Court File No. CV-20-00652216-000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Applicant/Respondent

AND

ADAMSON BARBECUE LIMITED
AND WILLIAM ADAMSON SKELLY

Respondents/Applicants

SUPPLEMENTARY AFFIDAVIT OF William Adamson Skelly
sworn April 12, 2021

April 13, 2021

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AFFIDAVIT OF WILLIAM ADAMSON SKELLY

(SWORN ON April 12, 2021)

I, WILLIAM ADAMSON SKELLY, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY**:

BACKGROUND

1. I am a father of two (2) young children and a husband to my wife.

2. I am the sole owner and director of Adamson Barbecue Limited with the following restaurant locations: 176 Wicksteed Avenue, Toronto, Ontario M4G 2B6 ("Etobicoke restaurant"), 7 Queen Elizabeth Boulevard, Toronto, Ontario M8Z 1L8 ("Leaside restaurant"), and 15195 Yonge Street, Aurora, Ontario L4G 1L8 ("Aurora restaurant").

3. As such, I have knowledge of the events and matters before the Court which gave rise to the s.9 Order under the *Reopening Ontario Act* (ROA) sought against me and my business.
4. I have always been a hard working and determined entrepreneur who is devoted to operating my businesses. The experiences and challenges I have had have taught me to be resourceful, to develop practical skills, to fully learn, and internalize the details and scope of projects. These skills allow me to take a macro perspective of situations to understand all working parts in them. Most of all, it has left me with an open mind to new ideas and concepts. This is relevant to my search for truth around COVID-19 and the resulting "safety" measures.

ADAMSON BARBECUE

5. At twenty-six (26) years old, I took $2,500 in savings and invested into a concession trailer to start my barbecue catering company. It was an overnight success. Within three (3) years, I had earned enough to open a restaurant. Within one (1) year, I reached $1 million in annual revenue and was employing over ten (10) people to provide quality customer service to our patrons.
6. By 2020, my third year in the restaurant business, I was onto my second location and employed over fifty (50) people with a payroll over $1 million per year. This location was profitable in the first month, so I took advantage of the CSBFL loans and went on to open my third restaurant. It was the largest, at 7000sqf. It would have been my flagship restaurant, with an impressive pit room and cooking operation, with seating for eighty (80) customers and parking for fifty (50) cars.
7. To get to this point, I had to understand human resources, customer service, digital marketing, accounting, importing, warehousing, inventory management, and of course, high quality cooking.

8. Understanding how to operate an efficient and successful business in Canada broadened my perspective on economics and politics. This helped me understand my role in the economy and in the Canadian society.
9. I believe that the ability to succeed and prosper as an entrepreneur is a fundamental key to a democratic and free society which is the pillar of the Canadian system. As such, I recognized not only how my business was being affected, but how the fundamental pillars of democracy were eroding away due to COVID-19 and its subsequent "safety measures".

COVID-19 IMPACTS

MARCH 2020

10. Early March 2020, I put down a $40,000 deposit to lease the building for my third location in Etobicoke. Within a few days, the province went into lockdown. My sales, which allowed for the CSBFL loans, immediately dropped. I went from a cash flow positive position to a financial bleed almost immediately.
11. Being an open minded, free thinking entrepreneur, I immediately began questioning everything we were told from the mainstream news and public officials regarding the alleged "deadly and contagious COVID-19 virus", COVID-19 lockdowns/safety measures (i.e., COVID-19 masks, social distancing, and self-isolation), and more. The COVID-19 measures were unprecedented, and the fear mongering from the media did not line up with the reality I and many others were experiencing. These COVID-19 measures have been causing significant collateral damages to myself and other Canadians such as financial harm and psychological harm. I attach as Exhibit "A" to this Affidavit, a collection of mainstream media on the breakout of COVID-19 during March 2020.

12. 2020 has been a year that propelled me into conducting my own research and investigation into the truth about COVID-19. I was following the news out of Europe closely, as they were a few months ahead of us as the "pandemic" progressed. I noticed how it was largely the elderly who were affected, yet nothing was being done to protect them. I noticed the politicization of medical treatments as the media was making a huge deal out of ventilators, despite 90% of the patients who were put on them ended up dying. All the while, common treatments like hydroxychloroquine ("HCQ") were vilified by the media as well as the failure to actually discuss anything about natural remedies, proper nutrition, and exercise. I attach as Exhibit "B" to this Affidavit, a collection of articles from Europe and media vilifying common treatments.
13. As the "pandemic" progressed in Canada, the same trends followed. This alleged virus was reported to negatively affect the elderly in Long-term Care ("LTC") centers, yet no rapid antigen testing was put in place at these facilities (and has not to this day). From my observance of LTC centres, I believe there are a lot of questionable and suspicious things going on behind the scenes in these LTC centres. I attach as Exhibit "C" to this Affidavit, a collection of articles illustrating the issues surrounding Long-Term Care centres.
14. I saw how record numbers of people were taking $2,000 a month from the government, while a small fraction of this money would have easily protected those in the LTC centers. I also saw that with this money being given to citizens there would be detrimental effects on businesses and entrepreneurs like myself, meaning that we were financially at the mercy of government hand-outs. I attach as Exhibit "D" to this Affidavit, a collection of articles advertising the availability and eligibility of Canadians to receive the Canadian Emergency Response Benefit.

15. I called my MPP, I wrote to politicians, and never heard back from them. This ignoring and unanswered questions and concerns raised further doubt about the entire situation. It became increasingly clear over the next few months how this was no longer about health, but about politics. Only one side of the narrative was accepted to discuss, and any dissenting opinions were labeled as selfish, ignorant, or "denying science". I attach as Exhibit "E" to this Affidavit, attempted correspondence with local politicians.

SEPTEMBER 2020

16. By September, I had to lay off a third of my workforce because of the financial harm caused by the lockdown/restrictions. These employees were not afraid and wanted to work to financially support their families, but I could not afford to keep them around. Not one of them, or our customers, had been affected by COVID-19. No one became sick. No one was hospitalized, let alone died. I was growing increasingly frustrated by the lack of government action around the LTCs and protecting the vulnerable; while they were clamping down on small businesses like mine, and healthy people like my employees and my customers. I attach as Exhibit "F" to this Affidavit, evidence of restaurant sales at this time.
17. I believe in Albert Einstein's quote, "condemnation without investigation is the height of ignorance", which encouraged me to research and investigate into COVID-19 myself. I learned about the polymerase chain reaction (PCR) test, and how its Nobel Prize-winning inventor, Dr. Kary Mullis, claimed it should not be used to diagnose viral infections, especially as a standalone test. At a high enough cycle threshold, it could "detect almost anything". Unfortunately, Dr. Kary Mullis passed away on August 7, 2019 strangely a few months prior to when the "pandemic" started in 2020 and cannot speak to the improper application of his

PCR test to COVID-19. I attach as Exhibit "G" to this Affidavit, information on Kary Mullis and the PCR Test.

18. I further learned how unreliable the PCR test is in isolating, identifying, and diagnosing COVID-19 when I discovered the President of Tanzania, John Magufuli, exposed that even a goat and a pawpaw fruit can falsely test positive for COVID-19. Others around the world have found similar testing issues using different non-human specimens, which receive very little to no mainstream media attention. I attach as Exhibit "H" to this Affidavit, information on the President of Tanzania, John Magufuli and the PCR Test.
19. I reached out to LifeLabs and DynaCare, the labs handling most of the COVID-19 tests in Ontario. I discovered that they both used a cycle threshold (Ct) value of over 40. When I pushed the question, and asked for comparison Ct values on other tests, I was met with hostility by the lab technicians. They eventually stopped answering my questions. I attach as Exhibit "I" to this Affidavit, email correspondence from LifeLabs and Dynacare.
20. The lack of response and transparency made me grow even more suspicious, considering how this new metric "case counts", which are created by this inaccurate PCR test, was the primary metric used to justify pulling us in and out of lockdowns, despite having no impact on real world metrics like overall mortality, hospital, and ICU admissions. I was also questioning as to how they determine when to put COVID-19 on death certificates as though it is the cause of death. I attach as Exhibit "J" to this Affidavit, a collection of articles explaining real world metrics as against metric "case counts".
21. I have seen others submit Freedom of Information Requests ("FOIR") to the public officials for evidence that the COVID-19 virus has been isolated and identified, as required by Thomas M. River's Postulates; however, they did not receive such evidence as requested. I attach as

Exhibit "K" to this Affidavit, a sampling of Freedom of Information Requests that have been submitted for response.

22. As more news was being released about the "second wave" (which at this point was obviously the approaching flu season), I was seriously questioning whether to continue complying with future mandates.

23. At a press conference, Premier Doug Ford said he would not shutdown bars, restaurants, and gyms again without solid evidence. I made a post on my personal Instagram page hypothesising we would in fact be locked down within 7-10 days. I was wrong, as it was only three days later he announced the lockdown. This announcement came with no supporting data despite his promise. Shortly after that, it was revealed that Toronto Public Health officials were made to sign NDA's when attending meetings with the provincial health board. I was livid at this news. I could see a lack of democracy, transparency, and accountability in our government officials. I attach as Exhibit "L" to this Affidavit, news articles indicating Premier Doug Ford would not shutdown bars, restaurants, and gyms again, the subsequent lockdown, and the non-disclosure agreements with Toronto Public Health officials.

24. A few days later, some data was released by Ontario Public Health describing yet another metric (not at all tied to real world impacts) "Outbreaks". These were supposedly happening in restaurants and bars in Toronto. I contacted dozens of colleagues in my industry, and none of them had their contact tracing data collected by the government. I was left with more questions as to how they determined that these outbreaks happened in restaurants if none of our personal data was collected. This made no sense to me and further amplified my confusion and desire for clarity as well as the truth. I attach as Exhibit "M" to this Affidavit, data released by Ontario Public Health describing a 'metric outbreak' in the restaurant and bar industry.

25. The authorities eventually abandoned contact-tracing but continued to enforce small businesses to keep records of our personal contact details and invade our privacy. Small businesses were used to collect this data, enforce masks and social distancing, and keep up the facade of this whole scam instead of the municipal by-law officers. This is not our job as business owners, and while most complied, it is a complete overreach by the authorities to place this burden on us, especially with its ambiguity. We, as small business owners, became police and enforcement against our own customers. I attach as Exhibit "N" to this Affidavit, a collection of news articles indicating that contact-tracing had been abandoned.
26. The new "colour coded" lockdown system was used as a social conditioning mechanism teaching us to accept these measures and new rules thrust upon us as business owners and citizens. They were constantly moving the goalpost and changing how businesses have operated. These expectations created many issues for my small business because I could not keep up with the constant fluidity and uncertainty caused by the imposition of COVID-19 restrictions and measures. I attach as Exhibit "O" to this Affidavit, the Regulations that were instituted to manage the "colour coded" lockdown system in Ontario.
27. In 2020, I have been attending the Canadian freedom movement's peaceful protests in Ontario and have been connecting with other like-minded individuals who do not agree with the government's COVID-19 measures. I attach as Exhibit "P" to this Affidavit, images of participation and attendance at protests during this time.

NOVEMBER 2020

28. By November, there were a plethora of studies on alternative treatments (Hydroxychloroquine, Ivermectin, holistic medicine, etc.), the ineffectiveness of masks and social distancing, and the

statistically insignificant effect of the alleged asymptomatic transmission from healthy people. There was enough data to prove that restaurants, bars, and gyms were not driving the spread of COVID-19. I attach as Exhibit "Q" to this Affidavit, a collection of articles indicating effective alternative treatments, the ineffectiveness of non-pharmaceutical interventions and the insignificant effect of asymptomatic transmission.

29. The province began around that time to release its daily and weekly epidemiological reports, which clearly demonstrates this. My calls and letters to politicians were proving fruitless, leaving me no recourse and no remedy. It was clear there was a larger Marxist agenda to crush small and medium-sized businesses, while favouring the largest and most profitable corporate businesses at our expense. The politicians had still not protected the vulnerable from this allegedly "deadly and contagious virus", and instead created further pockets of vulnerability within a relatively healthy society.

30. It was clear to me that civil disobedience was my last and only option to have my voice heard and preserve my rights and freedoms under the *Charter*. I decided that I would do so at my next opportunity.

CIVIL DISOBEDIENCE

NOVEMBER 24, 2020

31. On Monday November 23, 2020 I announced on my Instagram account via video that I would be opening my Etobicoke restaurant to peacefully protest in defiance of the *Reopening Ontario Act* (*ROA*) given that on November 24th Toronto would be entering a "red zone". It was met with an explosion of support from like-minded Canadians. My Instagram video amassed over

half a million views, and 20k comments. I attach as Exhibit "R" to this Affidavit, a screenshot of the Instagram announcement.

32. The first day of what was labelled the "Barbecue Rebellion", Tuesday November 24, 2020, hundreds of people showed up in support. It was obvious that I had the support of a huge number of people, who were also unsatisfied and in distress with the government's COVID-19 lockdown/restrictions; they were ready to engage in peaceful civil disobedience themselves to regain their rights and freedoms.
33. At the end of the day, the Medical Officer of Health, Dr. Eileen DeVilla, issued an *HPPA* section 22 Class Order to close my business. This was under the pretense of "reasonable and probable grounds to believe a communicable disease exists on the property". Considering nobody has ever showed any signs of illnesses or symptoms, I did not believe such reasonable and probable grounds existed then, or at any time. As such, I decided to continue engaging in peaceful civil disobedience. I attach as Exhibit "S" to this Affidavit, the s. 22 closure order issued under the *Health Protection and Promotion Act.*

NOVEMBER 25, 2020

34. On Wednesday November 25th, I opened my Etobicoke restaurant for dine-in for the second day of the "Barbecue Rebellion". I followed all COVID-19 procedures at my restaurant against my desires, except for the actual ban on dine-in service. Proper COVID-19 signage was posted. All customers were told to wear PPE and social distance. We allowed and respected COVID-19 mask exemptions.
35. Many of the customers engaged in peaceful civil disobedience themselves, as they were left with no choice either because of our governments' overreach. There were many bylaw officers

and police on site who did not attempt to enforce these mandates. Instead of regulating any customers, the Ministry of Health ("MOH") directed MLS, TPH, and TPS to "take actions necessary to ensure that the premises remain closed...including replacing the locks, installation of cinder blocks or other blockades and posting notices about the Order." I attach as Exhibit "T" to this Affidavit, correspondence to the Toronto Police Service dated November 25, 2020.

36. It was by the second day, when the crowds had grown larger. I met, shook the hands of, and hugged hundreds of patriotic, liberty-loving Canadians who I am proud to call my friends. Most of these people do not follow the COVID-19 measures, they see their friends and families, and do not wear masks. Despite my close contact with these great people, none of our friends or families fell ill from the alleged COVID-19. This went against everything I had been told about the alleged contagiousness and deadliness of COVID-19. By the end of the day, I was issued a summons for violating the *ROA*. I decided to open again and continue to accept my summons until I had my day in court. I attach as Exhibit "U" to this Affidavit, the total of 13 summons issued pursuant to the *ROA*.

NOVEMBER 26, 2020

37. On the third day, November 26, 2020, the Ministry of Health ("MOH") unlawfully seized ("possessed") my property and premises and used Toronto Police Services to invoke the *TPTA* on my own property. This action, effected in bad faith by an unelected health official, allowed the police to arrest me for accessing my own property. In the end, I was arrested and made to take a 200m perp walk in front of the media to a cruiser. I attach as Exhibit "V" to this Affidavit, the TPA notice dated November 26, 2020 and the Crown Response Record on the arrest.

38. Rather than using the cinder blocks, as recommended by the MOH, approximately 253 members of the TPS were deployed to my restaurant, including 140 uniformed officers, 18 mounted officers, and 41 public order officers. They surrounded my restaurant, blocking and denying my customers from entering. I believed this to be an incredibly excessive and unwarranted use of police resources. My restaurant was seized by the government. I refer to Exhibit "T" to this Affidavit, correspondence to the Toronto Police Service dated November 25, 2020 and the Applicant's Application Record dated December 1, 2020.
39. Later after the incidents and my arrest, I was delivered a payment request from the Board of Health for "expenses incurred by the Board in carrying out directions given by Dr. Eileen De Villa" of $187,030.56 to which I was shocked to receive. I cannot pay this fee given the financial catastrophe on my businesses caused by these COVID-19 lockdown/restrictions. I attach as Exhibit "W" to this Affidavit, the Recovery of Expenses letter dated December 18, 2020.
40. I was arrested and held for over thirty (30) hours on trespass, mischief and obstruct charges. This should never have been escalated to a criminal law matter. I was given a choice between a consent hearing on Friday night, or to wait in jail until the following Thursday for a proper bail hearing. I was advised by my counsel to bail out. In hindsight, this was a poor choice because the bail conditions put a stop to my civil disobedience.
41. Since my bail conditions, I was silenced and unable to make any difference. My ability to take part in a free and democratic society whereby *Charter* rights/freedoms, such as the right to peaceful protest and right to free speech, were taken away from me. However, this inability to act through my business operations allowed me another avenue to fight these issues and the COVID-19 lockdown/restrictions through a legal capacity.

42. I have suffered financial, emotional, and psychological distress from these measures and subsequent actions taken by the government against me and my business. From all my activism in the Canadian Freedom Movement, I truly know that I am not the only Canadian negatively impacted and harmed by the government's COVID-19 lockdown/restrictions. We are watching every one of our basic human rights and freedoms slowly being taken away from us.
43. I have been slandered, ridiculed, and silenced. The mainstream journalists and politicians have not only taken the hammer to me, but also construed a false narrative about me to publicly shame and ostracize me. Their unwarranted public ridicule of me has sent many other Canadians, who believe and trust the government officials and mainstream media, to send hatred and insults towards myself and everyone connected to me. Nonetheless, I am resilient and willing to continue challenging the government given the dire need to demand democracy and transparency from all levels of government pertaining to COVID-19 and maintain accountability for the injustices caused.
44. I will always feel tremendous gratitude and appreciation for my employees, customers, family members, and fellow Canadian freedom activists who have been supporting me and my businesses throughout these challenging times.
45. Due to time constraints, I intend to supply a supplementary Affidavit along with my factum to be presented for the constitutional challenge.
46. I make this Affidavit in support of my civil disobedience contrary to all COVID-19 related restrictions and "safety" measures that infringe my rights/freedoms, and for no improper purpose.

SWORN BEFORE ME in person at the City of Calgary in the Province of Alberta, on April 12, 2021.

Signature of Commissioner

Katherine Kowalchuk
Barrister and Solicitor

Signature of Deponent
WILLIAM ADAMSON SKELLY

Exhibit "A"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

Nfld. & Labrador · Weekend Briefing

COVID-19 is terrifying, but let's not let fear defeat public health

John Gushue · CBC News · Posted: Mar 21, 2020 6:00 AM NT | Last Updated: March 21, 2020

comments

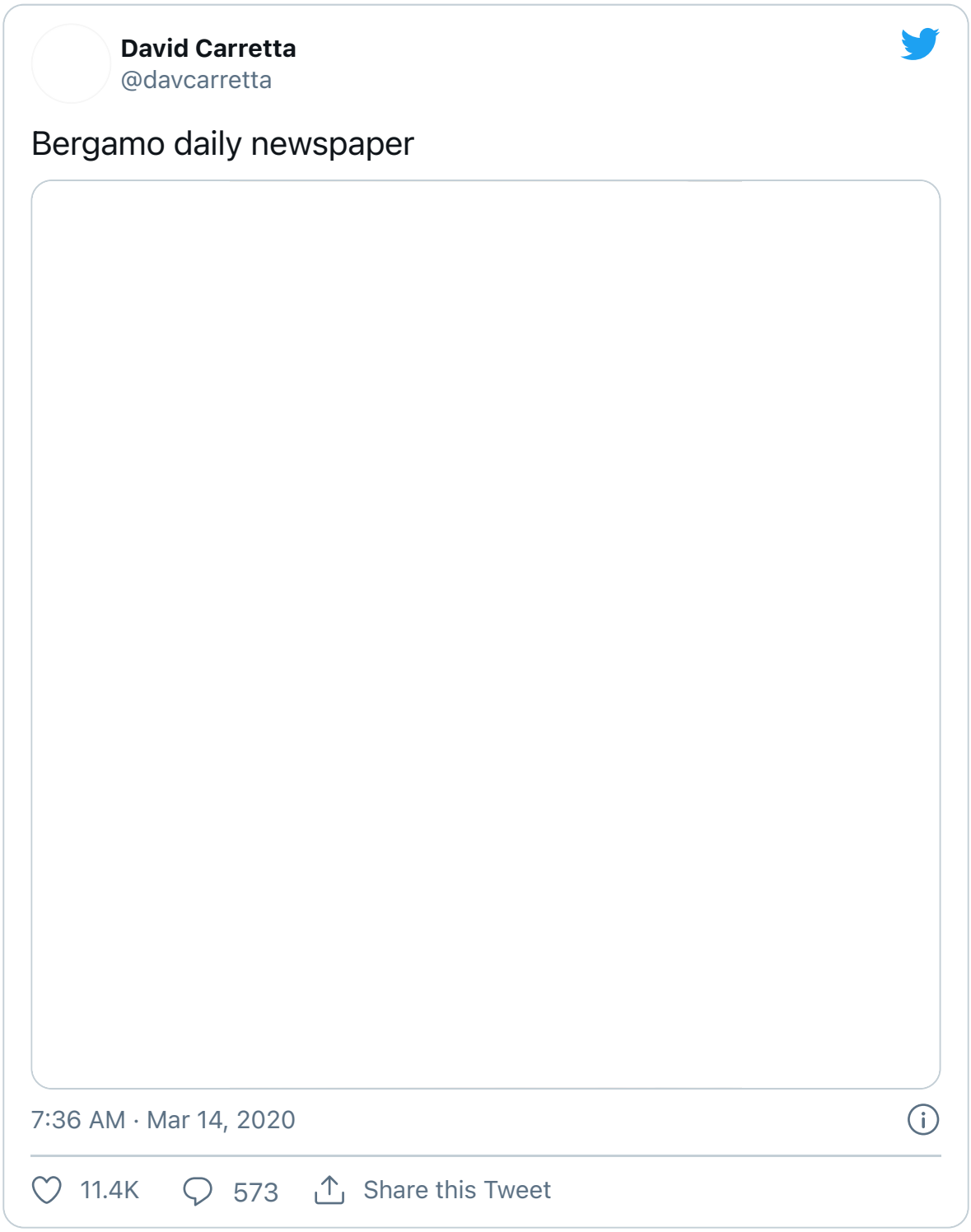
Dr. Janice Fitzgerald, Newfoundland and Labrador's chief medical officer of health, has been urging the public to follow advice on limiting the spread of COVID-19. (Ted Dillon/CBC)

It was a video that chilled me to the bone. It was from northern Italy, where COVID-19 has caused stunning damage. This video showed the obituary section in a newspaper from the city of Bergamo, from two issues published a month apart.

The first one shows what would presumably be a normal day. The second one, featuring a newspaper published March 13, shows page after page of obituaries, with photos of those killed by a virus that is now worldwide.

Terrifying.

And what struck me most is when I decided to learn more about Bergamo, a city about which I knew hardly anything. Its population is just over 120,000. In other words, it's comparable in size to St. John's.



That second newspaper in the video, which you can see above, was published just two days after the World Health Organization declared that COVID-19 was now a global pandemic.

In the days that followed, Italy's death toll continued to escalate on a curve that is exponential. Italy has overtaken China as the country with the highest death toll in the world.

Italy's COVID-19 death toll surpasses that of China

1 year ago | 3:43

Italy's death toll from coronavirus surpassed 3,400 on Thursday, overtaking the number of dead in China, where the virus first emerged. 3:43

The WHO declaration of March 11 changed daily life almost everywhere, including here in Newfoundland and Labrador.

