered, but it is not determinative (at paragraph 85):

> I do not agree that the existence of the COVID-19 pandemic necessarily constitutes a material change in circumstance for every bail decision rendered before the pandemic struck Ontario. I accept however, that in a proper case, circumstances arising from the COVID-19 pandemic may amount to a material change in circumstance in respect of any of the grounds for detention such that a new hearing should be conducted. For that to be the case, however, the pandemic must reasonably be expected to have affected the result, bearing in mind the reasons given by the first bail judge for denying bail.

In contrast, Justice Nordheimer, dissenting in ***J.A.***, held that "COVID-19 constitutes a material change in circumstances with respect to every detention order that was made prior to the advent of the pandemic. COVID-19 changed the lives of every person in this country. Indeed, it has changed the lives of almost everyone on this planet. The appearance of the pandemic necessitated a review of every person who was being held in custody pending their trial, just as it necessitated a review of, and change to, the manner in which detention facilities dealt with incarcerated individuals, including the release of individuals who might not otherwise have strictly merited release in the traditional sense" (at paragraph 109).

POST-CONVICTION, BAIL PENDING APPEAL

Pending appeal of conviction or sentence, bail can be granted in Canada if the offender establishes that she or he will surrender themselves into custody if the appeal is dismissed and that their detention "is not necessary in the public interest" (see section 679 of the *Criminal Code*).

In ***R. v. Bear***, 2020 SKCA 47, Justice Jackson of the Saskatchewan Court of Appeal noted that "COVID-19 presents challenging issues for a court hearing an application under s. 679. A balanced approach is required in order to respond to these issues. At the very least, an applicant for release pending appeal must be able to particularize the effect of COVID-19 on his or her situation" (at paragraph 15).

In denying bail in ***Bear***, Justice Jackson noted that "Mr. Bear has not provided the Court with any information or evidence that separates him from the inmate population with respect to the effect of COVID-19. During his hearing before me, held by way of a conference call, Mr. Bear indicated that he is 41 years old and his overall health is good, apart from some back pain. He is justifiably concerned about COVID-19 for personal reasons concerning his future and that of his family. Unfortunately, however, his concerns in that regard would apply to the whole of the inmate population without distinction" (at paragraph 16).

The importance of evidence that the specific appellant will be affected by a denial of bail is further illustrated by the decision in ***R. v. Eheler***, 2020 BCCA 280. In ***Eheler***, Justice DeWitt VanOosten noted that the appellant "was diagnosed with severe sleep apnea. He has provided a letter from a physician indicating that he requires specialized equipment to effectively manage this risk" (at paragraph 52). She considered this evidence, indicating that "I am satisfied in the circumstances of this case that Mr. Eheler's particular health vulnerabilities support his application for release. They are not dispositive, but certainly relevant to the analysis" (at paragraph 53).

Similarly, in ***R. v. Kazman***, 2020 ONCA 251, Justice Young, in granting release pending an appeal to the Supreme Court of Canada, considered evidence of the appellant's "health condition," as "well as his age," which placed "him within a vulnerable group

that is more likely to suffer complications and require hospitalization if he contracts COVID-19. It is necessary for him to practice social distancing to lower the risk of contracting COVID-19. Being in jail will make it difficult, if not impossible, to practice such social distancing" (at paragraph 17). Age also played a role in ***R. v. McRae***, 2020 ONCA 498. In this bail decision, it was indicated that "[t]he COVID-19 pandemic is . . . a factor that may be considered as part of the public interest criterion, though the weight to be given to it depends on the particular circumstances of each case. . . . Here, the applicant is elderly and has serious underlying medical conditions. This puts him in a class of people particularly vulnerable to COVID-19. I have given this factor some weight" (at paragraph 48). In ***R. v. T.S.D.***, 2020 ONCA 773, the age of the offender had a different effect. In that case, in considering an application for bail pending appeal, Justice Jamal indicated that "[t]he COVID-19 pandemic is . . . a factor that may be considered as part of the public interest criterion, though the weight to be given to it depends on the particular circumstances of each case," but held that "[h]ere, the applicant is young and in apparently good health. This factor was not invoked, and I give it little weight" (at paragraph 59).

In ***Kazman***, Justice Young indicated that he wished to "emphasize" that considering the effect of the Pandemic on the issue of bail "does not mean bail will be granted in every case where COVID-19 is raised as an issue." In granting release in that case, Justice Young concluded that "the particular circumstances of this case justify release. Given the applicant's health issues amidst the COVID-19 situation, and the limited bail period sought, I am persuaded that the applicant's detention is not necessary is in the public interest" (at paragraphs 20 and 21).

In ***R. v. Shingoose***, 2020 SKCA 45, in the context of an application for bail pending appeal, the Court considered "affidavit evidence regarding [Mr. Shingoose's] medical condition and the impact of COVID-19 on prison facilities," as well "affidavit evidence with respect to some of the actions the Ministry of Corrections and Policing has implemented to mitigate the risk of COVID-19 transmission within custodial facilities" (see paragraph 4). In granting release, Justice Jackson concluded that the evidence presented established that Mr. Shingoose was "particularly vulnerable to the risks posed by COVID-19 in the prison facility" (at paragraphs 7 and 8):

> In Mr. Shingoose's case, I find on the basis of the evidence placed before me that he is particularly vulnerable to the risks posed by COVID-19 in the prison facility. He is 69 years old. He is diabetic and his condition appears to have worsened in custody. The evidence presented to me with respect to what is transpiring in the correctional facility does not specify any special care that is being taken in relation to Mr. Shingoose.
>
> Mr. Shingoose has presented a release plan that will see him safely transported from the correctional facility to his farm where he has agreed to being quarantined for 14-days. He will abide by strict conditions thereafter. A member of his family has undertaken to ensure he will abide by any terms that may be imposed. Having regard for all of the applicable factors, I conclude that his detention pending the hearing of his appeal is not necessary in the public interest and I grant his application.