Our first presumptive case was announced one week ago today, with two further cases — connected to the first — announced Tuesday and a fourth on Friday. At least the first three cases involved patients with mild symptoms.

Amid it all, we saw unprecedented actions, from employers sending workers home, schools closing and ultimately a public health emergency declared Wednesday. Bars were subsequently closed, as well as gyms, arenas and other businesses. The Liquor Corp. has gone to a new business model of phone or electronic orders.

A system that is often ignored

We are not yet in a state of emergency, which provinces like Ontario, Alberta and British Columbia have declared.

> “There's a paradox in public health: the better it is, the less likely people know it even exists.”

Newfoundland and Labrador is trying to manage, ahead of a pending storm.

So too is the public health system — a vital part of our social infrastructure, and one which is almost always ignored, except during times of crisis.

There's a paradox that is very well known to those whose work involves public health: the better it is, the less likely people know it even exists. We've seen this apply in so many cases, and nothing is better than immunization against diseases that have practically disappeared, like polio. I'm not old enough to remember what it was like for children to contract polio, but you hear older people talk about how the illness would come around some summers, and would strike someone they knew.

A patient receives a flu shot. As yet, there is no vaccine to prevent COVID-19. (Mark Quinn/CBC)

In our day and age, the public health system chugs away in the background. We see the diligence and talents of the people who run it only occasionally. My memory is drawn to the flu shot clinics that public health nurses run; at the last one I attended, it appeared to be a huge crowd, and I sighed and expected a long wait.

But the wheels of this machine were in top gear. We were all registered and immunized with no real disruption to our schedule. These nurses are total pros.

Panic is in the air

COVID-19 is very different indeed from regular flu season, and panic is in the air.

For instance, I've lost count over how many people have called for universal testing of every single person in the province for this particular coronavirus.

- **4th case of COVID-19 in N.L., on eve of test sites opening**
- **811 backlog improves as nurses added to deal with COVID-19 calls**

This is of course not remotely feasible — there aren't enough swabs in the province, let alone staff who can do this at once — but more importantly, it would not stop the virus's path.

Let me explain. If we were all tested this afternoon, say, it would only tell us the relevant results for right now. A test is not immunization, and it does not offer protection. In fact, it could give a very false sense of security to many individuals.

To test for COVID-19, a swab is used to capture a sample from a patient's nose. (Shared Health/Province of Manitoba)

The virus is still in our midst, and any of us could become infected in the days, weeks and, yes, months (and, yes, *years*) to come. While testing needs to ramp up, it's certain that testing is going to need to be an ongoing process.

That's why Dr. Janice Fitzgerald, Newfoundland and Labrador's chief medical officer of health, is emphasizing why there is a logical system for testing. If someone has symptoms, they should contact public health or call 811 and follow instructions, and *not* go straight to a doctor's office or an emergency room. Self-isolation is the best, safest option.

Even now, the system — even more in jurisdictions where deaths are being reported — is struggling to keep up with demand for people who feel they may be infected, and want to be tested.

Much more lethal than flu

As Fitzgerald has told briefings, this virus is very different from seasonal flu. There is no vaccine for it. There is no treatment for it, either.

Much more critically, it is a much more lethal virus than influenza, which is dangerous enough. It's true that many people who get the new virus experience mild symptoms, but a great danger of COVID-19 is that people assume that is the universal and expected result of infection.

- **Doctors to start virtual care immediately, says N.L. health minister**
- **Dentists, nurses sound alarm on lack of masks in N.L.**

It's not. Carrying the virus to someone in a risk group — the elderly, or someone with

compromised immunity — could have fatal consequences. (This is, sadly, comparable to influenza, and why it can be so deadly to elderly people.)

As I write this, the mortality rate in Italy for COVID-19 cases is just above eight per cent. In Canada, the rate (again, as I write this on Friday) is substantially less, at 1.3 per cent.

In Newfoundland and Labrador, there are no deaths. I've been wondering how that may involve our geographic isolation, our low population density, and the fact that Newfoundland is an island. As the late great Tom Cahill wrote in a song for Joan Morrissey, "Thank God we're surrounded by water."

- **Weekend Briefing: Read previous editions of this column**

These factors, though, are not shields. The virus will find its way here in numbers. It's just a question of when.

We cannot be complacent about this.

We also need to be calm and rational, and guided by science and best practices in public health. I spoke the other night with a friend who is an epidemiologist. One of the topics we discussed are the fiery calls on social media for people to publicly identify neighbours— that is, *on* those same social media platforms — who may or may not be sick.

This is not contact tracing, she said. "That's vigilantism."

Still, the system needs to protect itself. On Friday, Health Minister John Haggie said the government is figuring out how to enforce new rules requiring self-quaranting, including those coming from other provinces. Haggie said government will have an online form where the public can report those flouting the new rules.

"It's likened to retuning and rebuilding a car engine while the vehicle is actually moving. We are in uncharted waters here. We're making some sensible, or what we believe to be sensible first steps," he told reporters.

The virus is not the only thing that's spreading quickly.

Our collective safety, and sanity, depends on keeping things in perspective, and working together to ensure that our public health system can work properly to protect us, especially those who need the help the most.

Read more from CBC Newfoundland and Labrador

Coronavirus pandemic

The shocking coronavirus study that rocked the UK and US

Five charts highlight why Imperial College's research radically changed government policy

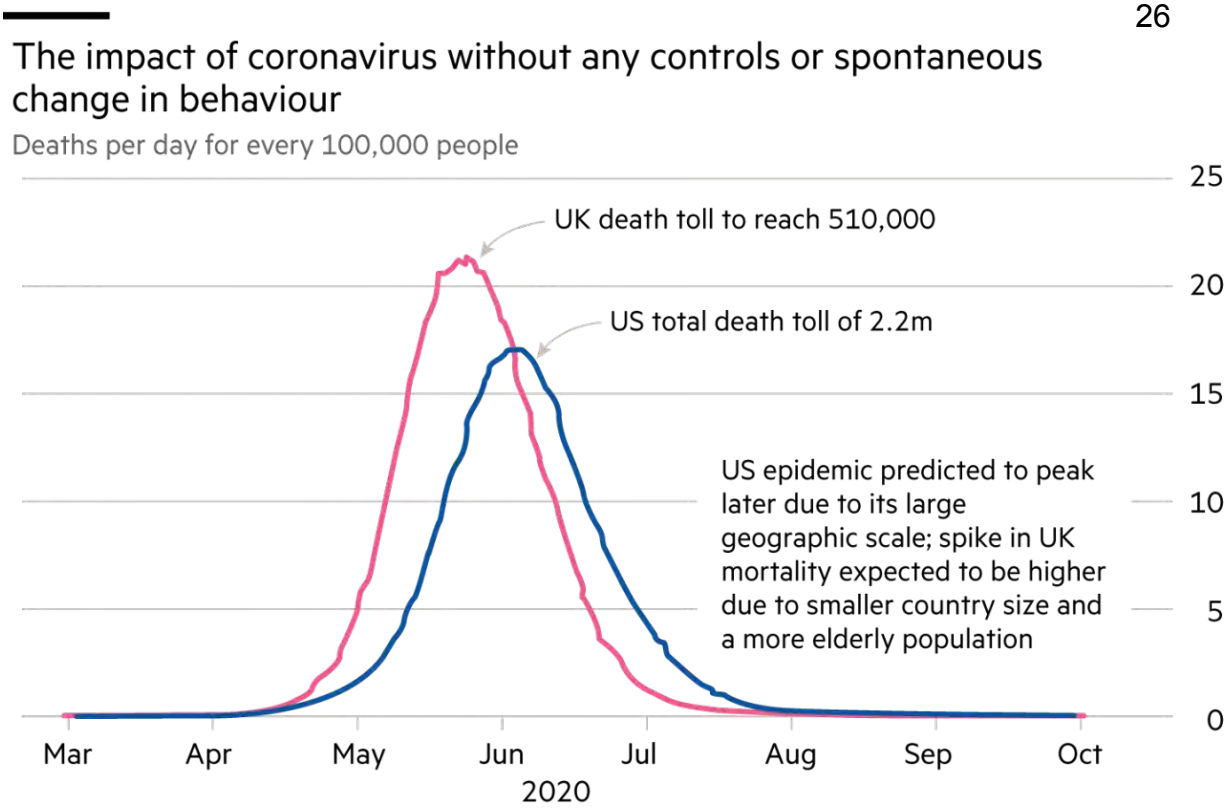
The Imperial College study emphasised the importance of social distancing to lessen surges that could overwhelm the NHS

Chelsea Bruce-Lockhart, **John Burn-Murdoch** and **Alex Barker** in London MARCH 19 2020

An Imperial College coronavirus model has had a profound impact on public policy since its results were shared with British and American officials last week.

No study has so exhaustively detailed the transmission of the virus through the UK and US population, the overwhelming pressure it has placed on health systems, or the limited effectiveness of individual measures to check its progress.

Like any simulation, it rests on uncertain assumptions. Many factors remain unknown to the research team led by Professor Neil Ferguson, who this week fell ill with coronavirus symptoms. But even with this caveat the conclusions are brutally stark: democratic politicians face only terrible choices in the battle to save lives.



The starting point for analysis is an unchecked epidemic. This would infect eight out of 10 people, according to the researchers, with 510,000 deaths in the UK and 2.2m in the US.

While the estimate draws on hospitalisation rates in Italy, it assumes every patient receives adequate care. In practice the researchers find available beds for critical patients would actually be exceeded by the second week of April. At peak, for every 30 patients requiring critical care, just one could be treated adequately.

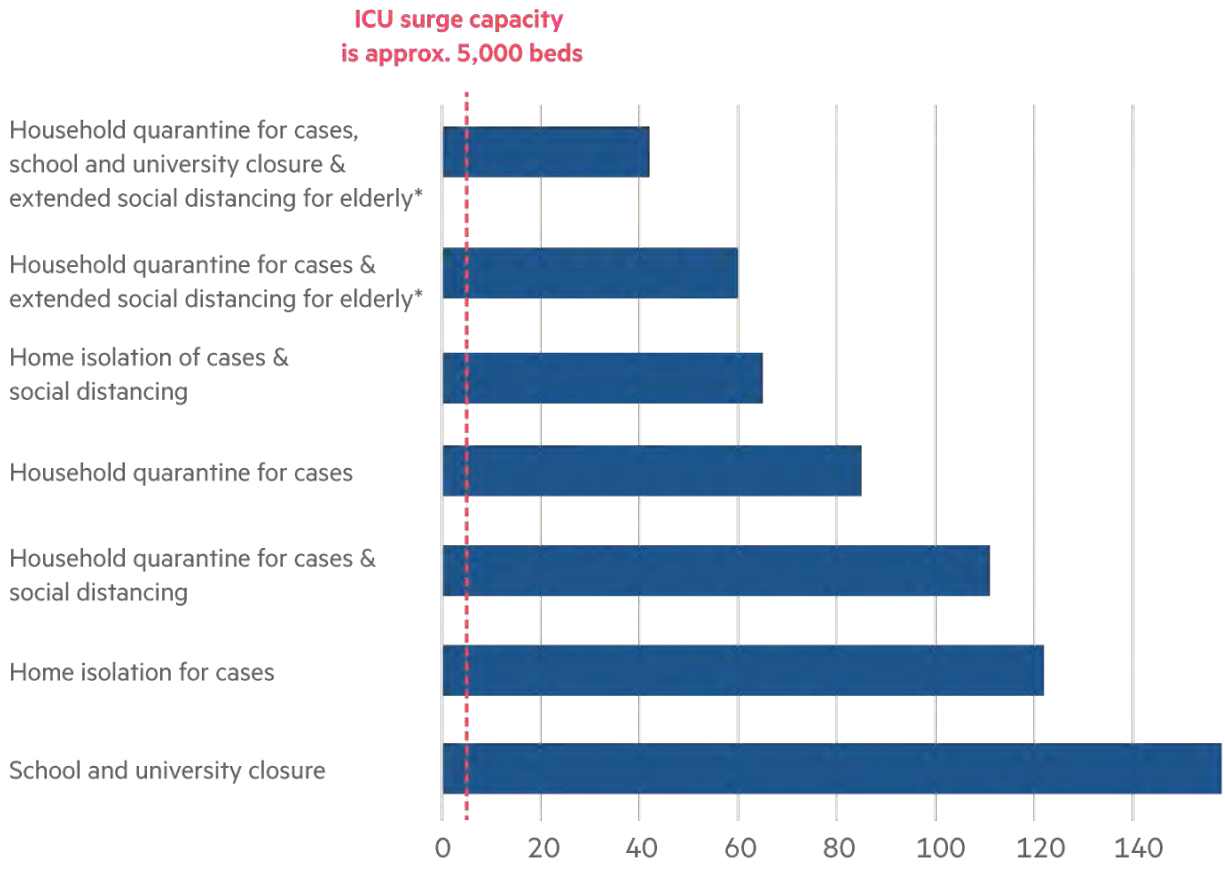
The mortality peak would occur after about three months. Because of its geographic size and younger population, the US lags the UK in how rapidly the virus spreads and the rate of death it causes.

While a vaccine is developed — a process that can take up to 18 months — or antiviral drugs identified, US and UK governments are left with two extraordinary choices.

The first is a “mitigation strategy” to reduce the peak of infection while the population builds immunity; the second a more drastic “suppression” approach to quell the epidemic, whatever the cost to the economy, or trauma for social life.

Peak demand for UK critical care beds will far outstrip supply under even the most ambitious mitigation strategies

Estimate for the maximum number of ICU hospital beds needed ('000s)



*Social distancing for those over 70 years assumed for four months
Figures based on (i) strategies being triggered for three months from the point where 1,000 ICU beds are needed per week and (ii) an average of 2.4 secondary cases generated per case
Source: Ferguson, N. M. et al (Imperial College Covid-19 Response Team)

Britain and America started with mitigation measures. But the limits of what can be achieved — even with a combination of stringent measures — are laid bare by the data.

The most effective mix tested involves asking people to stay home for a week if they show symptoms, quarantining their household, and urging over-70s to keep a distance from others.

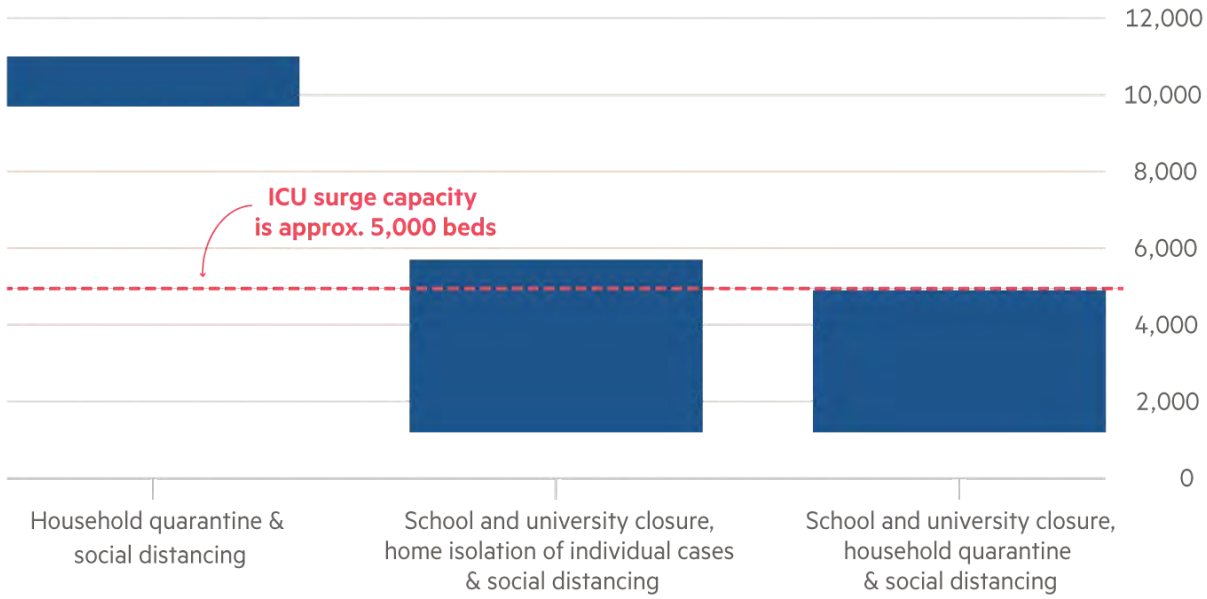
This would reduce demand for critical beds by two-thirds and halve the number of deaths during the three month period when the measures are applied. Parts of the population would build immunity, eventually driving transmission rates down.

But, crucially, demand for critical beds would still outstrip capacity eight times over in both the US and the UK. The Imperial researchers describe it as "perhaps our most significant conclusion".

Governments are racing to expand critical care. Yet even assuming all patients could be treated, the Imperial researchers conclude mitigation strategies alone would leave about 250,000 dead in the UK and around 1.2m in America. Boris Johnson, the UK prime minister, recognised that the ultimate toll would be too much for the country to bear.

Coronavirus suppression strategies could keep hospital bed demand at a manageable level

Peak number of ICU hospital beds needed under each suppression strategy; ranges depend on how early the strategies are triggered*



*Trigger points based on the number of ICU beds in use per week, ranging from 60-400

Figures based on (i) strategies being in place for a five-month period; schools and universities reopening when ICU hospital bed use is 75% below the trigger point (ii) an average of 2.4 secondary cases generated per case

Note that with no intervention 180,000 beds would be needed at the peak

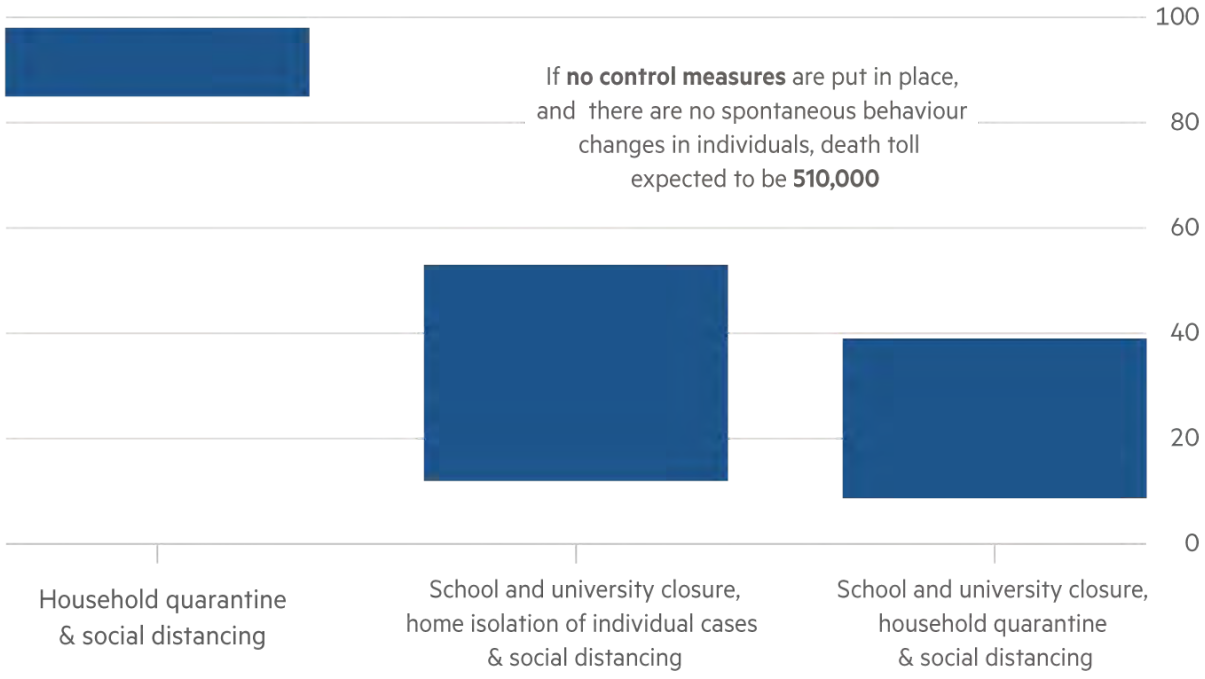
Source: Ferguson, N. M. et al (Imperial College Covid-19 Response Team)

More drastic curbs on society can make a big difference. Short of a complete lockdown on movement, the most effective scenario modelled involves isolating people with symptoms, reducing everyone's social contact by 75 per cent, quarantining households and closing schools and universities for five months.

If sustained, the measures can choke the epidemic to bring patient numbers to something hospitals could potentially cope with. The study does not, however, quantify related costs: the devastating blow to the economy, consequences for general wellbeing, or mortality rates for other diseases.

Coronavirus suppression strategies could have a big impact on UK death toll

Number of deaths expected in a two-year period; ranges depend on how early the strategies are triggered* ('000s)



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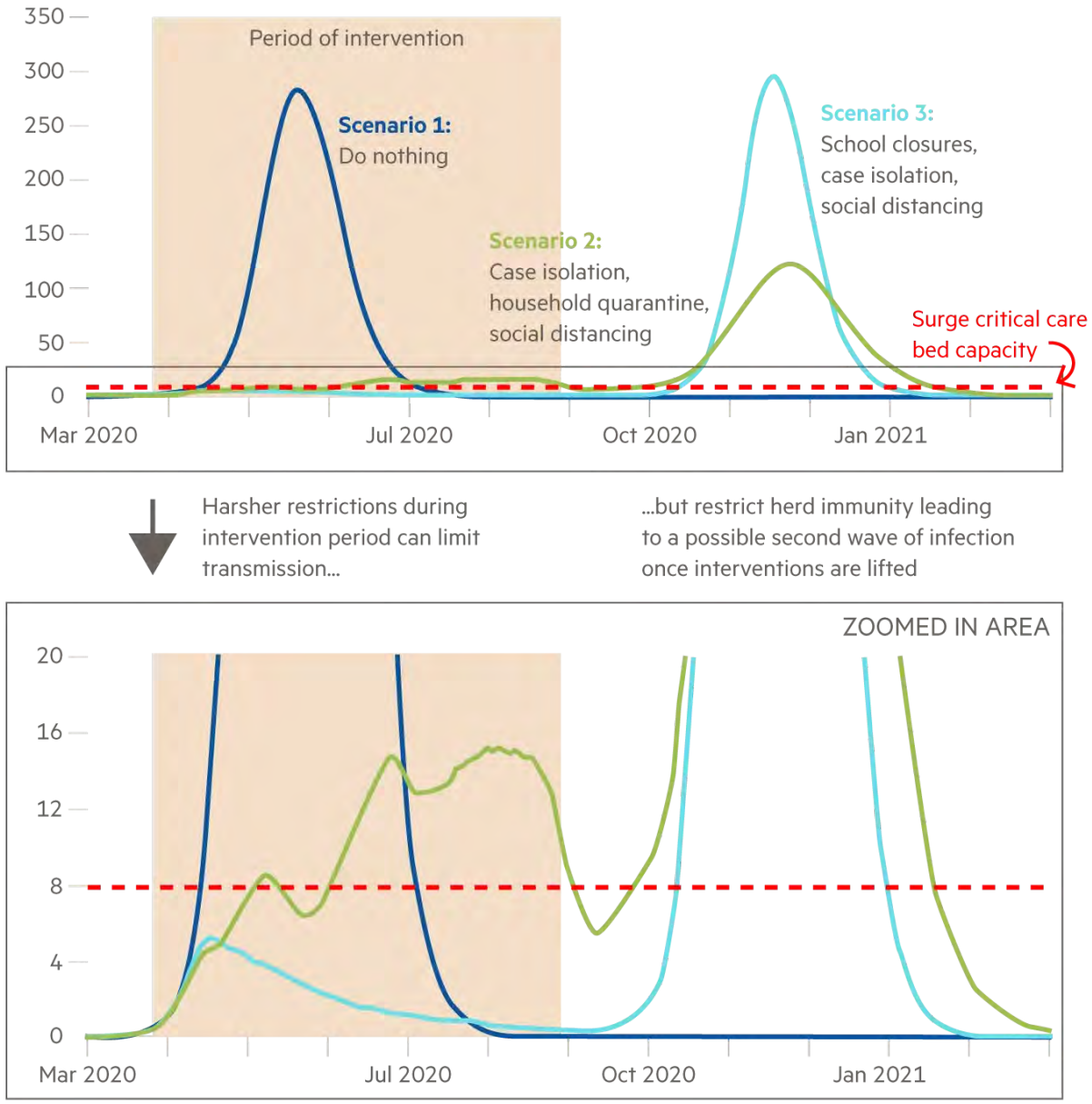
Source: Ferguson, M. N. et al (Imperial College Covid-19 Response Team)

This raises the important question of whether — and at what cost — such a curfew could be maintained by any government in the western world.