In ***R. v. W.M.***, 2020 ONCA 266, which also involved an application for release pending an appeal, Justice Brown of the Ontario Court of Appeal considered evidence that the appellant "suffers from C.O.P.D." Justice Brown noted that there "was a suggestion in his application materials that his medical condition would make him vulnerable to the COVID-19 virus were he to stay in jail" (at paragraph 39).

". . . there has been a much broader acceptance that modern technology can play an important role in ensuring timely and safe justice."

In the end, however, this evidence had no effect. Justice Brown noted that at the hearing, W.M.'s counsel "stated that this application would have been brought even in the absence of the COVID-19 pandemic." As a result, Justice Brown stated: "I do not place much weight on W.M.'s medical condition for purposes of the analysis" (at paragraph 40).

A SUMMARY OF THE PANDEMIC'S IMPACT ON BAIL IN CANADA

There has been some broad language used by a small number of Canadian judges as regards the impact of the pandemic on bail, with some suggesting that it is a crucial factor. However, as we have seen, the Canadian judiciary has generally adopted a more cautious approach: the pandemic is a factor, but it does not override the law of bail. In other words, the bail provisions must still be applied. If an offender presents evidence that the pandemic will cause them health problems, beyond those that all inmates are susceptible to, then this is one of many factors to be considered.

It has been suggested that "[t]he COVID-19 pandemic illustrates that it is possible to decrease the incidence of pre-trial detention in Canada. Indeed, the pandemic is forcing judges to increasingly consider how measures such as electronic monitoring, sureties, and house arrest—measures that still must be used sparingly and respect the ladder principle—can fulfil traditional law enforcement objectives while limiting pre-trial detention" (see Terry Skolnik, *Criminal Law During (And After) COVID-19*, 43 MANITOBA L.J. 145, 157 (2020)).

However, this was a trend that existed before the pandemic took hold. In ***R. v. Myers***, 2019 SCC 18, for instance, the Supreme Court of Canada held that pretrial release "at the earliest opportunity and in the least onerous manner is the default presumption in Canada" (at paragraph 1). Has the pandemic accelerated this approach as Terry Skolnick suggests? The decisions referred to in this column suggest otherwise.

CONCLUSION

The Canadian legal system was initially affected in a dramatic fashion by the pandemic. Courthouses were closed and all but emergency matters delayed. However, Canadian courts have responded and there has been a much broader acceptance that modern technology can play an important role in ensuring timely and safe justice. There has been some reluctance to accept the reality of how modern technology can allow courts to function in a Pandemic (see, for instance, ***R. v. Berent***, 2020 MBPC 53, in

which a reluctance to embrace trials by videoconferencing was expressed), but overall Canadian courts have adapted.

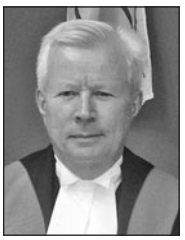
In sentencing, the pandemic has had little effect. It has not resulted in Canadian judges significantly reducing prison sentences. In a few cases, an enhanced credit for pretrial detention has been provided, but even in these instances the credit has been minimal. Thus, overall, the pandemic has not reduced jail as an option or the length of prison sentences when one is imposed.

In those cases in which a reduction in a prison sentence has been sought based upon the impact of the pandemic, Canadian judges have consistently required that evidence of the specific impact that the existence of the pandemic will have on an offender, if a prison sentence is imposed, be presented. Canadian judges have been quite willing to rely upon prison administrators to make the decision as to whether the incarceration of specific individuals poses unacceptable risks to their lives and safety. They have not generally been willing to reduce prison sentences solely because of the pandemic.

Similarly, the Court of Appeal for England and Wales in ***Whitting*** indicated that "the more serious the offence, and the longer the sentence, the less the pandemic can weigh in the balance in favour of a reduction unless there is clear, cogent and persuasive evidence of a disproportionately harsh impact on the prisoner. Over the course of a long sentence the period of time during which the prisoner is subject to lock down because of the pandemic might be quite short in relative terms. It is for prison governors to do what they can to alleviate the worst adverse effects" (at paragraph 30).

In the area of bail, there have been some broad statements by a few Canadian Judges about how the pandemic has dramatically changed the law of bail, but as we have seen, this approach has generally been rejected in Canada. Bail judges have been willing to consider the impact that the Pandemic has on bail, but only in specific instances in which evidence establishes a heightened risk. Even in those cases, protection of the public continues to be the dominant factor in Canadian bail decisions.

Overall, Canadian judges have not been willing to "put away" or forget the law that applies to bail because of the Pandemic (see ***Roman Catholic Diocese of Brooklyn v. Cuomo***, 2020, No. 20A87 (U.S.S.C.), in which the majority indicated that "[m]embers of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten").



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