Without a vaccine, as soon as the toughest restrictions are relaxed, a second wave of infections would be expected to follow.

Second wave of infections could arise if suppression strategies not maintained

Critical care beds occupied per 100,000 people



Source: Ferguson, N. M. et al (Imperial College Covid-19 Response Team)
© *FT*

Contact tracing and intensive testing — as deployed in South Korea — can help extend the effectiveness of measures to stifle infectious spread, as can technology if concerns about civil rights are set aside.

But given available resources in America and Britain, the timescales for vaccines, and the pace of transmission, the researchers conclude suppression is “the only viable strategy” at the moment, while being in no doubt about the profound challenges.

"No public health intervention with such disruptive effects on society has been previously attempted," the paper concludes.

Additional reporting by Joanna S Kao.

Are you seeing job cuts happen in your workplace or others? Is your company discussing changes in pay or benefits? Tell us what you're seeing. Send tips and stories to coronavirus@ft.com.

HEALTH AND SCIENCE

WHO says coronavirus death rate is 3.4% globally, higher than previously thought

PUBLISHED TUE, MAR 3 2020•4:28 PM EST | UPDATED WED, MAR 4 2020•8:54 AM EST

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KEY POINTS

World health officials say the mortality rate for COVID-19 is 3.4% globally, higher than previous estimates of about 2%.

"Globally, about 3.4% of reported COVID-19 cases have died," WHO Director-General Tedros Adhanom Ghebreyesus said during a press briefing at the agency's headquarters in Geneva.

A man wears a mask on Wall St. near the New York Stock Exchange, March 3, 2020.
Brendan McDermid | Reuters

World health officials said Tuesday the mortality rate for COVID-19 is 3.4% globally, higher than previous estimates of about 2%.

"Globally, about 3.4% of reported COVID-19 cases have died," WHO Director-General Tedros Adhanom Ghebreyesus said during a press briefing at the agency's headquarters in Geneva. In comparison, seasonal flu generally kills far fewer than 1% of those infected, he said.

The World Health Organization had said last week that the mortality rate of COVID-19 can differ, ranging from 0.7% to up to 4%, depending on the quality of the health-care system where it's treated. Early in the outbreak, scientists had concluded the death rate was around 2.3%.

During a press briefing Monday, WHO officials said they don't know how COVID-19 behaves, saying it's not like influenza. They added that while much is known about the seasonal flu, such as how it's

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transmitted and what treatments work to suppress the disease, that same information is still in question when it comes to the coronavirus.

VIDEO 01:14

WHO chief: Coronavirus is everybody's enemy

"This is a unique virus, with unique features. This virus is not influenza," Tedros said Monday. "We are in uncharted territory."

Dr. Mike Ryan, executive director of WHO's health emergencies program, said Monday that the coronavirus isn't transmitting the same exact way as the flu and health officials have been given a "glimmer, a chink of light" that the virus could be contained.

"Here we have a disease for which we have no vaccine, no treatment, we don't fully understand transmission, we don't fully understand case mortality, but what we have been genuinely heartened by is that unlike influenza, where countries have fought back, where they've put in place strong measures, we've remarkably seen that the virus is suppressed," Ryan said.

Exhibit "B"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

Coronavirus

Care homes and coronavirus: why we don't know the true UK death toll

Niamh McIntyre *and* Pamela Duncan

Tue 14 Apr 2020 22.05 BST

▲ Care home deaths are counted separately and never make it into the daily Department of Health and Social Care announcement. Photograph: Andy Bullock/Getty Images

The UK death toll has risen past 12,000 deaths yet we know that this figure is not the complete picture as it excludes deaths occurring in other settings, including care homes.

One care home told the Guardian a third of its residents had died, but deaths in care settings may not be captured in official figures for weeks after they occur. What does this mean for the UK's true fatality count?

How many Covid-19 deaths have there actually been in the UK so far?

According to government figures, there were 12,107 deaths in the UK to 5pm on 13 April. The problem is that this figure only tells part of the story as it just covers hospital deaths that had been verified as of that date. What we do not know is how many more deaths there have been in the community and, most pressingly, in care homes.

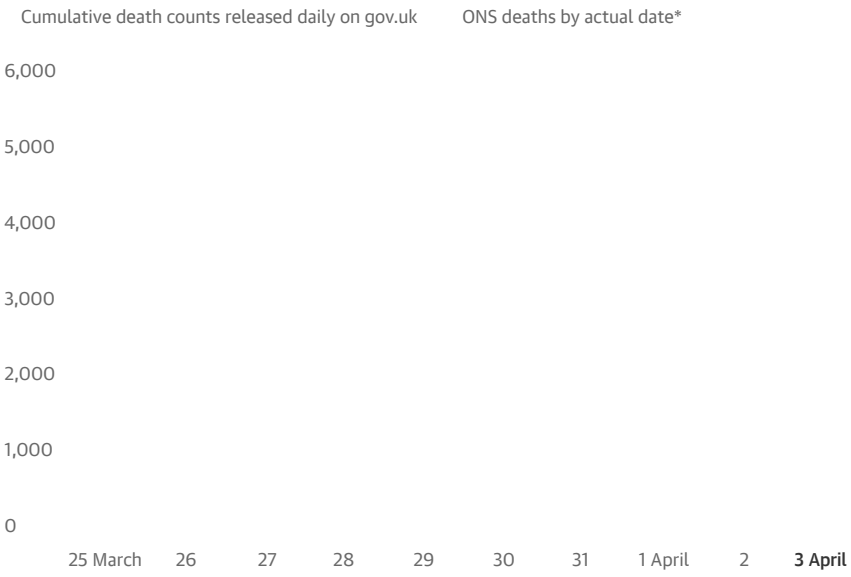
To give an indication of just how far out the daily figures are, as of 3 April the Department of Health and Social Care reported 4,093 coronavirus deaths in England and Wales. But the true figure - as revealed in the Office for National Statistics' latest release - was at least 52% higher than was known at the time.

Most viewed

Virus hotspots could lead to third Covid wave in UK, scientists warn

Former Big Brother contestant Nikki Grahame dies aged 38

On 3 April the government reported 4,093 cumulative coronavirus deaths but ONS figures show the true figure was 52% higher



Guardian graphic. Source: gov.uk, ONS. England and Wales figures. *Number of deaths so far registered up until 11 April

Many of these deaths will have been reported in the days after 3 April, but others, including care home deaths, are counted separately and never make it into the daily government announcements. Put simply, the big death toll you hear every day is an undercount.

How many deaths do we know to have occurred in care homes?

The truth is we have no way of knowing for certain. The Guardian has revealed hundreds of deaths have occurred in care homes to date: two of the UK's largest care home providers have reported 521 coronavirus deaths between them so far.

The only official figures for care home deaths are those published by the ONS. These come out weekly, but there is a time lag because there is a delay between a death occurring and it being registered.

The latest ONS figures provide a breakdown of the locations where 4,122 registered Covid-19 deaths took place. They show that 217 or 5% of deaths that occurred in England and Wales registered by 3 April actually happened in care homes. A further 136 deaths occurred in private homes, while 33 were in hospices.

In its briefing note the ONS said, when all comparable data was taken into account, the number of deaths in England was about 15% higher than the NHS figures.

However, the difference may well turn out to be higher as more deaths are registered. A recent report indicates that about half of all Covid-19 deaths could be happening in these settings in some European countries.

How do other countries count care home deaths?

We cannot directly compare care home deaths in the UK with those in other countries as there are different ways of recording these deaths.

In Ireland, France and Germany, official data on deaths includes those in care settings. Of Irish deaths up until 11 April, 54% had occurred in care homes,


BBC flooded with complaints over coverage of Prince Philip's death

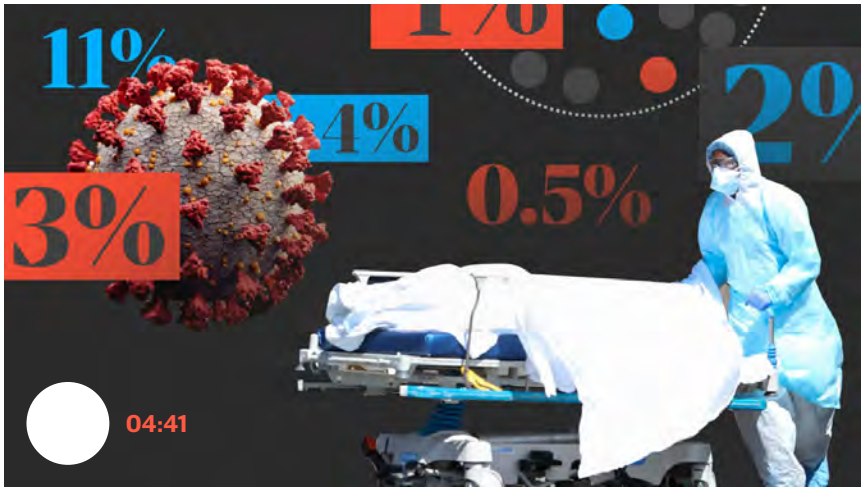

We've all suffered Khloé Kardashian's fate, even if we're not as famous
Rebecca Nicholson


Prince Charles remembers 'dear papa' as details of funeral emerge

according to the country's chief medical officer. Figures released by the French public health authority show 45% of deaths took place in care homes.

Removing care home fatalities from the French statistics reveals that the UK hospital death toll is higher than France's - which government briefings have failed to note when stating that Britain is behind France in official cumulative death figures.

Italy and Spain, by contrast, do not report deaths in care settings regularly. In Italy, best estimates were based on a survey of 10% of care homes in the country. The death rate in this sample was extrapolated to reach an estimate for all care homes, which suggests 53% of coronavirus deaths were happening in care. In Spain, estimates based on regional totals submitted to the government also suggest those in nursing homes accounted for more than half of deaths.



▲ Why are coronavirus mortality rates so different? – video explainer

What is the best estimate in the UK?

The ONS figures are expected to be the gold standard as they will include deaths in both hospital settings and in the community. However, as the ONS bases its figures on death certificates, there are delays in its figures, meaning we may not see the true scale of the deaths for a number of weeks.

Sarah Caul, head of mortality at the ONS, said in a blogpost explaining the methodology: "Numbers produced by ONS are much slower to prepare, because they have to be certified by a doctor, registered and processed. But once ready, they are the most accurate and complete information."

However, concerns have been raised regarding the death registrations on which the ONS figures are based. A whistleblower told Channel 4 News death certificates may be undercounting the true number of deaths, because coronavirus is not always correctly listed as a suspected cause.

investigate and challenge without fear or favour.

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Coronavirus: Care home deaths 'far higher' than official figures

19 April 2020

Coronavirus pandemic

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New data has added to growing evidence that the number of deaths linked to coronavirus in UK care homes may be far higher than those recorded so far.

The National Care Forum (NCF) estimates that more than 4,000 elderly and disabled people have died across all residential and nursing homes.

Its report comes amid calls for accurate data on virus-linked deaths.

Only 217 such care home deaths have been officially recorded in England and Wales up to 3 April.

The NCF, which represents not-for-profit care providers, said its findings highlight significant flaws in the official reporting of coronavirus-related death statistics.

- **How deadly is the coronavirus?**

It collected data from care homes looking after more than 30,000 people in the UK, representing 7.4% of those people living in one of the country's thousands of care settings.

It said that, across those specific homes, in the week between 7 April and 13 April, there had been 299 deaths linked to coronavirus. That was treble the figure for the previous week and double that in the whole of the preceding month.

If that number was reflected across all residential and nursing homes, NCF estimated there have been 4,040 coronavirus-related deaths in care homes which are not yet included in official figures.

Meanwhile, Cabinet Office Minister Michael Gove has denied reports the government has drawn up a graduated plan to start easing the lockdown within weeks.

Speaking to Sophy Ridge on Sky News, he said: "It is the case that we are looking at all of the evidence, but we have set some tests which need to be passed before we can think of easing restrictions in this lockdown."

Education Secretary Gavin Williamson said "no decision has been made" on when schools in England, which were closed on 20 March, will reopen.

Responding to a **report in the Sunday Times** suggesting some pupils could return in early May, **he tweeted:** "I can reassure schools and parents that they will only reopen when the scientific advice indicates it is the right time to do so."

But addressing claims in the same paper that ministers had failed to prepare properly for the outbreak, shadow health secretary Jonathan Ashworth said there were "serious questions about the government's immediate response to this pandemic and whether they were too slow to act".

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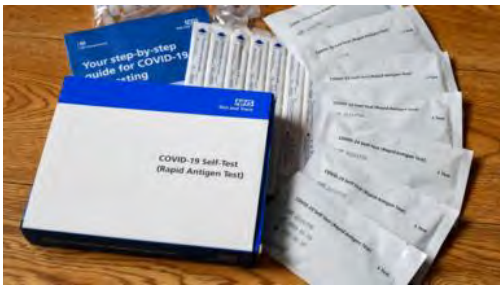

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Saving green turtles... by cooling their eggs

- WHAT WE DON'T KNOW **How to understand the death toll**
- TESTING: **Can I get tested for coronavirus?**
- LOOK-UP TOOL: **Check cases in your area**

The daily number of UK-wide coronavirus deaths, announced each day by the government, only includes people who died with the virus in hospital in the four nations.

Ministers have regularly explained that this is because the hospital figures can be quickly collated and released, enabling their experts to analyse trends to help them advise on how the UK is coping with the virus.

'Ring of steel' call for care homes

Virus-related deaths in care homes - and elsewhere in the community, such as in hospices or in people's own houses - are measured separately and figures covering England and Wales are announced on a weekly basis by the Office for National Statistics every Tuesday.

Because these are based on what doctors write on death certificates - sometimes only issued in the days after the death - there is a two-week lag on collecting this data from the thousands of care homes involved. For that reason, the figures issued last Tuesday only went up to 3 April.

- **How big is the problem in care homes?**
- **Which regions have been worst hit by coronavirus?**
- **Care home confirms 20th death**
- **More tests promised for care homes**

That official figure of 217 is **less than half the figure provided by two of the UK's largest care home providers** which, between them, say they know of 442 coronavirus-related deaths.

The Care Quality Commission (CQC), which holds detailed statistics of care home deaths, has been accused by some in the residential care sector of

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"dragging their heels".

The CQC, England's health and social care regulator, said it was working to "provide more detailed information about how the pandemic is affecting care homes".

Separately, analysis from Care England, which represents large care home providers in England, claims that there have been 7,500 more deaths in care home - from all causes - in the last two weeks than would be expected at this time of year.

And modelling by the health consultancy, Candesic, for the Financial Times, suggested the number of deaths due to the epidemic in UK care homes was at least 6,000.

The fact the National Care Forum is saying there's been such a rapid increase in deaths is not surprising - the hospital figures show deaths have been increasing at a similar rate, before beginning to slow more recently.

But it is the scale of the deaths which is shocking.

They are effectively saying the number of deaths is around six times higher than the Office for National Statistics figures suggest.

The NCF has relied on its own staff to say whether they suspect a person has died of coronavirus as well as including the confirmed cases, whereas the official figures rely on cases where doctors have recorded the virus on death certificates.

Since we have not had widespread testing in care homes so far it is very difficult to really judge the true impact. The government is now promising more testing so it will only be in the coming weeks and months that we will really know.

Vic Rayner, the NCF's executive director, said that as long as residents in care services are omitted from the most widely-quoted statistics, the government will not be able to properly plan how to protect its people or prepare an exit strategy.

She said: "Our current national debate on how to mitigate and exit this crisis is virtually entirely centred on the management of the peak within hospitals.

"We are overlooking how this crisis is playing out in other settings, which are there to protect those who are most vulnerable to the impact of the virus.

"If we truly believe that every life has value, there can be no meaningful discussions about exit strategies without considering these individuals."

A statement from the Department of Health said: "Every death from this virus is a tragedy and that is why we are working around the clock to give the social

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care sector the equipment and support they need to tackle this global pandemic."

The statement added that it was particularly focusing on providing tests for care workers and their families and ensuring that workers got access to any protective equipment that they required.

AFP

The UK's daily death figures only include those who died with the virus in hospital

Elsewhere, 84 tonnes of personal protective equipment for medics and care home workers is due to arrive in the UK today from Turkey. It follows warnings from the healthcare sector that stock was at "critical" level.

The government has appointed Lord Deighton, who headed the Organising Committee of the London Olympics, to resolve problems with supplies and distribution of PPE.

However, speaking at Saturday's Downing Street briefing, Communities Secretary Robert Jenrick did not dispute the suggestion that the 400,000 gowns in the shipment would only last NHS England around three days.

In other developments:

- Lady Gaga, Paul McCartney and Billie Eilish were among **more than 100 artists to perform from their homes** in a globally televised concert, organised to celebrate healthcare workers
- Front-line NHS staff **should receive an extra £29-a-day reward** for their service during the pandemic, the Lib Dems have said
- Public Health England **will start recording coronavirus cases and deaths by ethnicity**, after research suggested people from black, Asian and minority ethnic backgrounds were at greater risk of becoming seriously ill with Covid-19
- Parks and **cemeteries must stay open**, Mr Jenrick said, as he announced an extra £1.6bn for local councils in England
- Britons in Bangladesh **will be able to fly home this week**, with up to 850 seats available on four repatriation flights
- Rules which have kept Spanish children indoors since 14 March **are due to**

FOLLOW THE MONEY

APRIL 10, 2020 / 2:21 PM / UPDATED A YEAR AGO

Deaths soar at Britain's care homes as COVID-19 stalks elderly

By Andrew R.C. Marshall, Natalie Thomas

5 MIN READ

LONDON (Reuters) - Thousands of care homes across Britain were locked down last month to stop COVID-19 from spreading among their frail and elderly residents. For Jamshad Ali, 87, it came anyway.

Ali and six other residents at Hawthorn Green Care Home in east London died with "symptoms consistent with COVID-19," with 21 others also possibly infected, said a spokesman for the home.

With growing reports of COVID-19 deaths and cases at other homes, experts fear the disease, caused by the new coronavirus, which has already ripped through the care sector in the United States and the rest of Europe is now doing the same in Britain.

Care workers and advocacy groups are calling for more equipment to keep themselves and their residents safe, and

for testing to get self-isolating staff back to workplaces already understaffed when the pandemic struck.

They're also calling for more support for a sector whose workers are, like Britain's National Health Service, fighting the coronavirus up close, but with less pay, training and recognition.

Jamshad Ali's daughter, Luthfa Hood, is heartbroken but also angry that care homes are considered such a low priority.

"Young people, if they get the virus, they can fight it," she said. "But (with) older people, it just seems like we're saying, 'We don't care about you - you're too old.'"

A spokesman for Hawthorn Green Care Home said those showing COVID-19 symptoms were looked after "in

South African variant can 'break through' Pfizer vaccine, Israeli study says

Myanmar security forces with rifle grenades kill over 80 protesters - monitoring group

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How worried should we be about links of blood clots to AstraZeneca's vaccine?

EU's Michel says he's sleeping badly after sofa gaffe in Turkey

accordance with strict infection control measures," and that giving all residents the best care remained "our number one priority."

Nearly 8,000 people have died of COVID-19 in Britain, with London the worst affected.

Reporting delays and lack of testing make the death toll in care homes hard to pinpoint. Over 9% of them had reported cases and the number would continue to rise, said England's Chief Medical Officer Chris Whitty on Tuesday.

"If you have a virus this infectious in a setting with lots of vulnerable older people, then it's very bad news," said Caroline Abrahams, Charity Director of Age UK, which supports older people. "The mortality rate is likely to be very high."

Slideshow (14 images)

On Monday, France announced there had been more than 2,400 deaths in its care homes.

About 433,000 people live in Britain's 11,000 care homes, which have over 450,000 beds - three times more than the National Health Service.

Many care providers rely upon on agency staff who work at many different homes and could carry the virus with them.

"SHE'S SAFE"

Kate Holt's mother Shirley

had lived contentedly at Kendal Care Home in northwest England for three years until someone on the same ward had tested positive for COVID-19. Holt later heard that others were also showing symptoms.

She was so worried about her mother that she took her out of Kendal Care Home last week and now looks after her at a family house nearby.

Her mother has Alzheimer's and limited mobility, and being her sole carer is demanding. "But at least she's got me around and she's safe," said Holt.

Sarah Willitts, Regional Director for Abbey Healthcare, which runs Kendal Care Home and 15 others, confirmed that an elderly resident at the home had had COVID-19.

She declined to say how many other residents and staff were affected by the disease, saying she didn't want to "scapegoat" any home or worry residents' families.

"We have some homes with nothing and others with positive or symptomatic residents," she told Reuters. "Some recover well and sadly some don't."

Slideshow (14 images)

Staff levels were depleted, said Willitts, but employees were "working very hard to give the best care they can to the residents."

Some staff felt well enough to work, she said, but were off sick and self-isolating because they, or someone they lived with, had mild symptoms of what might not even be the

new coronavirus.

“It would be a huge burden lifted if we had some way of testing staff and getting them back to work,” she said.

So far, Britain has struggled to test even its doctors and nurses.

A spokesman said the government’s Department of Health and Social Care was “determined to give the social care sector the support it needs to respond to coronavirus.”

He said the department had given guidance and equipment to care homes and was “rapidly working to extend testing to social care workers.”

Care homes are expected to accept patients discharged from hospitals who might

have COVID-19, but some managers say they don't have the staff, training or equipment to safely isolate those patients.

"How can I bring anyone in from a hospital ... when potentially they pose a high risk to all my other residents and the staff that work here?" said David Steedman, who runs Arlington House Care Home in Brighton, on England's south coast.

One infected person, he said, "can bring a whole home down."

Reporting by Andrew R.C. Marshall and Natalie Thomas; Editing by Timothy Heritage

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Health · CBC Investigates

Doctors face sanctions for prescribing unproven COVID-19 drugs to friends and family, regulators warn

Regulators suspect some Canadian doctors stockpiling medications touted by Trump as possible 'game changers'

Timothy Sawa · CBC News · Posted: Mar 27, 2020 4:00 AM ET | Last Updated: March 27, 2020

Pharmacist Jim Giontsis, who runs a pharmacy in Toronto's Moss Park neighbourhood, warns against using drugs like hydroxychloroquinine to treat COVID-19. (Evan Mitsui/CBC)

Medical regulators in Canada suspect some doctors have been stockpiling drugs that are being tested as potential treatments for COVID-19 and are now warning them they can be sanctioned if they prescribe the drugs to themselves or friends and family.

The drugs in question — hydroxychloroquine and azithromycin — are among a number of medications being studied as part of a global effort to fight COVID-19. So far, experts say evidence of their effectiveness in treating the disease is thin.

Hydroxychloroquine is currently used to treat malaria, rheumatoid arthritis and lupus, while azithromycin is an antibiotic for infections caused by bacteria and can be used in treating bacterial pneumonia.

U.S. President Donald Trump touted the drugs as potential "game changers" in a tweet last weekend.

Since then, the experimental combination of the two drugs has been widely discussed and debated online.

Spike in prescriptions

As a result, several regulators in Canada have reported a dramatic spike in prescriptions, including of another malaria drug, chloroquine.

"Globally, there are reports of physicians prescribing chloroquine or hydroxychloroquine to

otherwise healthy patients for prevention of COVID-19," reads a directive from the Canadian Pharmacists Association issued Monday.

"This practice threatens the Canadian supply of these drugs and will prevent their use in the sickest patients, in whom the benefit may outweigh the risks associated with these medications."

An employee checks the production of chloroquine phosphate at a pharmaceutical plant in east China's Jiangsu province in February. The drug, which treats malaria, has shown some efficacy against COVID-19-associated pneumonia in early research, but more study is required, experts say. (Barcroft Media/Getty Images)

Regulators in this country are also reporting an increase in orders for the drugs from doctors who list it as "for office use." Typically, such requests are from doctors who want to keep a supply on hand for future use.

They could be used off-label to treat patients, but there is concern those orders could also be used by doctors to treat themselves, or their friends and family who are concerned about

"At a time where resources are liable to become scarce, actions like [stockpiling and treating friends and family] dramatically depart from the core values of medical professionalism, may be in contravention of the College's [policies] and undermine the trust the public has in the profession at a time when they are most vulnerable," the College of Physicians and Surgeons of Ontario said in a recent notice to doctors.

'We wanted to act quickly'

The college says any complaints about doctors prescribing to friends and family will be investigated. The potential consequences range from providing advice to the doctor to referral to the disciplinary committee.

"We've heard some suggestion this is happening. We thought it was important to address it given the severity of the situation," said college spokesperson Shae Greenfield.

"We wanted to act quickly."

- **U.S. coronavirus cases now highest in the world**
- **Hospitals across Canada face COVID-19 'storm'**

A statement from medical regulators in British Columbia issued Thursday made similar warnings.

"More British Columbians will become infected and tragically, more may die from this virus," says a joint statement from B.C.'s College of Physicians and Surgeons, College of Pharmacists and College of Nursing Professionals.

"This means the well-intentioned pressure from patients, fellow health-care workers, and even friends and family to help access these medications, will undoubtedly increase."

Except when there is a clinical trial, the statement instructs both doctors and pharmacists not to provide the drugs as a treatment for COVID-19.

Giontsis confirms he saw an initial rush of orders for azithromycin and hydroxychloroquine, including some requests from doctors labelled 'for office use.' (Evan Mitsui/CBC)

Jim Giontsis, co-owner of Moss Park PharmaChoice in Toronto, confirms he saw an initial rush of orders for the drugs, including some requests "for office use."

"When [doctors] order it for the office, it could be for their patients, their staff or personal use," he said.

"We have to limit that now. We have limited supply now. We need to be very careful now to try to be fair to everyone."

'Very serious shortage'

The increased demand has already led to shortages for patients needing the drugs to treat other diseases.

A joint directive from medical associations in Ontario issued Monday says they are now

facing a "very serious shortage" of hydroxychloroquine.

"This presents very serious challenges for long-term continuity of care for patients suffering from rheumatoid arthritis and lupus," says the directive from Ontario's Pharmacists Association, Medical Association and Registered Nurses' Association.

WATCH | How Canadians are helping each other through the COVID-19 pandemic:

All alone, together: Helping each other during COVID-19

1 year ago | 3:04

How Canadians across the country are helping each other through the COVID-19 pandemic. 3:04

The statement also says there is a "serious lack of evidence" for using the experimental drug to treat COVID-19 and warns about the potential side-effects, which can include heart damage.

"Our patients expect us to protect them to the best of our abilities, and with all health professions rallying together, we will ensure that our patients are well cared for and that their confidence in us — and in the drug supply — is well founded."

For tips, please contact Timothy Sawa at timothy.sawa@cbc.ca

CBCNEWS

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World · Analysis

Trump's touting of unproven COVID-19 drug is unusual. We'll soon see if he's right

The global race to test a malaria drug as a treatment for COVID-19 is underway

Alexander Panetta · CBC News · Posted: Apr 08, 2020 4:00 AM ET | Last Updated: April 8, 2020

U.S. President Donald Trump, right, listens as Dr. Anthony Fauci, left, director of the National Institute of Allergy and Infectious Diseases, speaks during the daily coronavirus task force briefing at the White House on Tuesday. (Kevin Lamarque/Reuters)

comments

A U.S. president known for smashing norms is now breaking another one by promoting an unproven treatment during a deadly pandemic.

We'll soon find out if Donald Trump is right.

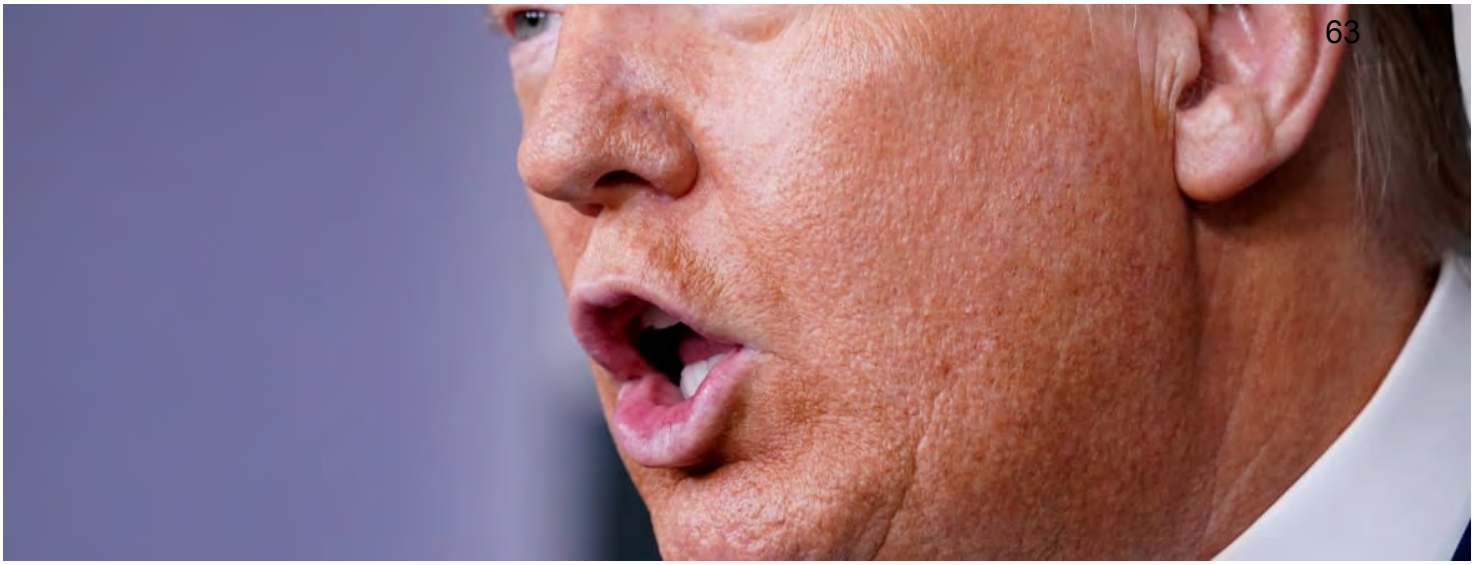
A global race is underway to test the malaria drug hydroxychloroquine for its anti-viral properties. It's a race unfolding in research labs and hospitals, including in Canada, as the death toll from COVID-19 continues to rise.

While other world leaders may urge caution regarding hydroxychloroquine, Trump, at times, seems to hurl caution to the wind.

He is the only G7 leader facing re-election this year, and controlling coronavirus is now the No. 1 issue.

His campaign website is promoting the very earliest sign of a possible pharmacological breakthrough.

"I'm not a doctor. But I have common sense," Trump told a weekend news conference, as he announced that the U.S. government has ordered 29 million doses of the malaria drug for labs, the military and hospitals.



Trump regularly expresses optimism that hydroxychloroquine could be an effective treatment for COVID-19. The medical research community says the evidence isn't there yet. (Kevin Lamarque/Reuters)

He encouraged medical professionals to take it protectively, if they don't have heart trouble, saying, "What do you have to lose?"

According to a paper from researchers at the Mayo Clinic, there is an increased risk of heart irregularities for one per cent of the drug's users.

Meanwhile, there are now shortages for those who rely on the drug to treat chronic autoimmune diseases such as lupus and rheumatoid arthritis.

Elizabeth Warren
@ewarren

Trump’s unproven claims about hydroxychloroquine have already led to stockpiling, creating shortages for the physicians and patients who rely on the medication.

Medical misinformation is dangerous and Donald Trump has no business giving this advice.

Ignoring Expert Opinion, Trump Again Promotes Use of Hydroxychloro...
The president’s advocacy of the anti-malarial drug has created tensions in his administration, and fears among doctors that it could ...
nytimes.com

10:14 PM · Apr 6, 2020

22.4K 1.1K Share this Tweet

To Trump's detractors, his willingness to promote off-label drugs is the latest example of the president obliterating basic norms of government: calling for prosecutors to go easier on a friend; pressuring the central bank to cut interest rates; pushing for criminal probes of his last election opponent and his next likely opponent; and, in the past few days alone, firing or reprimanding the independent watchdogs of several departments.

But here's the thing: Trump's faith in this drug might ultimately be vindicated.

The drug has shown promise in limited early studies. A Michigan Democrat credited it with saving her life and thanked Trump for promoting it. The Democratic governor of New York, Andrew Cuomo, has sounded cautiously hopeful.

"Anecdotally, it's been positive," Cuomo told a news conference this week.

"Anecdotally, you'll get suggestions that it has been effective. But we don't have any official data yet from a hospital, or a quote-unquote study."

It's being given to some patients in New York City hospitals overrun with COVID-19 patients and is part of the official instructions for treatment in that city's Mount Sinai network.

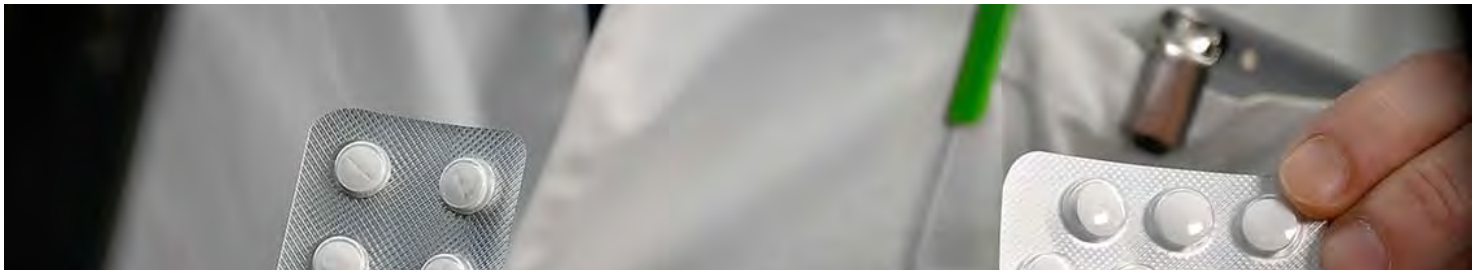
A frenzied global race is now underway to assess the results.

Hospitals testing the drug in Canada, too

The drug actually has a long history — and the story harkens back to the biggest pandemic of the 20th century. During the Spanish flu outbreak, doctors prescribed quinine, a malaria treatment derived from the bark of a tropical tree, without evidence it would help.

Intended as a synthetic substitute for quinine, chloroquine was originally developed by Bayer in 1934. In the late 1960s, researchers first noted the potential anti-viral properties of the drug, which is similar to hydroxychloroquine.

WATCH | Why it's so important to wait and see what the science says about hydroxychloroquine:



Doctors warn about trying malaria treatment for COVID-19

1 year ago | 2:04

Doctors are warning people about self-medicating for COVID-19 with an ingredient in an anti-malaria treatment that's been touted by U.S. President Donald Trump — chloroquine. 2:04

Now, dozens of studies are happening worldwide, including in Calgary and Montreal. That's while some hospitals also use it on a case-by-case basis.

One Toronto doctor assigned to a COVID-19 ward said his hospital isn't using it — but it's being offered elsewhere in Canada.

"I do know that some institutions are using it, and some are not. Some are combining it with antiviral drugs," said David Juurlink, head of clinical pharmacology at Sunnybrook Health Sciences Centre in Toronto.

He says the debate should be cleared up soon, given the number of experiments underway.

"I think that if we are having this conversation a month from now, we are going to have more information about what works and what doesn't."

Dr. David Juurlink, head of clinical pharmacology at Sunnybrook Health Sciences Centre in Toronto, says the questions about hydroxychloroquine as a potential treatment for COVID-19 should be answered soon. (CBC)

His own expectations are mixed.

On the one hand, Juurlink said, "There's reason for optimism." However, he has three significant caveats about the drug.

The first is one he shares with Dr. Anthony Fauci, the director of the U.S. National Institute of Allergy and Infectious Diseases who has tussled with White House officials: that the evidence presented so far is weak.

Second, Juurlink said that because of possible side-effects, he wouldn't even consider using it for most people — only hospitalized patients in worsening condition.

When used to treat chronic conditions, side-effects can include nausea, skin irritation and pigment changes, and with prolonged use, damage to the retina, although the latter is rare.

Juurlink's third caveat is that he suspects that if the drug does yield results, they won't be dramatic. Trump has suggested it works "unbelievably" well.

Juurlink said truly game-changing drugs, such as insulin, are recognizable pretty quickly.

"If it was a real home run, we would know by now." 68

One thing he's adamant about is his view that Trump should avoid boosting untested medicine.

"His promotion of this drug is dangerous," Juurlink said. "He knows nothing about clinical medicine."

While some have questioned whether Trump has any financial interest in promoting it, investigations by U.S. media have shown he has only a tiny stake — worth a maximum of $1,305 — through a mutual fund.

The New York Times, which first reported his small stake in French company Sanofi, said some Trump associates might also have investments in companies that make the drug.

What the tests show so far

Scientists don't yet know how exactly the drug acts on the virus and its symptoms. Some research has suggested it prevents the virus from fusing with cells inside the body. Another possibility is that it targets the immune response that doctors think is partly responsible for inhibiting lung function in COVID-19 patients.

In France, a study of the drug has triggered hope — and criticism. It was a non-randomized, non-peer-reviewed study run by a team that included a controversial doctor known for once declaring that drinking up to four glasses of wine per day boosts life expectancy.

In this study, researchers chose 42 patients with COVID-19. They gave hydroxychloroquine to 26 of them who agreed. Six of the 26 getting the drug were left out of the final results because they either moved into intensive care or dropped out for other reasons. Of the final 20 patients, nearly three-quarters were virologically cured after six days; only two of the 16 who didn't get hydroxychloroquine fared as well.

Researcher Cody Hoffmann checks the results of an automated liquid handler as researchers at the University of Minnesota begin a trial to see whether malaria treatment hydroxychloroquine can prevent or reduce the severity of COVID-19. (Craig Lassig/Reuters)

A small initial study of 30 COVID-19 patients by researchers at Shanghai's Public Health Clinical Centre produced no clear result. After seven days, the control group and hydroxychloroquine group had about the same rate of people testing negative for COVID-19.

In a lab experiment, researchers from the Chinese Academy of Sciences in Wuhan and the Beijing Institute of Pharmacology found chloroquine was "highly effective" in limiting the in-vitro spread of COVID-19. The authors called for human trials.

Increasing the supply

Amid a surge of international testing, Canadian companies that make or import the drug are working to ramp up supply.

Apotex has plans to double its production.

Montreal-based importer Orimed Pharma has announced plans to give one million doses to Canadian hospitals.

Managing director Bruno Mäder said the company's supply is imported from India and usually sells for 16 cents a pill — but international prices are now rising.

India had imposed an export ban. After a threat from Trump, India agreed to allow some exports.

- **Your guide to COVID-19 and its impact on life in Canada**
- INTERACTIVE **Coronavirus tracker: The cases, hospitalizations and vaccinations in your area**

Mäder repeated several times in an interview that he was not making unauthorized claims about the drug.

Unlike the president of the United States, pharmaceutical companies in Canada are not allowed to promote a medicine for off-label purposes.

"We're not making a judgment on [this]," said Mäder. "We leave it to [health workers'] good judgment."

Exhibit "C"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

Toronto

Military report reveals what sector has long known: Ontario's nursing homes are in trouble

System has been 'ignored' and 'neglected' for decades, says province's minister for long-term care

Adam Carter · CBC News · Posted: May 27, 2020 4:00 AM ET | Last Updated: May 27, 2020

The Canadian Armed Forces on Tuesday released a scathing report about the conditions at five Ontario long-term care homes, but many — including the government itself — say problems have been known for years. (CBC)

comments

Jacqueline Mitchell hasn't been able to hug her 94-old-mother since March, and now, in the face of a shocking Canadian Armed Forces (CAF) report into the state of five Ontario long-term care homes, she is aghast.

Mitchell's mother has Alzheimer's disease and has been a resident at Etobicoke, Ont.'s Eatonville Care Centre since 2017. That's one of the homes listed in the report, which details disturbing observations made by military members who were called in to help after some of the province's long-term care facilities were overrun by COVID-19 outbreaks.

The CAF report outlines instances in which members spotted equipment used on both infected and non-infected patients without being disinfected, as well as rotten food, cockroach infestations and a startling disregard for basic cleanliness.

"It is scandalous. It is shameful. It is shocking," Mitchell said. "Our senior generation is living in that, and that is a national atrocity."

There are many signs the provincial government knew, or should have known, what's happening inside these homes, but it took military intervention to bring the details to light.

WATCH | Minister of Long-Term Care discusses military report:

Merrilee Fullerton, Ontario Minister of Long-Term Care, says the province is committed to fixing long-term care homes in need of help after a report by the Canadian military on conditions in five facilities. 2:02

For weeks, Ontario Premier Doug Ford has been saying the province's long-term care system is "broken." And on Tuesday he said that he saw firsthand the limitations of the system when his brother, former Toronto mayor Rob Ford, was in palliative care before his death in 2016.

That, to Mitchell, signalled an acknowledgement on the premier's part that something was very wrong with the system.

"That should have alerted him on a personal basis to what was happening in these homes.... He should not be surprised," she said.

- **Ford faces blowback after military report reveals 'horrific' conditions at Ontario long-term care homes**

Since the first weeks of the pandemic, Ford has been advocating for the need to put an "iron ring" around Ontario's long-term care homes, with the province touting measures it has enacted to keep people safe, like limiting visitors and preventing most caregivers from working at multiple homes. The province then asked for the military's help late last month.

As of Tuesday, the Ministry of Long-Term Care was reporting 1,538 deaths linked to COVID-19, while the Public Health Ontario Daily Epidemiologic Summary listed 4,892 cases among residents.

Provincial officials have asked the military to continue its mission assisting at nursing homes for an additional 30 days. (CBC)

In a statement issued Tuesday, Opposition NDP Leader Andrea Horwath slammed the government's response, and called for the resignation of Minister of Long-Term Care Merrillee Fullerton.

"It's shocking that the Canadian Armed Forces needed to lift the veil when Doug Ford and Merrilee Fullerton ought to have known about these horrific conditions, and did nothing to take the homes over," Horwath said. "The premier cannot pass the buck, finger-point and express outrage about what his own government is doing on his watch."

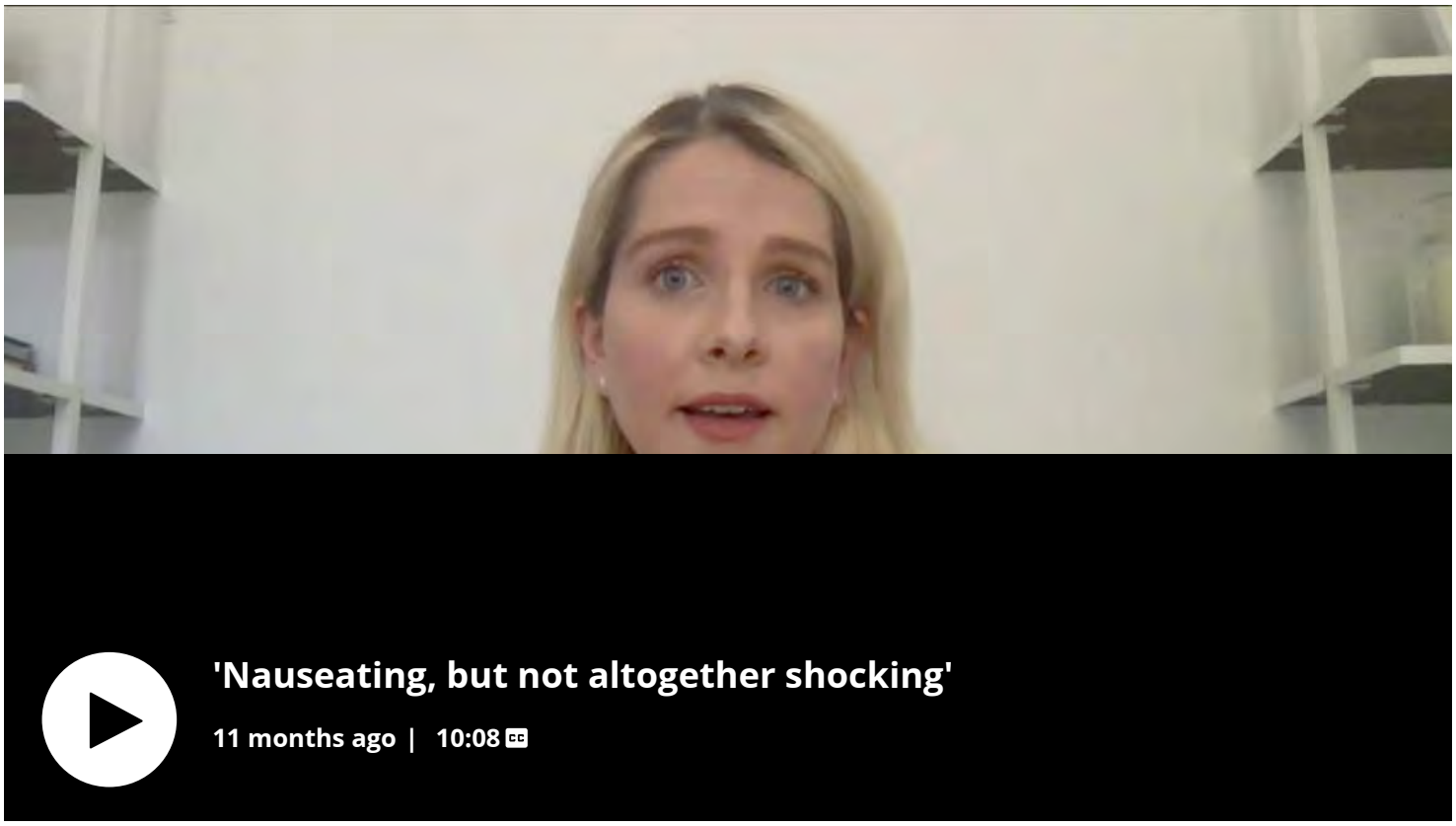
System 'neglected and ignored' for decades

Fullerton said it was the novel coronavirus that pushed some of the province's long-term care homes to the brink.

"This is something that everyone has known about for years. Our population is aging. Long-term care was ignored. Long- term care was neglected," she said.

"We were shining a light on this. We were looking at fixing a system that had been neglected and ignored for decades — and then COVID ... tipped the homes that were having difficulties with staffing already right over the edge."

WATCH | Marissa Lennox of CARP says the system has long been broken:



CARP Chief Policy Officer, Marissa Lennox, says long-term care is something people don't want to think about, and that the system has long been broken. 10:08

Ford said Tuesday that it took a constant, watchful eye from the military to truly uncover the scope of the problem.

"Yes, inspections happen and these folks come in there, but it took the military to be there 24/7," the premier said, adding it's impossible to know the extent of the problems plaguing the system "until you live, breathe, eat it ... until you're there around the clock, at nighttime and during the day."

Fullerton said Tuesday that the province conducted nearly 3,000 inspections last year at long-term care facilities, spurred by so-called critical incidents and complaints reported to an "action line" for families, residents and staff.

- CBC INVESTIGATES **Ontario scaled back comprehensive, annual inspections of nursing homes to only a handful last year**

But a recent CBC News investigation found that last year just nine out of 626 homes in Ontario actually received resident quality inspections (RQIs), which are unannounced and more comprehensive than those arising from incident reports.

CBC News reviewed inspection reports from the last five years for all long-term care homes in the province and found that while most received an RQI in 2015, 2016 and 2017, the number dropped to just over half in 2018 and nine last year.

'Immediate attention' needed

In a news release issued Tuesday, Ontario Nurses' Association (ONA) president Vicki McKenna said the association has contacted the Ministry of Labour about working conditions in long-term care homes, but the ministry has written few orders and has "rarely been on site to conduct physical inspections."

"This sector needs immediate attention," she said. "Government must act now to halt these outbreaks."

ONA's statement also notes that a number of long-term care reports have been issued in the last two decades that continue to make the same recommendations to improve the sector: more staffing, more funding, better training and increased resources.

- **Ontario long-term care homes in scathing report could face charges, says Ford**

A 2017-2018 public inquiry into the safety and security of residents in long-term care homes found "systemic vulnerabilities" in the system. The Ontario Health Coalition has for years been issuing reports about problems in long-term care, including understaffing and excessive violence.

The Ontario Personal Support Workers Association also said in a statement that these are not new problems.

"We have been working through these difficult conditions for years," the statement reads. "They have worsened over the last three months."

Laura Tamblyn Watts, CEO of national seniors' advocacy organization CanAge, told CBC News in an interview it's very telling that the state of these long-term care homes could shock even soldiers who go on peacekeeping missions.

"How much more do we need for this government and our provinces and territories to take needed action?" she asked.

With files from CBC's Katie Pedersen

Canada · CBC Investigates

Ontario scaled back comprehensive, annual inspections of nursing homes to only a handful last year

Government says it did 2,800 inspections in 2019, but most were related to complaints or critical incidents

Katie Pedersen, Melissa Mancini, David Common · CBC News ·
Posted: Apr 15, 2020 4:00 AM ET | Last Updated: April 15, 2020

A CBC News investigation found that only nine long-term care homes in Ontario received a so-called resident quality inspection, or RQI, in 2019. RQIs are meant to be more proactive, comprehensive, unannounced inspections conducted annually rather than the reactive inspections that follow complaints or particular incidents. (Myriam Fimbry/Radio-Canada)

comments

People with loved ones in long-term care homes in Ontario might assume those facilities are thoroughly inspected every year to ensure they are in compliance with safety standards and regulations as the Ontario Ministry of Long-Term Care says they should be.

The province says on its website that each care home undergoes an annual inspection that includes interviews with residents, family members and staff "as well as direct observations of how care is being delivered."

But CBC News has learned that last year, only nine out of 626 homes in Ontario actually received so-called resident quality inspections (RQIs).

CBC News reviewed inspection reports from the last five years for all long-term care homes in the province and found that while most received a comprehensive resident quality inspection in 2015, 2016 and 2017, the number dropped to just over half in 2018 and just nine last year.

Natalie Mehra says that RQIs are more rigorous than inspections that are in response to a specific incident. (CBC)

That came as a surprise to Natalie Mehra, executive director of the Ontario Health Coalition, which has been lobbying for better regulations around long-term care in Ontario for 25 years.

- INTERACTIVE **Coronavirus tracker: The cases, hospitalizations and vaccinations in your area**
- CBC INVESTIGATES **Advocates wonder why long-term care COVID warnings were ignored**

"It's incredibly frustrating to hear this," she said. "We have been fighting for a regular, unannounced inspection each year for all of the homes since the 1990s, and we've won it, and then we've seen it deregulated, then we won it again.

"And then quietly behind the scenes, it stops happening again, and we have to fight and win it again."

Not all inspections the same

The inspections in long-term care homes fall primarily into two categories: complaint and critical incident inspections, which are reactive, and RQIs, which are broader and proactive.

In the case of critical incident inspections, homes usually know in advance that they will come under scrutiny.

"They prepare the home, and the workers tell us, they staff up, they clean up the home," said Mehra.

But RQIs are more comprehensive and unannounced.

"They go into the home, they interview an array of residents ... they interview the residents' council, the family council," she said.

"They look at a whole bunch of safety standards, all of the standards in long-term care that have been developed to protect residents' safety and levels of care and so on."

Ontario drastically reduced comprehensive long-term home inspections a year before COVID-19

12 months ago | 2:16

CBC news has learned Ontario stopped doing surprise, detailed inspections of long-term care homes a year before COVID-19 started tearing through the facilities. 2:16

As outlined in the 2018 Long Term Care Homes Public Inquiry, RQIs are "proactive inspections" that provide "an objective review of the whole operation of the long-term care home."

In recent years, such inspections have uncovered evidence of neglect, poor sanitation, abuse and mishandling of medication.

The inquiry highlighted the importance of these inspections and noted that "focusing only on specific complaints or critical incidents could lead to missing systemic issues."

- **Ontario to stop caregivers from working at multiple long-term care homes as COVID-19 spreads like 'wildfire'**
- **'No benefit' to sending seniors ill with COVID-19 to hospital, some nursing homes tell loved ones**

The Ontario Ministry of Long-Term Care told CBC News in a statement that every home is inspected "at least once a year," and that the ministry's "risk-based inspection framework determines how frequent and intense inspections will be."

The ministry says it completed 2,800 inspections in 2019, but only nine of those were RQIs. The rest were critical incident inspections, complaints inspections and related follow-ups.

COVID-19 death toll rising at nursing homes

That worries Lenore Padro, whose mother, Shoshana Padro, 79, is a resident at Cummer Lodge in Toronto.

"I assumed that they were happening at least once a year," she said.

"That's very concerning because, I mean, there's hundreds of long-term care homes that if they're not doing regular inspections, how are they able to find out what's really happening there?

"I think a lot of people would be really surprised to hear that."

Lenore Padro, 49, holds up a photo of her mother Shoshana Padro, a resident at Cummer Lodge in Toronto. She's worried after learning that Shoshana's long-term care home hasn't received a resident quality inspection in over a year. (CBC)

Cummer Lodge has not reported a COVID-19 outbreak, but 114 long-term care facilities in Ontario have, and across the country, almost half of the more than 975 COVID-19 related deaths have occurred in nursing homes.

The Ontario homes that have had multiple deaths from COVID-19 were not among the few that had resident quality inspections last year.

For example, Pinecrest in Bobcaygeon, where as of Tuesday, 29 residents had died, had its last RQI in June 2018. The same is true for Seven Oaks in Toronto, where 22 people have died of COVID-19.

- **Long-term care deaths expected to rise as growth of total cases slows: Tam**

Eatonville in Toronto, where 27 residents have died, and Anson Place in Hagersville, with 19 deaths, each last had an RQI in 2017.

Inspections triggered by critical incidents or complaints

In 2017, about 85 per cent of homes in the province received a full inspection. But since then, only 60 per cent of homes have had one.

The ministry told CBC News in a statement it started using a "risk-based inspection

framework" in the fall of 2018 and began focusing primarily on critical incidents and high-risk homes.

"The framework prioritizes homes with complaints, critical incidents, histories of non-compliance and other risk factors and subjects those homes to closer monitoring. The vast majority of Ontario's homes are considered to be low risk," the statement said.

Inspections are not expected to ramp up any time soon. The COVID-19 crisis has diverted resources as the pandemic continues to spread in long-term care homes.

The ministry's inspectors have been "redeployed," the spokesperson said, to "use their skills and experience to best guide and support the long-term care system through the COVID-19 crisis."

With files from William Wolfe-Wylie

Exhibit "D"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

CORONAVIRUS | News

Feds say more than 300,000 Canadians have already applied for CERB

CTVNews.ca Staff
Rachel Gilmore CTVNews.ca Writer
@atRachelGilmore | Contact

Published Monday, April 6, 2020 2:48PM EDT
Last Updated Monday, April 6, 2020 3:08PM EDT

Why CERB payments may result in financial uncertainty for some seniors
NOW
With CERB being considered a taxable income, it could create some complications for seniors when tax season comes around.

CTV National News: The price of living in lockdown
Genevieve Beauchemin reports on how the COVID-19 pandemic is straining the finances of seniors and what Ottawa is doing to help.

Trudeau on action being taken to support seniors
PM Trudeau announces the new aid they are providing to seniors and urges residents to

1 2 ›

OTTAWA – More than 300,000 Canadians applied for the new federal aid benefit for Canadians who lost their income as a result of the COVID-19 pandemic within the first few hours they could, according to the Treasury Board President Jean-Yves Duclos.

The application portal for the new Canada Emergency Response Benefit (CERB) opened on Monday, on the heels of news that more than two million Canadians have lost their job amid the COVID-19 outbreak.

By the time Prime Minister Justin Trudeau addressed the nation shortly before noon EDT, he said that 240,000 Canadians had successfully applied. Roughly an hour later, Duclos shared that the figure had already jumped to "more than 300,000."

COVID-19 PANDEMIC

- Full coverage at CTVNews.ca/Coronavirus
- Tracking every case of COVID-19 in Canada
- 3M makes deal with White House, says Canada will continue to receive N95 masks
- More aid coming for those who don't qualify for current COVID-19 benefits: PM
- Huawei donates medical supplies to Canada amid shortage concerns
- Trump slams watchdog report on hospitals engulfed by virus
- Domestic violence increases with 'stay home' pandemic response
- British Prime Minister Boris Johnson moved to intensive care
- Experts urge retirees to 'stay invested' as concerns over devalued RRSPs rise
- 'Light at the end of the tunnel:' Legault says as Quebec reports tiny increase in COVID-19 hospitalizations
- Can UV light kill the coronavirus? Experts break down online claims
- Family of woman who died from COVID-19 calls for uniform policy on hospital visitations
- Pink eye may be an overlooked symptom of COVID-19
- 13 more COVID-19 deaths and 309 more cases confirmed in Ontario
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The new benefit will provide successful applicants with $2,000 a month for four months.

However, not everyone is eligible for the new benefit. In order to be eligible, applicants must have earned at least $5,000 in the past 12 months or in 2019 as a whole, and must be out of work for reasons directly related to the COVID-19 pandemic.

According to Duclos, the onslaught of applications for government assistance is blowing averages out of the water. He explained in his Monday press conference that the 2.5 million applications for Employment Insurance (EI) the government has received in recent weeks "were processed quickly," despite being more than the government usually receives in a year.

"Out of these 2.5 million requests, 2.1 [million] of them were processed over the past two weeks," Duclos said, adding that those who have already applied for EI do not need to apply for the CERB.

The government has staggered the application process, meaning the 300,000 Canadians who have applied for the benefit so far represent a fraction of those who are slated to apply throughout the week. Canadians born in January, February and March applied today, with Canadians who were born in later months being phased into the application process throughout the rest of the week.

For those who are able to successfully apply, Trudeau said those availing themselves of the direct deposit option will receive money in three to five days. Cheques by mail will take a little bit longer, with an anticipated 10 days delivery time.

Opposition parties have criticized the government for what they say are holes in the program. Conservative finance critic Pierre Poilievre said there are "serious design and delivery flaws" with the CERB that leave out groups like small business owners who paid themselves with dividends and workers who have retained some clients.

According to The Canadian Press, NDP MPs Peter Julian and Gord Johns wrote to Morneau Sunday also asking for changes, including to address the fact the benefit provides an incentive not to work at all.

The government has said they will have more announcements in coming days regarding changes to the program. Duclos said they plan to ensure three groups are brought under the umbrella of the CERB: workers with reduced hours, those who are paid less than they would receive with the CERB, and students or other seasonal workers.

Canadians looking to apply for the benefit can visit this link or call 1-800-959-2041.

With files from The Canadian Press and CTV's Rachel Aiello

Exhibit "E"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

From: **Adam Skelly** adam@adamsonbarbecue.com
Subject: Where's the evidence?
Date: October 9, 2020 at 9:55 PM
To: premier@ontario.ca

AS

Doug & team,

First time I ever voted was for you. Strong Ontario! As an entrepreneur I was inspired by this message. I now own 3 restaurants and a cafe and employed over 50 people in February.

I'll be lucky if I employ 10 by the end of the year if this keeps up.

I'll happily comply with your orders for my 3 restaurants once you answer a few questions:

1) Where is the evidence that viral transmission is happening at bars, restaurants and gyms?

2) Why are we using case counts to determine the severity of covid instead of real impact- hospitalizations and deaths?

3) Why hasn't the minister of health addressed the serious concerns related to false positives from PCR tests?

Thanks, you can get me here or at 416-316-5216.

Adam

From: **Councillor Jaye Robinson** councillor_robinson@toronto.ca
Subject: RE: Stage 2 Closures
Date: October 26, 2020 at 10:10 AM
To: Adam Skelly adam@adamsonbarbecue.com

CR

Hi Adam,

Thank you for following up.

I completely understand your frustration and will carry your concerns into my next meeting with senior Toronto Public Health officials.

If you haven't already, I would also encourage you to share your feedback with the Province – as you know, the Ontario government has the final say over the Stage 2 closures in Toronto.

Thanks again, Adam.

Warm regards,

Jaye

Jaye Robinson
City Councillor | Ward 15-Don Valley West
Chair, Toronto Transit Commission
Toronto City Hall | 100 Queen Street, A12 | Toronto, ON M5H 2N2
416-395-6408 | councillor_robinson@toronto.ca | www.jayerobinson.ca
Facebook: facebook.com/councillorjayerobinson

From: Adam Skelly [mailto:adam@adamsonbarbecue.com]
Sent: October 24, 2020 10:17 AM
To: TPHLiaison <TPHLiaison@toronto.ca>
Cc: Councillor Jaye Robinson <councillor_robinson@toronto.ca>
Subject: Re: Stage 2 Closures

Hi Jaye,

As you can see, Eileen's office will not address:

-The glaring issues with PCR testing false positives
-How "outbreaks" from this particular 5 day period in September affect the case counts, hospitalizations or deaths
-Why "case counts" are being used to assess the current risk scenario and not hospitalizations (250 in Ontario's 400+ hospitals) or deaths (negligible and 80%+ in LTC)

Will you help us push for answers? I employed 55 people in February from two locations, I employ 28 today from three. My business is on the verge of collapse and will not make it through the winter with further lockdowns, while major corps suck the revenues from small business. The wealth transfer happening to global interests is happening at an alarming rate, and we need support.

Adam

On Mon., Oct. 19, 2020, 10:38 a.m. TPHLiaison, <TPHLiaison@toronto.ca> wrote:

> Hello Adam,
>
> Thank you for your email and for sharing your concerns with us.
>
> The additional targeted public health measures as per O.Reg. 263/20 for Ottawa, Peel as well as Toronto introduced by the Ontario government were established in consultation with the Chief Medical Officer of Health, the Public Health Measures Table, and local medical officers of health and other health experts. As of 12:01 am on Saturday October 10, 2020 these modified Stage 2 restrictions came into effect and will be in place for a minimum of 28 days and reviewed on an ongoing basis.
>
> These decisions are made based on a multitude of factors, including: increasing numbers of COVID-19 cases and outbreaks, percent positivity, health system capacity, hospitalizations and ICU admissions, and experiences from other jurisdictions. Some of the data and context for Toronto include:
>
> - There have been almost 2,000 COVID-19 cases reported during the first 8 days of October. The figure represents almost 10% of all our cases since the beginning of the pandemic.
> - As of October 14, the seven day moving average for new COVID-19 cases is 209 cases per day, noting that September started with a seven day moving average of only 40 cases.
> - Steep increase in the number of cases and hospitalizations in Toronto, with seven consecutive week-over-week increases in new infections per population
> - The percentage of people testing positive is rising quickly on a provincial level, with some regions far above three per cent positivity, the international benchmark. Toronto as of October 14, 2020 sits at 3 %
>
> Dr. de Villa shared in her media statement further data on cases linked to fitness centres.
>
> - In late September, Toronto saw 18 cases linked to a fitness centre, with a potential 76 contacts.
> - In Hamilton, nearly 70 cases are linked to one week at a spin class facility and public health officials there feared one hundred more people may have been exposed.
> - These are cases we are aware of. For every confirmed case, there are likely more cases that do not show severe or worrisome symptoms. Some cases don't give rise to symptoms at all. Resultantly people are moving about the community spreading infection without realizing it, and also spreading infection that may not be mild or moderate in other people.

Furthermore the following data also informed the recommendations:

- TPH's community outbreak team identified 44 per cent of community outbreaks between September 20 and 26 were related to restaurants, bars and entertainment venues. These outbreaks were incredibly resource intensive. Bars and restaurants have large volumes of contacts to trace, with some of these venues having more than 500 contacts to notify, and with one having 1,700 patrons to reach.

- For the same time frame above, TPH was investigating 6 fitness and recreational sport facilities, and while the number of facilities is small, the number cases linked to each outbreak is significant and can result in hundreds of high risk contacts. For example, as stated earlier, one gym outbreak had 18 cases and 76 contacts; another had 5 cases and 220 contacts, and was also linked to additional 21 exposures at a golf tournament.

Regrettably, cases identified in facilities such as gyms and fitness centres were adhering to public health control measures. Given the context, COVID-19 can spread in an indoor group class or activity because it is difficult to exercise while wearing a mask, physical distancing of more than 6 feet may be required to prevent droplet spread, and good ventilation systems are recommended to increase air exchanges. Social gatherings before or after a class or game may also contribute to spread. The additional restrictions, therefore, target indoor public settings where masking and physical distancing is difficult or not possible. These settings present a higher risk for COVID-19 spread and these actions, while difficult, are necessary to further reduce the immediate health risks to the public posed by COVID-19.

As per the Province, community spread has now reached 25 per cent while clustering of cases or multiple small outbreaks continues to grow in Ontario. These include long-term care homes, retirement homes, shelters, and other congregate settings. "*But a significant proportion of the outbreaks are also happening in workplace and community settings such as bars, restaurants, nightclubs and gyms".* The rise in transmission rates poses a significant risk to vulnerable populations, including seniors, school children, and those living in congregate care settings and require immediate action. Given the current transmission risk in Toronto and knowing that benefits of interventions start to emerge in about four weeks, the additional public health measures taken now can drive transmissibility of the infection down. As per the modelling predictions for Toronto, with added measures to control COVID-19 spread at the end of October, by the end of May 2021, the total number of people infected would be 6 times lower, compared to a scenario of taking no action.

Thank you again for your e-mail and sharing your comments, recommendations and concerns. While we have provided you data and examples from Toronto, you may also direct your questions to the province's toll-free number at 1-888-444-3659. In addition, consider relaying your concerns to Ontario's Chief Medical Officer of Health, Dr David Williams dr.david.williams@ontario.ca .

These are extraordinary times with difficult decisions that have been made. Please know your concerns and comments are noted and we recognize the sacrifice these

know your concerns and comments are noted and we recognize the sacrifice these industries will bear. Dr. de Villa has also personally acknowledged that she will have important conversations in the days ahead with her peers and colleagues and will advocate to help find ways to help those impacted by these restrictions.

Kind regards,
Covid-19 Liaison Team
Toronto Public Health
City of Toronto

From: Councillor Jaye Robinson
Sent: October 16, 2020 11:21 AM
To: 'Adam Skelly' <adam@adamsonbarbecue.com>
Cc: Medical Officer of Health <medicalofficerofhealth@toronto.ca>; Public Health <publichealth@toronto.ca>
Subject: RE: Stage 2 Closures

Hi Adam,

Thank you very much for your email.

I completely understand your frustration with the decision to temporarily prohibit indoor dining services at restaurants – I know these closures have been devastating for our City's restaurant economy.

By copy of this email, I am asking the office of Toronto's Medical Officer of Health, Dr. Eileen de Villa, to review your email and provide the data behind this recommendation.

Thanks again, Adam.

Warm regards,
Jaye

Jaye Robinson
City Councillor | Ward 15-Don Valley West
Chair, Toronto Transit Commission
Toronto City Hall | 100 Queen Street, A12 | Toronto, ON M5H 2N2
416-395-6408 | councillor_robinson@toronto.ca | www.jayerobinson.ca
Facebook: facebook.com/councillorjayerobinson

From: Adam Skelly [mailto:adam@adamsonbarbecue.com]
Sent: October 16, 2020 6:12 AM
To: Councillor Jaye Robinson <councillor_robinson@toronto.ca>
Subject: Stage 2 Closures

Good morning Jaye,

I have reached out to the premiers office several times and received no response.

I am looking for the evidence used to support shutting down in restaurant dining, bars and gyms.

The best I have found is this- an article claiming 1/3 of "outbreaks" are from bars and restaurants.

https://www.thestar.com/news/gta/2020/10/08/one-third-of-torontos-community-outbreaks-related-to-bars-and-restaurants-says-new-covid-19-data.html

I tried to find out how "outbreaks" impact cases and deaths.

On the daily epidemiology report from Public Health Ontario, we see "close contact and outbreaks" being lumped together, and make up about 50% of cases. It does not seperate "close contact" and "outbreak" so it is challenging to determine the impact "outbreaks" have. Attached screenshot.

Can you help me understand how these figures are being used to decimate my industry?

Exhibit "F"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

LEASIDE SALES

Week	2016	2017	2018	2019	2020
1		$17,408.64	$17,646.02	$28,552.22	$30,713.27
2		$18,867.59	$17,336.00	$36,163.63	$30,316.75
3		$25,480.21	$18,125.00	$41,269.12	$40,955.81
4		$24,554.09	$18,777.85	$33,078.88	$37,777.65
5		$26,937.11	$20,060.75	$42,528.21	$47,210.60
6		$19,683.63	$20,358.42	$36,646.73	$36,251.05
7		$21,127.00	$21,316.50	$37,691.14	$42,210.10
8		$22,132.25	$19,787.61	$52,607.00	$47,287.82
9		$26,528.64	$20,138.94	$46,051.20	$44,777.93
10		$24,351.25	$20,537.17	$46,775.21	$52,066.61
11		$27,328.25	$23,800.37	$45,959.41	$55,812.48
12		$29,353.00	$21,638.29	$55,530.21	$24,862.26
13		$28,351.00	$26,102.67	$54,269.74	$9,787.11
14		$29,202.50	$19,998.40	$55,864.02	$29,867.90
15		$27,234.25	$22,370.44	$57,164.32	$24,228.60
16		$26,154.25	$22,838.25	$55,674.84	$19,596.00
17	$4,443.75	$27,834.75	$22,546.70	$60,431.41	$27,016.50
18	$8,125.00	$26,816.29	$23,569.85	$54,028.45	$21,573.50
19	$8,578.40	$30,119.75	$23,929.56	$54,447.09	$20,412.51
20	$11,362.17	$25,452.75	$25,030.45	$52,970.68	$25,047.60
21	$10,314.50	$24,409.00	$23,648.02	$42,876.00	$28,348.80
22	$12,928.85	$34,019.75	$23,537.80	$61,895.65	$22,780.20
23	$16,282.80	$29,727.00	$25,971.68	$47,718.93	$29,587.00
24	$10,788.09	$40,075.25	$25,928.83	$69,133.43	$29,785.30
25	$14,549.65	$28,441.93	$23,377.29	$53,550.19	$23,155.50
26	$14,744.46	$0.00	$27,550.95	$57,879.44	$23,668.34
27	$14,410.71	$28,308.75	$24,332.85	$58,144.76	$26,887.94
28	$11,574.65	$29,684.75	$24,230.97	$50,904.12	$26,150.34
29	$17,267.62	$37,284.75	$22,316.43	$51,692.03	$26,365.88
30	$15,750.35	$28,714.75	$28,392.92	$45,787.43	$25,673.18
31	$12,665.29	$34,513.27	$28,000.00	$55,212.60	$24,116.72
32	$15,356.41	$29,011.00	$26,544.25	$59,635.91	$21,350.00
33	$15,192.11	$26,782.00	$27,538.47	$57,670.69	$27,660.00
34	$15,982.05	$25,788.74	$27,350.40	$54,544.28	$29,951.05
35	$16,962.64	$28,476.00	$30,592.45	$62,936.36	27435.87
36	$14,390.90	$23,328.32	$21,758.41	$48,962.50	$25,151.96
37	$16,192.62	$21,579.65	$22,207.69	$51,262.14	$29,260.65
38	$14,087.98	$20,407.35	$23,235.40	$48,449.17	$30,649.08
39	$15,100.48	$20,907.95	$21,477.88	$54,334.20	$30,157.74
40	$15,917.99	$21,012.39	$26,403.54	$49,204.00	$29,355.06
41	$11,478.70	$16,535.40	$21,311.50	$49,312.13	$27,194.90
42	$14,418.91	$18,353.98	$24,191.15	$43,632.59	$22,174.80
43	$13,654.06	$19,828.00	$24,419.47	$46,938.63	
44	$14,970.11	$19,461.00	$23,588.94	$53,128.07	
45	$17,854.66	$21,409.25	$25,694.69	$47,770.88	
46	$18,016.48	$20,921.24	$25,677.88	$42,960.99	
47	$18,104.41	$21,783.69	$27,228.32	$41,361.18	
48	$19,500.37	$21,133.81	$27,054.87	$42,079.57	
49	$18,321.32	$19,562.25	$38,602.00	$44,117.59	
50	$21,318.09	$20,244.87	$42,563.72	$43,966.89	
51	$22,432.85	$29,221.98	$53,237.39	$54,526.53	
52	$0.00	$0.00	$2,676.99	$32,659.74	

AURORA SALES

Week	2020
1	12459.2
2	22681.56
3	21333.58
4	20889.9
5	25047.84
6	17830.92
7	19930.82
8	19594.82
9	17988.34
10	19216.32
11	18577.54
12	7106.84
13	2501.24
14	9292
15	CLOSED
16	CLOSED
17	7898.9
18	5065.1
19	5837.2
20	5777.2
21	5163.6
22	4442.3
23	5283.79
24	6172.3
25	5042
26	6917.6
27	4426.5
28	4656.04
29	5492.36
30	5832.5
31	5484
32	5405
33	6065
34	6341
35	4899
36	5952.5
37	7103.28
38	8148.76
39	6612.04
40	6847.72
41	6506.38
42	6961.38
43	
44	
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Exhibit "G"

This is the Affidavit of

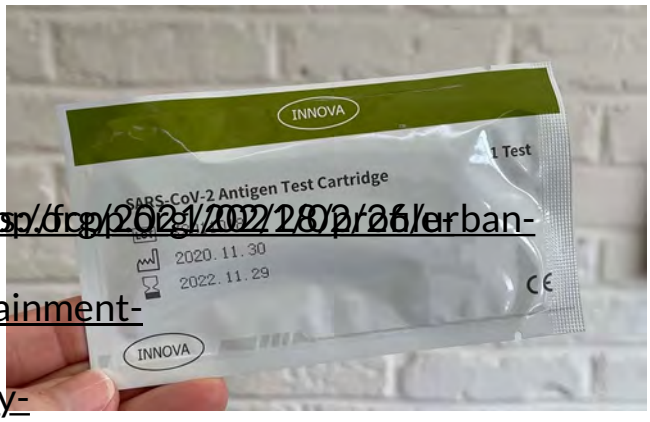
William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

(HTTPS://FCPP.ORG/)



PCR Test is Flimsy, Say Inventor and Courts

Commentary (https://fcpp.org/product_type/commentary/), COVID-19 (https://fcpp.org/research_portfolio/covid-19/), Government (https://fcpp.org/research_portfolio/government/), Lee Harding (https://fcpp.org/authors/lee-harding/) / February 27, 2021

Every day, the television news tells people about new COVID-19-positive test results, but are they reliable? Kary Mullis, the late inventor of the diagnostic test for SARS-CoV-2, the virus behind COVID-19, explained how his test could be misused. So did a Portuguese court which ruled a positive test is an insufficient basis to isolate or quarantine anybody. Fortunately, this is not the TV news.

Mullis won the 1993 Nobel Prize in chemistry for his invention of the polymerase chain reaction (PCR) test. He died August 7, 2019, months before it would be used to diagnose SARS-CoV-2. Regardless, his weighty words remain.

"The PCR, if you do it well, you can find almost anything in anybody," Mullis once said (https://www.bitchute.com/video/I34oouXAb7Dj/) in a public address. "If you can amplify one single molecule up to something you can really measure, which is something you can do….So that could be thought of as a misuse of it."

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The Sweet Spot for Incubating Alberta's Tech

In an interview (https://www.bitchute.com/video/OOpWClE6s9A9/), Mullis claimed the president of the University of South Carolina invited Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases, to debate Mullis, but Fauci declined.

"These guys like Fauci get up and start talking and he doesn't know anything really about anything and I would say that to his face. Nothing," Mullis said. "The man thinks you can take a blood sample and stick it in an electron microscope and if it's got a virus in there, you'll know it. He doesn't understand electron microscopy and he doesn't understand medicine and he should not be in a position like he's in. Most of those guys up there on the top are just total administrative people and they don't know anything about the body.

COVID-19 (HTTPS://FCPP.ORG/COVID-19/)
LATEST (HTTPS://FCPP.ORG/POSTS/)
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CONTACT (HTTPS://FCPP.ORG/CONTACT/)
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OPINION POLLS (HTTPS://FCPP.ORG/WE-WANT-TO-KNOW-YOUR-OPINION/)

"Those guys have got an agenda which is not what we would like them to have, being that we pay for them to take care of our health in some way. They have a personal kind of agenda. They make up their own rules as they go; they change them when they want to. And they (are smug)—like Tony Fauci does not mind going on television in front of the people who pay his salary and lie directly into the camera.

"You can't expect the sheep to really respect the best and the brightest. They don't know the difference, really. Like humans, don't get me wrong, but the vast majority don't have the ability to judge who is and who isn't a really good scientist."

But if any non-scientist could judge, might it be an actual judge?

Last summer, four German tourists were detained in Portugal indefinitely after one of the four tested positive for the coronavirus. A subsequent test two weeks later drew the same conclusion, leaving the four stranded in their hotel. Finally, they made a legal appeal under habeas corpus and were released. On November 11, the Lisbon Court of Appeal in Portugal upheld that decision in a 34-page ruling (https://translate.google.com/translate?hl=&sl=pt&tl=en&u=http%3A%2F%2Fwww.dgsi.pt%2Fjtrl.nsf%2F33182fc732316039802565fa

(https://fcpp.org/2021/04/0
sweet-spot-for-
incubating-albertas-
tech/)

Canada's Aboriginal Policies Constitute the Rejection of our Enlightenment Heritage (https://fcpp.org/2021/04/0
aboriginal-policies-
constitute-the-
rejection-of-our-
enlightenment-
heritage/)

In Defense of Alternative Lenders (https://fcpp.org/2021/04/0
defense-of-
alternative-lenders/)

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test-

The judges noted that none of the applicants was ever seen by a doctor, “which is frankly inexplicable, given the alleged seriousness of the infection.” (https://fcpp.org/donations/)

Everything relied on the PCR test, which the judges found flimsy: “However, in view of the current scientific evidence, this test is, in itself, unable to determine, beyond reasonable doubt, that such positivity corresponds, in fact, to a person’s infection with the SARS-CoV-2 virus.”

Such reliability was “more than debatable,” in the judges’ words, as it depended on the viral load and how many repetitive cycles in the PCR test were used to amplify the samples. Each cycle exponentially increased the load, but the court was not told how many cycles were used for the tourists’ tests.

The verdict referenced a study published by *Oxford Academic* in September on the correlation between 3,790 positive PCR tests and 1,941 SARS-CoV-2 isolates (https://translate.google.com/translate?hl=&sl=pt&tl=en&u=http%3A%2F%2Fwww.dgsi.pt%2Fjtrl.nsf%2F33182fc732316039802565fa
The researchers found that at a cycle threshold (ct) of 25, the test was 70 percent reliable, a figure that dropped to 20 percent at 30 cycles, and just three percent at 35 cycles. That meant 97 percent were false positives, yet that was used “in most laboratories in the USA and Europe.”

The judges also concluded that, “however, and more relevantly, there is no scientific data to suggest that low levels of viral RNA by RT-PCR equate to infection, unless the

presence of infectious viral particles has been confirmed by laboratory culture methods."

Why all of this matters is best summed up by the words of Gian Luigi Gatta, a professor of criminal law at Italy's Università degli Studi di Milano. The judges quoted Gatta's warning of a slippery slope for freedom: "Today the emergency is called a coronavirus. We don't know tomorrow. And what we do or don't do today, to maintain compliance with the fundamental principles of the system, can condition our future….The legislative turmoil generated around the containment of the spread of COVID-19…can never harm the right to freedom and security and, ultimately, the absolute right to human dignity."

Lee Harding (https://fcpp.org/authors/lee-harding/) is a research associate with the Frontier Centre for Public Policy.

Photo by John Cameron on Unsplash.

Exhibit "H"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

Tanzania coronavirus kits raise suspicion after goat and pawpaw test positive

'There is something happening. I said before we should not accept that every aid is meant to be good for this nation,' says president

Katie Ng | Tuesday 12 May 2020 07:02 | comments

Covid-19 test kits in Tanzania have raised suspicion after samples taken from a goat and a pawpaw fruit came back with positive results, as the president said there were "technical errors".

President John Magufuli said during an event in the north west of Tanzania that the test kits were imported from overseas, but did not say where.

He said that in order to evaluate the quality of the kits, Tanzanian security forces randomly obtained non-human samples, including from a pawpaw, a goat and a sheep. The random samples were assigned human names and ages, and sent to a laboratory to test for coronavirus.

Lab technicians were deliberately not informed about the origins of the samples. The pawpaw and goat samples tested positive for Covid-19, said Mr Magufuli.

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The president said the faulty kits meant some people were testing positive for coronavirus without actually being infected, reported *Reuters*.

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He said: "There is something happening. I said before we should not accept that every aid is meant to be good for this nation."

The Tanzanian government has come under scrutiny for its secretive approach to the pandemic. Earlier this week, footage of burials taking place at night under tight security circulated on social media, with activists accusing the government of covering up the real impact of the virus in the country.

Opposition leader Zitto Kabwe was quoted by the BBC as saying: "I don't want to feel like the government is hiding something. I want it to perform its role. Right now, we are witnessing a lot of mourning, burials and dead bodies everywhere.

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Jeff Bezos' ex-wife called a woman to give her $8m


TikToker spots man's sinister behaviour in gym mirror


Uproar after restuarant calls customers 'two very annoying Asians'


Waitress quits on the spot after customer refuses to wear mask


Jordan Peterson is upset that Nazi in a Marvel comic shares his ideas

Promoted stories

Mr Magufuli also came under fire in March when he encouraged Tanzanians to continue going to church and praying, as he likened the pandemic to Satan.

His comments came during a church service in the capital, Dodoma, just before announcing six more confirmed cases of the virus. The devout Catholic claimed the virus "cannot live in the body of Christ, it will burn instantly".

Tanzania has recorded 480 positive cases of coronavirus and 17 deaths as of Sunday. Mr Magufuli said during a speech he was sending a plane to Madagascar to collect a herbal "cure".

Britons 'ready to accept vaccine passports' - foll...
Covid live

He said: "I'm communicating with Madagascar. They have got a medicine. We will send a flight there and the medicine will be brought into the country so that Tanzania too can benefit."

Mapped: Coronavirus global deaths pass 1m

Tap or hover over each country for daily statistics and zoom in for details

Active cases refers to patients currently infected (confirmed cases minus

Madagascar's president Andry Rajoelina launched a plant-based tonic "cure" for Covid-19, claiming it has cured two people and shows results within seven days".

At the launch of the drink, called Covid-Organics, at the Malagasy Institute of Applied Research, Mr Rajoelina said:"Schoolchildren should be given this to drink... little by little throughout the day."

But the World Health Organisation (WHO) warned against believing in the tonic, and said there is no proof of a cure for coronavirus. The body did not recommend "self-medication with any medicines" and warned there were "no short-cuts" to finding treatment for the virus.

conversations. indy100 FEATURED

Rapper Moneybagg Yo has responded to Joe Biden's 'Moneybagg Joe' meme—and I can't stop laughing

Jennifer Lopez and Alex Rodriguez called it quits. Jose Canseco is not surprised

As an American, the Piers Morgan news this week has been a bizarre learning curve

Harry Potter's Katie Leung having to pretend she didn't face

BREITBART

TANZANIA: PRESIDENT SAYS FAULTY 'IMPORTED' TEST KIT CLAIMED GOAT HAD CORONAVIRUS

Menu BREITBART

Wikimedia

by GABRIELLE REYES | 4 May 2020 | 348

Tanzanian President John Magufuli denounced imported coronavirus test kits as faulty after he said they returned positive results for samples taken from a goat and a pawpaw, a fruit similar to papaya, Reuters reported on Sunday.

The testing kits had "technical errors," Magufuli said during an event in Chato in northwestern Tanzania on Sunday. The president added that the coronavirus testing kits had been imported from abroad but did not say from where.

Magufuli said he told Tanzanian security forces to check the quality of the imported kits. They randomly obtained several non-human samples, including from a sheep, a goat, and a papaya, but assigned them human names and ages.

According to the president, these samples were then submitted to a Tanzanian laboratory to test for the coronavirus. Laboratory technicians were not told that these were not human samples.

Samples from the papaya and the goat tested positive for coronavirus, Magufuli said.

He added that this meant it was likely that some people in Tanzania were falsely testing positive for coronavirus.

"There is something happening. I said before we should not accept that every aid is meant to be good for this nation," the president said. According to the report, Magufuli said he wants the imported testing kits investigated.

In recent weeks, several countries around the world including the United States, Australia, Spain, Turkey, and the Netherlands have rejected coronavirus medical equipment imported from China as defective.

On April 21, Indian health authorities told states to stop using coronavirus testing kits imported from China after a scientific investigation concluded they were wildly inaccurate. This rejection of Chinese-made goods by India was a demonstration of "prejudice" according to the Chinese embassy in New Delhi last week.

"It is unfair and irresponsible for certain individuals to label Chinese products as 'faulty' and look at issues with pre-emptive prejudice," Chinese embassy spokeswoman Ji Rong said in a statement.

Last month, the Chinese Communist Party (CCP) called on the world to "stop smearing Chinese [coronavirus] assistance" in an article published in the state-run newspaper *Global Times*.

"I think the quality issue reported by some media has been politicized. They can't prove the reported testing kits have quality issues, because the use and transport [of the kits] may influence their stability and sensitivity," an employee at Beijing Beier Bioengineering, a test kit provider, told the newspaper.

In Tanzania, Magufuli's government has drawn criticism in recent weeks for failing to take the coronavirus pandemic seriously. In March, he said Tanzanians need prayer, not medical masks, to protect themselves from the coronavirus.

Tanzania has not taken extensive measures against the coronavirus pandemic yet, unlike most other African nations. Markets, public transportation, and shops remain open in the country, although schools and universities have been closed.

On April 29, a prominent Tanzanian lawyer was arrested for saying the coronavirus was "serious" and "a real threat" to the nation. News of the arrest came amid accusations from

a Tanzanian opposition leader that Magufuli's government was hiding the true number of coronavirus cases and deaths, both believed to be much higher than reported.

At press time on Monday, Tanzania had officially reported 480 infections and 16 deaths from the Chinese coronavirus.

READ MORE STORIES ABOUT:

Africa, Health, National Security, Chinese coronavirus, coronavirus, Tanzania

TRENDING TODAY

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Exhibit "I"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

From: **Adam Skelly** adam@adamsonbarbecue.com
Subject: Re: Cycle threshold
Date: November 15, 2020 at 6:43 PM
To: Noorpour, Lida Lida.Noorpour@lifelabs.com

AS

Hey Lida, circling back here with those questions!

Adam

On Thu., Nov. 12, 2020, 1:40 p.m. Adam Skelly, <adam@adamsonbarbecue.com> wrote:

> Thanks, for the quick response, Lida.
>
> Couple more questions if you don't mind:
>
> Which brand are the tests processed at Lifelabs?
>
> Does the test manufacturer set the cycle threshold? If not, who does?
>
> What other tests are PCR's used for at Lifelabs? Can you give me a few examples, with the corresponding cycle thresholds?
>
> Thanks so much,
>
> Adam
>
> On Thu., Nov. 12, 2020, 1:34 p.m. Noorpour, Lida, <Lida.Noorpour@lifelabs.com> wrote:
>
> > Hi ,
> >
> > The cut off threshold for Covid test is 40 at Life labs, With a grey zone of 38.5-40.
> >
> > Thanks
> >
> > **Lida Noopour,**
> >
> > **Senior Medical Laboratory Technologist, Microbiology**
> >
> > LifeLabs | 100 International Blvd. | Toronto, ON M9W 6J6
> >
> > T 416-675-4530 Ext.42337
> >
> > E lida.noorpour@lifelabs.com
> >
> >

From: **Adam Skelly** adam@adamsonbarbecue.com
Subject: Thanks Olivia,
Date: November 16, 2020 at 5:44 PM
To: Beckett, Olivia Olivia.Beckett@lifelabs.com

AS

I enjoy researching current events. The answers to these questions will help me better understand the policy decisions that are impacting all of us.

Adam

On Mon., Nov. 16, 2020, 3:19 p.m. Beckett, Olivia, <Olivia.Beckett@lifelabs.com> wrote:

> Hi Adam,
>
> I see you have some questions regarding our PCR methods here at Lifelabs.
>
> We are more than happy to answer your questions, however can I ask what is the nature of your inquiry?
>
> Thank you,
>
> **Olivia Beckett,** *BASc, MLT*
>
> **Supervisor Laboratory Operations, Microbiology (Molecular/Parasitology)**
>
> LifeLabs | 100 International Blvd. | Toronto, ON M9W 6J6
>
> T 416-675-4530 Ext. 42337 | F 416-213-4638
>
> E **olivia.beckett@LifeLabs.com**
>
> **www.LifeLabs.com**
>
> ---
>
>

From: **Adam Skelly** adam@adamsonbarbecue.com
Subject: Re: Thanks Olivia,
Date: November 20, 2020 at 6:32 AM
To: Beckett, Olivia Olivia.Beckett@lifelabs.com

AS

Hi Olivia,

Circling back with these questions;

Which brand are the tests processed at Lifelabs?

Does the test manufacturer set the cycle threshold? If not, who does?

What other tests are PCR's used for at Lifelabs? Can you give me a few examples, with the corresponding cycle thresholds?

On Mon., Nov. 16, 2020, 5:44 p.m. Adam Skelly, <adam@adamsonbarbecue.com> wrote:

> I enjoy researching current events. The answers to these questions will help me better understand the policy decisions that are impacting all of us.
>
> Adam
>
> On Mon., Nov. 16, 2020, 3:19 p.m. Beckett, Olivia, <Olivia.Beckett@lifelabs.com> wrote:
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> >
> > E **olivia.beckett@LifeLabs.com**
> >
> > **www.LifeLabs.com**
> >
> > ---
> >
> >

From: **Lee Goneau** GoneauL@dynacare.ca
Subject: RE: FW: DYN-389584-
Date: September 18, 2020 at 5:57 PM
To: Adam Skelly adam@adamsonbarbecue.com

LG

Hi Adam,

Each assay uses proprietary algorithms to set the cycle threshold used for interpreting the overall value of the assay in each analytical run so it's important to remember the cycle number is only one component used in the testing process to determine positive/negative status. We use ThermoFisher and Roche, with both cycling upwards of 40 times before providing a final result.

The tests that we use are Health Canada approved and have passed extensive evaluation and validation, including the testing of many hundreds of known negative samples without false-positives identified. The specificity of these tests are very high.

All the best,

Lee

From: Adam Skelly <adam@adamsonbarbecue.com>
Sent: Friday, September 18, 2020 5:37 PM
To: Lee Goneau <GoneauL@dynacare.ca>
Subject: Re: FW: DYN-389584-

Hey Lee,

I've seen some comments that 20-30 cycles is commonplace and using a 40 cycle test will lead to false positives.

Can you provide examples of other PCR tests and their amplification cycles?

Again, thanks for your responses.

Adam

On Thu., Sep. 17, 2020, 10:18 p.m. Lee Goneau, <GoneauL@dynacare.ca> wrote:

> Hi Adam,
>
> The thresholds are set by the manufacturers.
>
> 40 cycles is pretty standard for many PCR tests.
>
> Cheers,

Lee

From: Adam Skelly <adam@adamsonbarbecue.com>
Sent: Thursday, September 17, 2020 10:17 PM
To: Lee Goneau <GoneauL@dynacare.ca>
Subject: Re: FW: DYN-389584-

Thank you Lee, I appreciate the quick response.

Who sets the threshold limits for the tests?

Is 40 cycles usual procedure for PCR testing, or unique to COVID-19?

Thanks again,

Adam Skelly

On Thu., Sep. 17, 2020, 10:00 p.m. Lee Goneau, <GoneauL@dynacare.ca> wrote:

> Hi Adam,
>
> I oversee COVID-19 molecular testing at Dynacare.
>
> The tests we use for COVID-19 PCR are all Health Canada Approved. The threshold values are proprietary so not publicly available, but all of our tests cycle 40 times before providing a result final.
>
> Please let me know if you have any additional questions.
>
> Best,
>
> Lee
>
> ---
>
> **From:** Dana Bailey <BaileyD@dynacare.ca>
> **Sent:** Thursday, September 17, 2020 5:47 PM
> **To:** Dora Goncalves <GoncalvesD@dynacare.ca>; Lee Goneau <GoneauL@dynacare.ca>
> **Cc:** DL.Scientific_Chemists <DL.Scientific_Chemists@dynacare.ca>
> **Subject:** Re: DYN-389584-
>
> Hi Lee,

Could you please follow up with this inquiry?

Thank you!

Dana Bailey, MSc, PhD, FCACB, DABCC
Clinical Chemist
Dynacare

> On Sep 17, 2020, at 5:11 PM, Dora Goncalves <GoncalvesD@dynacare.ca> wrote:
>
> ***[EXTERNAL EMAIL]:*** *DO NOT CLICK ANY LINKS, OPEN ANY ATTACHMENTS, OR SEND ANY SENSITIVE INFORMATION UNLESS YOU TRUST THE SENDER.*
> ***[COURRIER EXTERNE]:*** *NE CLIQUEZ SUR AUCUN LIEN, N'OUVREZ AUCUNE PIÈCE-JOINTE ET N'ENVOYEZ AUCUNE INFORMATION SENSIBLE, A MOINS QUE VOUS FASSIEZ CONFIANCE À L'EXPÉDITEUR.*
> Name: adam skelly
>
> Email: adam@adamsonbarbecue.com
>
> Province/Territory: Ontario
>
> City: Toronto
>
> Subject: General Question
>
> Message: What is the cycle threshold for COVID-19 PCR tests? How many amplification cycles are completed before determining the results?
>
> Location visited:
>
> Date visited:
>
> Time visited:
>
> Did we meet your customer service needs today?:

Was our service provided to you in an accessible manner?:

Would you like a response?:

Preferred method of contact:

Phone number:

Captcha: 706960

DYN__Contact_PatientsAndIndividualsID: 24154

Form inserted: 0001-01-01 12:00:00 AM

Form updated: 0001-01-01 12:00:00 AM

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Exhibit "J"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

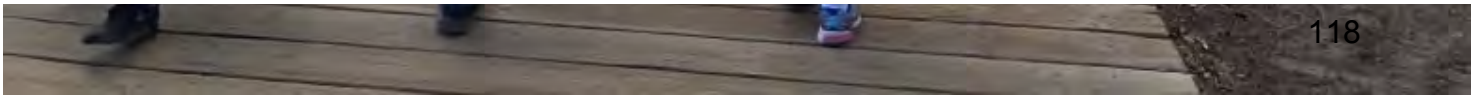
Katherine Kowalchuk
Barrister and Solicitor

Toronto

'A surge is coming': Physical distancing critical as Ontario sees 426 new COVID-19 cases, 4 more deaths

Provincial tally of cases now at 2,392, of which 145 are in intensive care units

CBC News · Posted: Apr 01, 2020 9:19 AM ET | Last Updated: April 1, 2020



Hundreds of people turned out to Toronto's Beaches boardwalk on Sunday as the city's battle with the COVID-19 pandemic continues. (Jasmin Seputis/CBC)

comments

Physical distancing measures are critical to keep Ontario from facing the scale of devastation seen in Italy as number of COVID-19 cases continue to climb, Premier Doug Ford said at a news conference Wednesday.

Ford's comments come as Ontario confirmed 426 new cases of COVID-19 Wednesday, marking a 21.7 per cent increase in the total number of infections and the largest single-day jump there since the outbreak began.

"Right now, today, there is very little separating what we will face here in Ontario from the devastation we have seen in Italy and Spain," Ford said. "We know a surge is coming."

Pressed by reporters, Ford declined to provide a specific date about when that surge could happen and defended the decision not to release a forecast of the potential number of novel coronavirus cases that the province could see, saying the models vary widely.

Ford added that Ontarians must ultimately decide whether "we go the route of Italy and Spain," and stay home accordingly to stop the spread of the disease.

Wednesday's new cases bring the provincial total to 2,392, including at least 37 deaths and 689 cases that are resolved, as of 4 p.m. ET Tuesday.

Premier Doug Ford's comments come as Ontario confirmed 426 new cases of COVID-19 Wednesday, marking the largest single-day jump there since the outbreak began. (Frank Gunn/The Canadian Press)

There are now 145 confirmed cases of COVID-19 in Ontario hospital intensive care units. That's 20 more than the previous day, a 16 per cent jump. Of those in hospital, 98 patients are on ventilators. The number of COVID-19 patients in the province's ICUs is doubling every four days.

And in what is being called the largest outbreak at a long-term care home in Ontario, a total of 14 residents and the spouse of a resident of Pinecrest Nursing Home in Bobcaygeon have died of the virus.

The latest two deaths were reported on Wednesday.

The Haliburton, Kawartha, Pine Ridge District Health Unit has said at least 24 staff members are also infected.

Discrepancies in death reports expected to narrow

Associate chief medical officer of health Dr. Barbara Yaffe acknowledged at a news conference the provincial totals may not capture all of the deaths associated with COVID-19 because of some clusters at long-term care homes are not confirmed by testing.

Yaffe said that should change due to a new directive on testing at such homes that would see anyone with symptoms tested for the virus, meaning any such deaths will be lab-confirmed.

At the same time, she emphasized the need for local public health units to input any data into the province's integrated reporting tool to keep numbers as up to date as possible.

A CBC Toronto analysis published Wednesday found that the death toll in long-term care homes is more than double what the province had officially reported this week.

Another 3,135 people are awaiting test results, a drop of 1,145 since the last update. A total of 57,874 tests have been approved.

The province provided this breakdown of the total cases since Jan. 15:

- There's an even split when it comes to male and female patients.
- The median age is 50, ranging in age from less than one to 105 years of age.
- Greater Toronto Area public health units account for 56.0 per cent of cases.
- 11.3 per cent of those who have COVID-19 were hospitalized.

The Ontario Hospital Association said in a statement on Wednesday that as the number of COVID-19 cases in acute care units rises, many hospitals are experiencing the equipment shortage, with masks in especially limited supply.

The association is calling on the federal and provincial governments to clearly communicate when new supplies will be
provided to specific hospitals.

'A race against time'

In his daily briefing Wednesday, Ford announced a $50-million fund to help businesses retool their operations to produce medical equipment and personal protective gear for front-line workers.

The Ontario Together Fund will go to the most viable, innovative proposals that can quickly provide medical supplies and equipment, including gowns, coveralls, face shields and ventilators, the government said in a news release.

Ford also said the province has worked with the Automotive Parts Manufacturers' Association to get ventilators produced and Ontario recently ordered 10,000 of the

machines from O-Two Medical Technologies.

How soon those ventilators might become available, Ford didn't say explicitly, calling the process "a race against time."

Ford also said the province is reviewing its list of businesses deemed "essential" and that updates could be coming.

New Ontario fund aims to help businesses adapt to producing medical equipment

1 year ago | 0:50

Vic Fedeli, minister of economic development, job creation and trade, announced new funding on Wednesday aimed at helping Ontario businesses pivot to producing ventilators, COVID-19 tests and safety equipment for health-care workers. 0:50

Given the current trends, Ontario's top doctor is imploring local health units to use their legal powers to "implement more aggressive" measures to ensure people with COVID-19 remain isolated, and to trace the contacts infected people have had are tracked more thoroughly.

"We must do more given the ongoing and increasing incidence of community transmission across the province," said Dr. David Williams in a memo to regional medical officers of health Wednesday.

Toronto's medical officer of health, Dr. Eileen de Villa, said the city will be issuing these orders to those people, as well as others suspected of having COVID-19.

- **Toronto announces stronger measures in 12-week plan to stop COVID-19 spread**

Meanwhile, anyone being charged under the province's emergency powers is required to identify themselves, Ontario's solicitor general says.

Sylvia Jones says people could face hefty fines if they refuse to give their proper name, date of birth and address if asked by a provincial offences officer. That includes police officers, First Nations constables, special constables and municipal by-law enforcement officers.

Refusing to correctly identify oneself carries a fine of $750 or $1,000 for obstructing any person in exercising a power if a provincial offences officer issues a ticket.

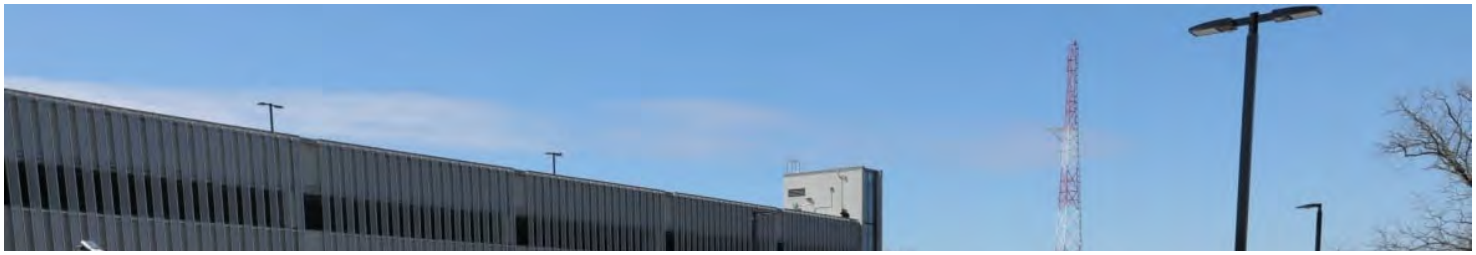
The temporary power was approved by the province yesterday, under the Emergency Management and Civil Protection Act.

- INTERACTIVE **Coronavirus tracker: The cases, hospitalizations and vaccinations in your area**
- **40 dead from COVID-19 in Ontario nursing and retirement homes**

Further, failure to comply with an emergency order could carry punishments of up to one-year in jail or a fine of up to $100,000 for an individual, $500,000 for a director of a corporation, or $10,000,000 for a corporation itself.

"It is the responsibility of all Ontarians to do their part and respect the emergency orders in place," Jones said in a statement.

The province is also changing testing guidelines at the province's long-term care homes to try to curb the spread of COVID-19.



A dedicated COVID-19 unit being built adjacent to Joseph Brant Hospital in Burlington, Ont. (Jonathan Castell/CBC)

Under the new rules, which took effect Monday, every resident and staff member who shows symptoms of the virus must be tested, even after an outbreak has already been declared in the home.

Previously, testing was only conducted on the first few symptomatic residents to establish the existence of an outbreak.

Temporary COVID-19 unit

A hospital in Burlington is building a temporary COVID-19 unit in anticipation of a surge of patients.

Joseph Brant Hospital says the structure being built on hospital grounds will have 93 beds.

The hospital's chief of staff, Dr. Ian Preyra, says the pandemic response unit will allow the hospital to keep its critical care and high acuity beds for the sickest patients.

The Ministry of Health is also allowing all public hospitals to lease or acquire temporary

space in institutions or other buildings such as hotels or retirement homes. 124

The ministry says hospitals could use those spaces to house COVID-19 or other patients.

- **INTERACTIVE** **Air pollution eases in 4 Canadian cities as pandemic measures keep people home**

With files from Mike Crawley and The Canadian Press

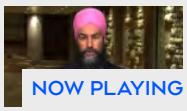
TORONTO | News

Ontario records significant surge in new COVID-19 cases

Sean Davidson Multi-Platform Writer, CTV News Toronto
@SeanDavidson_ | Contact

Published Friday, July 24, 2020 10:14AM EDT
Last Updated Friday, July 24, 2020 2:07PM EDT

CTV QP: 'Why can't the Liberals be transparent?'



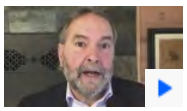
NDP Leader Jagmeet Singh discusses why he thinks the Liberals failed on their COVID-19 vaccine rollout plan.

Who is leading Ontario's vaccine task force?

Here is a look at who will be leading Ontario's COVID-19 vaccine task force.

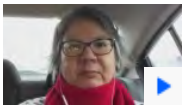
A lo

'It will requite military precision'



Former NDP Leader and CTV News political commentator Tom Mulcair says to get vaccines rolled out across Canada will take logistical planning.

'We need to be at the table': Ont. Regional Chief



Ont. Regional Chief, Roseanne Archibald says isolated First Nations communities across the province are high risk of contracting COVID-19.

Ont

CTV QP: Provinces ask feds for transparency

CTV's Joyce Napier, Canadian Press reporter Stephanie Levitz and Dr. Caroline Quach weigh in on Canada's readiness to distribute a vaccine

Ontario unveils vaccine task force

The task force, led by retired Gen. Rick Hillier, includes a range of people with different expertise.

Forc

1 2 3 4 5 6 7 8 9 10 11 12 >

TORONTO -- Ontario has recorded another significant surge in COVID-19 cases, reporting nearly double the number of new infections than yesterday.

Health officials reported 195 new cases of COVID-19 on Friday, bringing the provincial total to 38,405 confirmed infections.

On Thursday, the province recorded 103 new cases of COVID-19, which came as a relief after Ontario reported 203 new infections on Wednesday, the highest number since last June.

There were three additional COVID-19-related deaths in the past 24 hour period, bringing the total number of fatalities to 2,758.

There are now 141 patients in Ontario hospitals with COVID-19. Of those 141 patients, 31 are being treated in an intensive care unit, 20 of which are breathing with the assistance of a ventilator.

overage at lews.ca/Coronavirus

iavirus vaccine tracker: How people in Canada have ed shots?

st of Ontario bourhoods where the D-19 vaccine will be available se 18+

io's stay-at-home order: op questions answered

MOST-WATCHED

The Amazon scam you should know about

io father dies, wife now
gles to walk after entire
got infected with COVID-19

s what you need to know
getting the COVID-19
ne in the Toronto area

D-19 cases in Ontario
ls and child-care centres as
ril 9

- Tracking Ontario's 38,405 COVID-19 infections

The majority of total deaths to date have been reported in people over the age of 70.

One person, under the age of 19, who had COVID-19 died in Ontario, but it is not clear if the death was caused by the disease or other health issues.

Eleven patients who died were between the ages of 20 and 39, while 114 were between the ages of 40 and 59 and 739 were between the ages of 60 and 79.

Where are the new COVID-19 cases?

According to Friday's epidemiology report, released by the province, these are the regions reporting the most new cases:

- Windsor-Essex - 57 cases
- Toronto - 31 cases
- Ottawa - 27 cases
- Peel Region - 18 cases
- Chatham-Kent Public Health - 13 cases

Toronto, Peel Region and Windsor-Essex have all been held back from advancing to Stage 3 of the province's reopening plan because of their case numbers.

More than 65 per cent of the new cases are in people under the age of 40.

- Ontario premier expected to make an announcement

Of the new cases in Ontario, 49 of them were under the age of 19, 79 of them were between the ages of 20 and 39, and 51 of them were between the ages of 40 and 59. There were 16 cases in people aged 60 and older.

How COVID-19 restrictions will be enforced

People wait hours at Toronto pop-up vaccine sites

Ontarians urged to get outside during lockdown

MOST-READ

Full list of Ontario neighbourhoods where the COVID-19 vaccine will be available to those 18+

COVID-19 testing in Ontario

In the last 24 hours, just over 28,809 COVID-19 tests were conducted by officials.

Ontario health officials have conducted more than 1.9 million tests for the disease since the pandemic was declared.

More than 25,550 tests are still under investigation.

TORONTO TOP STORIES

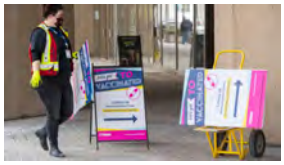
COVID-19 cases in Ontario drop below 4,000, but positivity rate rises slightly

Two-vehicle collision in Brampton leaves man dead

Two people in life-threatening condition after separate shootings in North York

Toronto Mayor John Tory receives first dose of AstraZeneca COVID-19 vaccine

Motorcyclist in critical condition after crash in Mississauga



Toronto plans to vaccinate education workers starting Monday

WATCH MORE FROM CTV NEWS

Ontario will be hit with 'sweltering heat' this summer, Farmers' Almanac forecast says

Doctor urges Ford government, feds to coordinate transfer of ICU nurses from other provinces to Ontario

COVID-19 cases in Ontario drop below 4,000, but positivity rate rises slightly

Ontario records more than 4,200 new COVID-19 cases, highest daily count ever

TORONTO TOGETHER

Exhibit "K"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service

Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333

November 2, 2020

[redacted]

This letter is in response to your Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) Freedom of Information Act (FOIA) request of August 9, 2020, for "All records in the possession, custody or control of The Centers for Disease Control (CDC) describing the isolation of a SARS-COV-2 virus, directly from a sample taken from a diseased patient, where the patient sample was not first combined with any other source of genetic material (i.e. monkey kidney cells aka vero cells; lung cells from a lung cancer patient).

Please note that I am using "isolation" in the every-day sense of the word: the act of separating a thing(s) from everything else. I am not requesting records where "isolation of SARS-COV-2" refers instead to:

* the culturing of something,
* or the performance of an amplification test (i.e. a PCR test),
* or the sequencing of something.

Please also note that my request is not limited to records that were authored by the CDC or that pertain to work done by The CDC. My request includes any sort of record, for example (but not limited to) any published peer-reviewed study that the CDC has downloaded or printed.

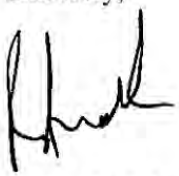
If any records match the above description of requested records and are currently available to the public elsewhere, please provide enough information about each record so that I may identify and access each record with certainty (i.e. title, author(s), date, journal, where the public may access it)."

A search of our records failed to reveal any documents pertaining to your request.

You may contact our FOIA Public Liaison at 770-488-6277 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, Suite 729H, Washington, D.C. 20201. You may also transmit your appeal via email to FOIARequest@psc.hhs.gov. Please mark both your appeal letter and envelope "FOIA Appeal." Your appeal must be postmarked or electronically transmitted by Monday, February 1, 2021.

Sincerely,



Roger Andoh
CDC/ATSDR FOIA Officer
Office of the Chief Operating Officer
(770) 488-6399
Fax: (404) 235-1852

#20-02166-FOIA

MFIPPA request to KFL&A PH re "SARS-COV-2" isolation

Christine Massey <cmssyc@gmail.com> Sun, Jan 31, 2021 at 3:15
To: kieran.moore@kflaph.ca, denisdoyle@kos.net

January 31, 2021

To:
Dr. Kieran Moore
KFL&A Public Health
221 Portsmouth Avenue
Kingston, ON
K7M 1V5
kieran.moore@kflaph.ca

Dear Dr. Moore and and Mayor Doyle,

This is an **email follow-up** of a formal request for access to general records that I just submitted via your online portal (as shown in the attached screenshot), made under the *Municipal Freedom of Information and Protection o Privacy Act*, 1990.

Please advise how I may submit the $5 application fee, as the online portal provided no payment options.

Description of Requested Records:

All records in the possession, custody or control of Dr. Kieran Moore or KFL&A Public Health describing the isolation of **any variant** ("new" or "old") of the alleged "SARS-COV-2" / "COVID-19 virus" (including the alleged "B.1.1.7" alleged to have been detected in KFL&A), directly from a sample taken from a diseased patient, where the patient sample was not first combined with any other source of genetic material (i.e. monkey kidney cells aka Vero cells fetal bovine serum).

Please note that I am using "isolation" in the every-day sense of the word: *the act of separating a thing(s) from everything else.* I am not requesting records where "isolation of SARS-COV-2" refers instead to:

- the culturing of something, and/or
- the performance of an amplification test (i.e. a PCR test), and/or
- the sequencing of something.

Please also note that my request is **not limited** to records that were authored by Dr. Kieran Moore or KFL&A Public Health or that pertain to work done by Dr. Kieran Moore or KFL&A Public Health. Rather, my request includes any record matching the above description, for example (but not limited to) any published peer-reviewed study **authored by anyone, anywhere, ever** that Dr. Kieran Moore or KFL&A Public Health has downloaded or printed.

If any records match the above description of requested records and are currently available to the public elsewhere, please provide enough information about each record so that I may identify and access each one with certainty (i.e. title, author(s), date, journal, where the public may access it). Please provide URLs where possible.

Format:
Pdf documents sent to me via email; I do not wish for anything to be shipped to me.

Contact Information:

Request for General Records from KFL&A Public Health

Taggart, Suzette <Suzette.Taggart@kflaph.ca>

to CMSSYC@gmail.com

February 12, 2021

Request Number (M001-21)

Christine Massey

[redacted]

[redacted]

Dear Christine Massey,

This letter is written in response to your request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to general records in the possession, custody or control of Dr. Kieran Moore describing the isolation of any variant of the alleged SARS-COV-2 directly from a sample taken from a diseased patient, where the patient sample was not first combined with any other source of genetic material.

This request is denied in its entirety pursuant to personal privacy section 14 (1) of the Act.

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates.

You may request that this decision be reviewed by the Information and Privacy Commissioner. The Commissioner can be reached at:

2 Bloor Street East

Suite 1400 Toronto, Ontario M4W 1A8

1-800-387-0073

Sincerely,

Suzette Taggart, RD, MBA
Manager, Communications

Phone: 613-549-1232, ext. 1262
Toll-Free: 1-800-267-7875
Fax: 613-549-7896

suzette.taggart@kflaph.ca

KFL&A Public Health

221 Portsmouth Avenue

Kingston, Ontario K7M 1V5

www.kflaph.ca

Request for General Records from KFL&A Public Health

Christine Massey <cmssyc@gmail.com> Fri, Feb 19, 2021 at 3:24 PM
To: "Taggart, Suzette" <Suzette.Taggart@kflaph.ca>, kieran.moore@kflaph.ca, denisdoyle@kos.net

Dear Ms. Taggart, Dr. Moore and Mayor Doyle,

Thank you for your response, however **my request (attached) is not for personal information**.

I explicitly stated in my follow up email to Mayor Doyle and Dr. Moore that my request is for **general records**.

I would be very surprised if a description of methodology used to (allegedly) "*isolate SARS-COV-2*" is entered into any patient record, anywhere. One would expect such a description to be found in a scientific study, or perhaps a government report.

Further, I explicitly stated the following in my request:

> *...my request includes any record matching the above description, **for example (but not limited to) any published peer-reviewed study** authored by anyone, anywhere, ever that Dr. Kieran Moore or KFL&A Public Health has downloaded or printed.*
>
> *If any records match the above description of requested records and are currently available to the public elsewhere, please provide enough information about each record so that I may identify and access each one with certainty (i.e. title, author(s), date, journal, where the public may access it). Please provide URLs where possible.*

It's unclear to me how anyone could interpret such a request as a request for personal information.

Regardless, 14 (1) of the Act does not apply to my request.

Note that we now have formal responses to the same records request from 17 other Canadian institutions (yielding in total zero responsive records). I don't recall any other institution interpreting the request as a request for personal information:

Public Health Agency of Canada, **Health Canada**, the **National Research Council of Canada**, **Vaccine and Infectious Disease Organization-International Vaccine Centre** (VIDO-InterVac), **Canadian Institutes of Health Research**, **Natural Sciences and Engineering Research Council of Canada**, **Ontario Ministry of Health**, **Institut National de Sante Publique du Quebec**, **British Columbia's Provincial Health Services Authority**, **Newfoundland Labrador Department of Health & Community Services**, **McGill University**, the **City of Toronto**, the **Region of Peel** (Ontario), the **University of Toronto**, **Sunnybrook Health Sciences Centre**, **McMaster University** and **Mount Sinai Hospital** (Toronto) (note that researchers from the last 4 institutions had publicly claimed to have "isolated the virus", as had VIDO-Intervac).
https://www.fluoridefreepeel.ca/fois-reveal-that-health-science-institutions-around-the-world-have-no-record-of-sars-cov-2-isolation-purification/

Thus, I look forward to KFL&A Public Health's response to my request, which will be made public in the public interest.

Thank you and best wishes,
Christine

Request for General Records from KFL&A Public Health

Taggart, Suzette <Suzette.Taggart@kflaph.ca> Sun, Feb 21, 2021 at 9:46 AM
To: Christine Massey <cmssyc@gmail.com>
Cc: "Moore, Kieran" <kieran.moore@kflaph.ca>, "denisdoyle@kos.net" <denisdoyle@kos.net>

February 21, 2021

Request Number (M001-21)

Christine Massey
[redacted]

Dear Christine Massey,

This follow up letter is written in response to your email on February 19, 2021 regarding your request for access to general records under the *Municipal Freedom of Information and Protection of Privacy Act* in the possession, custody or control of Dr. Kieran Moore describing the isolation of any variant of SARS-COV-2 directly from a sample taken from a diseased patient, where the patient sample was not first combined with any other source of genetic material. The request includes any record matching the description, for example (but not limited to) any published peer-reviewed study authored by anyone, anywhere, ever that anyone at KFL&A Public Health has downloaded or printed.

KFL&A Public Health conducted a search for the requested records but did not locate any records related to your request. This request will not be granted as the records do not exist at our agency.

KFL&A Public Health do not have records related to the process of testing COVID-19 samples. If you haven't already, it is recommended that you seek information from Public Health Ontario as they are the lead agency on the process of COVID-19 testing in Ontario.

You may request that this decision be reviewed by the Information and Privacy Commissioner. The Commissioner can be reached at:

2 Bloor Street East
Suite 1400 Toronto, Ontario M4W 1A8
1-800-387-0073

Sincerely,

Suzette Taggart, RD, MBA
Manager, Communications

Phone: 613-549-1232, ext. 1262

Toll-Free: 1-800-267-7875
Fax: 613-549-7896

suzette.taggart@kflaph.ca

KFL&A Public Health

221 Portsmouth Avenue

Kingston, Ontario K7M 1V5

www.kflaph.ca

Connect with us on Facebook | Twitter | YouTube

Exhibit "L"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

TORONTO | News

Ontario premier needs to see 'hard evidence' before shutting down indoor dining in Toronto

Codi Wilson Web Content Writer, CP24
@CodiWilson | Contact

Published Monday, October 5, 2020 3:56PM EDT
Last Updated Monday, October 5, 2020 3:58PM EDT

CTV QP: 'Why can't the Liberals be transparent?'

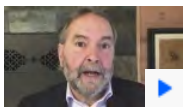
NDP Leader Jagmeet Singh discusses why he thinks the Liberals failed on their COVID-19 vaccine rollout plan.

Who is leading Ontario's vaccine task force?

Here is a look at who will be leading Ontario's COVID-19 vaccine task force.

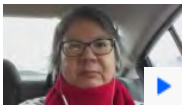
A lo

'It will requite military precision'



Former NDP Leader and CTV News political commentator Tom Mulcair says to get vaccines rolled out across Canada will take logistical planning.

'We need to be at the table': Ont. Regional Chief



Ont. Regional Chief, Roseanne Archibald says isolated First Nations communities across the province are high risk of contracting COVID-19.

Ont

CTV QP: Provinces ask feds for transparency

CTV's Joyce Napier, Canadian Press reporter Stephanie Levitz and Dr. Caroline Quach weigh in on Canada's readiness to distribute a vaccine.

Ontario unveils vaccine task force

The task force, led by retired Gen. Rick Hillier, includes a range of people with different expertise.

Forc

1 2 3 4 5 6 7 8 9 10 11 12 >

TORONTO -- Ontario Premier Doug Ford says he needs to see "hard evidence" before agreeing to shut down indoor dining in the country's largest city, which continues to see a rapid surge in new COVID-19 infections.

Speaking to reporters at Queen's Park on Monday, Ford said he is not yet convinced that the province needs to further restrict dining at restaurants and bars in Toronto as requested by the city's medical officer of health last week.

"These are people that have put their life in these small restaurants and they put everything they have and I have to be 100 per cent, I've proven before we will do it in a heartbeat, but I have to see the evidence before I take someone's livelihood away from them," he told reporters.

"I want to exhaust every single avenue before I ruin someone's life. It is easy to go in there and say I'm just shutting down everything. Show me the

ıavirus vaccine tracker: How people in Canada have ved shots?

st of Ontario bourhoods where the D-19 vaccine will be available se 18+

io's stay-at-home order: op questions answered

io father dies, wife now gles to walk after entire got infected with COVID-19

s what you need to know getting the COVID-19 ne in the Toronto area

D-19 cases in Ontario ls and child-care centres as ril 9

evidence, hard, hard evidence."

In an open letter published Friday to Ontario's Chief Medical Officer of Health Dr. David Williams, Toronto's medical officer of health, Dr. Eileen de Villa, asked the province to give officials in Toronto the power to ban indoor dining and cancel indoor group fitness classes and sports activities in an effort to slow the spread of the disease.

She warned that "without quick action," there is an "acute risk that the virus will continue to spread widely" in the city.

When asked whether the province plans to implement additional restrictions in Toronto, Williams said Monday that the public health measures table "will continue to look at that."

Williams said that additional measures were taken on Friday, when the province announced that no more than 100 customers are allowed in restaurants at one time and no more than six people can be seated at a table, restrictions that were already in place in Toronto.

"I know Dr. de Villa was concerned and wanted to take even more extensive measures as noted in her communications," Williams said on Monday.

"We want to see what the impact was thus far with the processes put in place. We are continuing to ask them to give more data to make sure it supports any further steps so we can handle that. And then looking at aspects of what can they do in Toronto? What we can do? What can they do in Ottawa?"

The province recorded 615 new cases of COVID-19 on Monday

How COVID-19 restrictions will be enforced

People wait hours at Toronto pop-up vaccine sites

Ontarians urged to get outside during lockdown

MOST-READ

Full list of Ontario neighbourhoods where the COVID-19 vaccine will be available to those 18+

with nearly half of those cases coming from Toronto.

Eighty-eight new infections were recorded in Peel Region and 81 were in Ottawa.

“We are trying to put all our things together to understand how best to handle these big surges that we are seeing in Toronto and Ottawa at this time to give them the best capability to respond and to deal with it in a way that meets the needs and is targeted but at the same time protects the public at large not only from COVID but other issues as well,” Williams said.

Speaking to reporters at city hall on Monday, de Villa said while she has not spoken to the premier, she recently had a “very productive” conversation with Williams about additional restrictions in Toronto.

“We are actively in conversation with our provincial counterparts, and I think there are many, many points on which we agree,” she said.

“I think they need the time to look at what they've got to understand it in the perspective of the other data sources that they have. And I look forward to this continuing conversation occurring quickly, cooperatively, collaboratively, and in support of the people of Ontario.”

She noted that the city provides the province with up-to-date data on COVID-19 cases in Toronto on a daily basis along with specific information on clusters and outbreaks.

“We are constantly collaborating (and) happy to provide data to help support decisions being made,” she added.

Mayor John Tory said he has spoken with the premier about the situation in Toronto and believes the province is carefully considering the city’s request.

“They have their own decision-making process and their own need to seek advice on something that we transmitted to them on

Ontario will be hit with 'sweltering heat' this summer, Farmers' Almanac forecast says

Doctor urges Ford government, feds to coordinate transfer of ICU nurses from other provinces to Ontario

COVID-19 cases in Ontario drop below 4,000, but positivity rate rises slightly

Ontario records more than 4,200 new COVID-19 cases, highest daily count ever

TORONTO TOGETHER

Friday. I am absolutely convinced that they have been acting in good faith since that time," Tory said.

"They will put it into their decision-making apparatus sooner rather than later and have some response to that."

Be cautious when travelling to COVID-19 hotspots: Williams

Ontario's top doctor was also asked about whether people should avoid travel to COVID-19 hotspots as cases continue to climb in those regions.

"As far as internal provincial travel restrictions, we have not put those in place," Williams said. "We know that areas in Toronto, Peel and Ottawa are having issues at this time and we are continuing to monitor that."

He said those who do have to travel to those regions for essential reasons must continue to be cautious and practice physical distancing, wear masks, and keep up good hand hygiene.

"You have to be very judicious about your choice of when to travel and where to travel," he said.

TORONTO TOP STORIES

COVID-19 cases in Ontario drop below 4,000, but positivity rate rises slightly

Two-vehicle collision in Brampton leaves man dead

Two people in life-threatening condition after separate shootings in North York

Toronto food bank takes to social media after receiving donations that expired more than 20 years ago

Toronto councillor and faith leaders to create waterfront space for spreading funeral ashes

Hit hard by COVID-19 one year ago, vaccinations bring hope for Ukrainian-Canadian LTC home

MLSE launches new 'digital arena' for Toronto Raptors and Maple Leafs

Toronto

Ontario tightens restrictions in 3 major areas amid 939 new cases of COVID-19

Toronto, Ottawa, Peel Region moving to modified Stage 2 restrictions for at least 28 days

Mike Crawley, Shanifa Nasser, Ania Bessonov · CBC News ·
Posted: Oct 09, 2020 5:50 AM ET | Last Updated: October 9, 2020

region

6 months ago | 2:45

Out of options and out of time, Ontario is moving back to COVID-19 shutdowns. They're targeted to the regions and sectors most impacted by the virus. But for more than five million Ontarians in Toronto, Peel region and Ottawa, that could be cold comfort. 2:45

comments

THE LATEST:

- ***Ontario is implementing targeted temporary measures in Ottawa, Toronto and Peel Region by moving them into modified Stage 2 restrictions for a period of at least 28 days.***
- ***The measures, which go into effect at 12:01 a.m. Saturday, include prohibiting indoor dining, and closing gyms, cinemas, casinos, performing arts and racing venues.***
- ***Schools, child-care centres and places of worship will remain open. Before-school and after-school programs will also be exempt from the new restrictions.***
- ***Personal care services where masks must be removed are prohibited, as are team sports games and scrimmages.***
- ***Capacity limits are reduced to 10 people indoors for tours, real estate open houses and meeting and event spaces. Physical distancing must be maintained.***
- ***Wedding receptions will be limited to 10 people indoors or 25 people outdoors effective Oct. 13.***
- ***The government is also asking people in those areas to only leave their homes for essential purposes. Travel to other regions in the provinces should also be limited (though there is no outright travel restriction in place).***

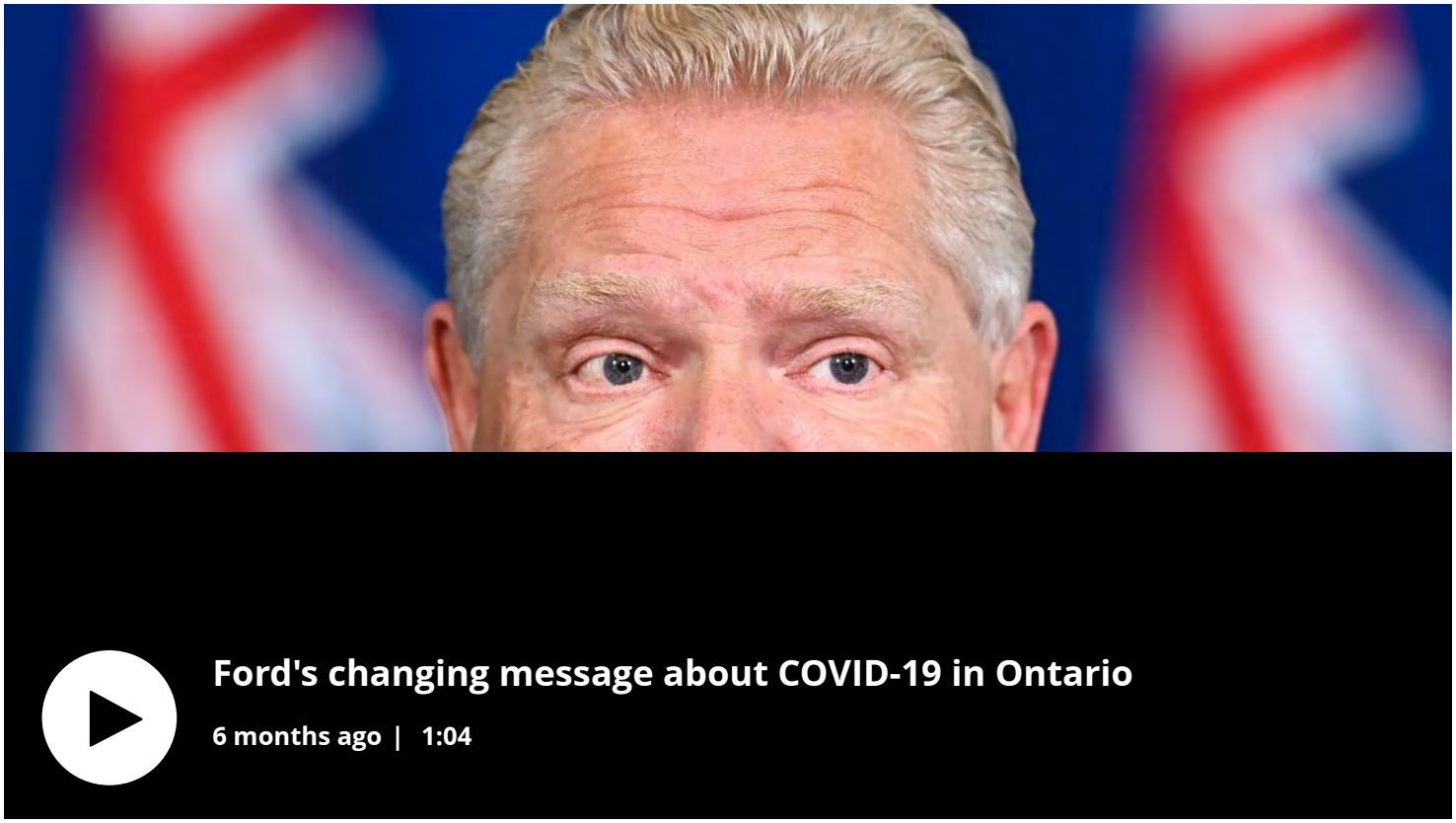
Ontario is imposing stricter measures in Toronto, Ottawa and Peel Region in a bid to curb the spread of COVID-19 as the province's curve climbs ever steeper.

The measures, which go into effect Saturday for a period of 28 days, include prohibiting indoor dining at restaurants and bars, and closing gyms, movie theatres and casinos. After that, the province's health experts will review the measures.

The government is also asking people in those areas to only leave their homes for essential purposes. Schools and child-care centres will remain open as part of the plan.

"All trends are going in the wrong direction," said Premier Doug Ford at a news conference Friday, saying the pandemic has picked up speed at "an alarming rate." Ford added that if current trends continue, hospitals could be overwhelmed with intensive-care unit placements tripling in less than 30 days.

WATCH | Ford's changing message about COVID-19 in Ontario:



Just days ago, Premier Doug Ford said the province was "flattening the curve." Now, cases are hitting record highs and he has different advice for the public. 1:04

"If we don't take action now, the situation could overtake us," said Health Minister Christine Elliott.

The new restrictions come as Ontario marked a record 939 new cases of COVID-19 on Friday, most of them in Toronto, Ottawa and Peel Region. Those regions have consistently reported the majority of new cases in recent weeks.

Ford said the measures were decided on after the province's top doctors provided "brand new data" to justify new restrictions — although critics have been calling for a rollback to stricter measures for several weeks.

On Friday, the province shared a document from its COVID-19 science table that it said provides the evidence that informed the decision to take stricter measures in the three regions. ***See it for yourself at the bottom of this story.***

Asked why the province didn't act sooner despite the calls of many doctors and health professionals, Ford said he took his direction from the province's health table, and said the recent surge was a sudden one. That's despite Ontario's own modelling forecasting 1,000 cases by mid-October more than a week ago.

"I made a decisive decision to act immediately," he said. "If I didn't make this decision now, I would be negligent."

Ford again defended provincial Chief Medical Officer of Health Dr. David Williams on Friday after criticism surfaced about mixed messaging when it comes to public health. But the premier acknowledged that while Williams was at the helm when Ontario brought its new COVID-19 cases down to under 100, perhaps the government loosened its grip on the virus too soon.

"All of us, maybe even the government, maybe we got too lackadaisical when we saw 80 cases with a population of 14.5 million people.... It came back to bite us, as we all went out there and now we have to tighten it up," he said.

However, a return to the further restrictions of Stage 1, he said, would be an "economic disaster."

Ford also spoke directly to business owners, announcing $300 million to support businesses amid the closures.

Asked when the province might consider shutting down schools, Williams said there hasn't been evidence of a lot of transmission within schools as yet. In many cases, the virus has entered schools from outside the community, he said, but that hasn't happened in a uniform way across the province.

A large-scale shut down of schools is "not merited at this time," he said.

'Worst-case scenarios' could mirror those in Italy, New

The government said if current trends continue, the province could experience "worst-case scenarios" seen in northern Italy and New York City earlier in the pandemic.

Williams said the sharp increase in daily case numbers was very concerning and action was required, particularly in settings where mask-wearing and physical distancing is more difficult.

Williams said the new measures will take the three hot spot regions back to a "modified Stage 2" of the province's pandemic response plan, which saw restrictions on non-essential businesses earlier this year.

He said that if people return to following public health guidelines well, the province can once again flatten the curve.

"We've done this before. I think we can do it again," he said.

Targeted action could prevent province-wide restrictions

Dr. Adalsteinn Brown, who is advising the province on its pandemic response, said taking the targeted action could prevent broader province-wide restrictions down the road.

"Jurisdictions that are intervening early are getting better control of the pandemic," he said.

Ontario reported its highest-ever daily number of new cases on Friday.

It is also the second day in a row the province is seeing record-breaking daily figures after reporting 797 cases Thursday. Doctors are also sounding the alarm about an increased number of COVID-19 patients being admitted to intensive care units.

Toronto, Peel and Ottawa continue to account for the majority of the province's daily figures, with 336, 150 and 126 cases respectively, Elliott said in a series of tweets.

Other areas that saw double-digit increases include:

- Halton Region: 59
- Simcoe-Muskoka: 28
- Durham Region: 32
- Hamilton: 40
- Middlesex-London: 24
- Waterloo Region: 13
- York Region: 68
- Windsor-Essex: 18
- Niagara Region: 10
- Wellington-Dufferin-Guelph: 16

Friday's update brings the province's total to 57,681 cases of the virus since the outbreak began in late January.

There are 225 patients currently hospitalized in Ontario, a significant increase from yesterday's figure of 206.

An additional 724 cases of COVID-19 are now considered resolved, bringing the province's total number of resolved cases to 49,032.

Premier Doug Ford's government imposed 'modified' Stage 2 restrictions on the province's COVID-19 hot spots Friday: Toronto, Ottawa and Peel Region. (Nathan Denette/The Canadian Press)

Toronto Mayor John Tory called the recent surge in numbers "troubling."

"The status quo is not acceptable," he said on CBC Radio's *Metro Morning* on Friday.

Toronto's Medical Officer of Health Dr. Eileen de Villa asked the province last week to order a 28-day closure of indoor service at restaurants, as well as indoor fitness and recreation facilities, to try to rein in the spread of COVID-19 in the city.

Opposition says Ford 'dithered, pinched pennies'

NDP Leader Andrea Horwath criticized Ford for waiting until Friday to announce the new restrictions.

"It's shocking the Mr. Ford was the last person in the province to see that this crisis was coming," she said. "The premier
dithered, he delayed, he pinched pennies when experts have been calling for stronger, tougher measures for some time."

Doris Grinspun, CEO of the Registered Nurses' Association of Ontario, welcomed the new measures but said the time it took for them to be announced made her question the advice the premier was receiving.

"I wish [Ford] had listened earlier," she said. "But at the end of the day, what I was asking is that we cannot get to Thanksgiving without more serious restrictions."

Toronto's mayor said Friday that he understands people might be concerned with how long it took the province to act.

"The bottom line is we ended up in the right place," said Tory. "I know the premier agonized over this file."

Some in the business community, however, expressed dismay at the new restrictions.

The Canadian Federation of Independent Business called the measures a "crushing blow," noting it would be the second time in the pandemic some businesses would have to close.

Cineplex Inc. chief executive and president Ellis Jacob said the government's measures were "excessive" and didn't take into account cinemas' efforts to follow public health rules.

Meanwhile, Restaurants Canada said it anticipates the loss of tens of thousands of jobs as a result of the measures.

Under strain

This all comes with many hospitals in the province filled to capacity and intensive care units in some Greater Toronto Area hospitals reporting few available beds.

The Ontario Hospital Association also urged the province to put the GTA and Ottawa back to Stage 2.

- **Ontario experiencing spike in new COVID-19 ICU admissions not seen since June, data shows**
- **'Alarm bells are ringing louder' as Ontario sees record-high 797 new COVID-19 cases: top doctor**

The province's COVID-19 testing system is also under strain, with appointments at assessment centres in the hardest-hit areas being snapped up shortly after they become available, and some people having to wait days to get tested. The Ministry of Health last week changed the criteria to get a test, limiting eligibility primarily to people with symptoms of COVID-19 or those who've been exposed to a confirmed case.

Nearly one-tenth of Ontario's 4,800 publicly funded schools have reported cases of COVID-19, and a similar proportion of the 630 long-term care homes in the province are battling outbreaks of the coronavirus.

Still have questions about COVID-19? These CBC News stories will help.

What's the latest guidance from the government and health experts surrounding Thanksgiving celebrations?

Celebrate with those in your household only, officials are urging. Experts warn not doing so could lead to a "runaway train" of infections in the coming weeks

Will Ontario be able to track down everyone who came in contact with those who have COVID-19?

Doctors are warning the surge in cases will strain the contact-tracing system

What's happening in Ontario schools and child-care centres?

The province just changed its rules around runny noses, and you see what schools have COVID-19 outbreaks on this provincial site

Who is getting COVID-19?

CBC News crunched the data from across Canada to get the clearest picture possible

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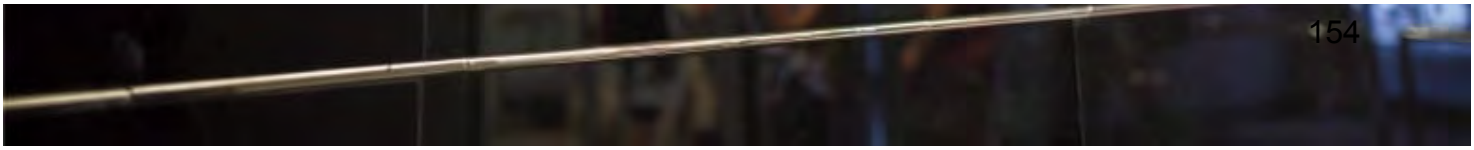
With files from The Canadian Press

Toronto

Toronto staff made to sign non-disclosure agreement to be part of Ontario's COVID-19 health table

City's board of health has now unanimously approved motion to call on province for transparency

CBC News · Posted: Nov 16, 2020 12:18 PM ET | Last Updated: November 16, 2020



The motion by Toronto's Board of Health comes just as it was revealed that Toronto Public Health staff were required to sign a non-disclosure agreement in order to participate at the province's public health measures table. (Cole Burston/The Canadian Press)

comments

The Toronto Board of Health has unanimously approved a motion calling on the provincial government to make public all recommendations received from its COVID-19 advisory table, its chair says.

The move comes just as it was revealed at a board of health meeting Monday that Toronto Public Health staff were required to sign a non-disclosure agreement in order to participate at the province's public health measures table.

"Once again, we're asking people to make hard sacrifices in order to control the surge in new COVID-19 cases. Full transparency and accountability are more important than ever in order to maintain public confidence and public trust. In the midst of an emergency, complete transparency is required," Coun. Joe Cressy, the board's chair, said in a news release Monday.

Recommendations made to Ontario's Chief Medical Officer Dr. David Williams and cabinet by the provincial advisory tables, including the public health measures table, is currently kept confidential by the province, the news release says.

CBC News reached out to the province for an explanation as to why a non-disclosure agreement was required. A provincial spokesperson did not directly answer the question in an email response.

"The terms of reference of the Public Health Measures Table allow for candid discussions that ultimately lead to guidance and advice being provided to the Chief Medical Officer of Health," spokesperson David Jensen said. "Ultimately a formal recommendation is made by the Chief Medical Officer of Health and is reviewed and a decision is made by Cabinet."

At the province's daily press conference Monday, Premier Doug Ford was also asked about the issue. Ford said his government has shown "unprecedented transparency" — but did not explain why the non-disclosure agreement was necessary.

"I'll continue being transparent on anything I know," Ford said.

"I'm going to continue coming out here every day informing the people of Ontario."

In a tweet posted Monday morning, Coun. Gord Perks called the situation "unbelievable.

"I just learned [that] in order to participate in the Ontario public health measures table, Toronto Public Health staff had to sign an NDA. Why the secrecy?" he asked.

538 new cases Monday

During the city's news conference Monday, Medical Officer of Health Dr. Eileen de Villa said the city recorded 538 new cases today. The city's numbers are usually more up to date than those seen in provincial data.

There are also 176 people in hospital, de Villa said, with 42 people in intensive care.

"The case counts in Toronto are alarming," she said.

De Villa also said that in the face of high case counts, it's fair for people to question whether the "modified Stage 2" restrictions enacted in Toronto have actually made any difference.

"I believe they did," she said, adding that case rates have dropped in certain neighbourhoods, especially in areas of downtown Toronto with high density of bars and restaurants. Without those measures, the case counts "would have been much worse," de Villa said.

Also on Monday, the board approved recommendations to call on the provincial and federal governments to boost financial supports for communities "disproportionately" impacted by COVID-19, as well as guaranteeing paid sick days for all workers, and providing more support for businesses and staff directly affected by public health restrictions.

New data released by Toronto Public Health on Monday continues to show higher rates of COVID-19 in parts of the city's northwest corner.

For the week of Oct. 25, Black Creek had a positivity rate of 14 per cent and Rustic, 12.4 per cent. Thorncliffe Park in the city's east end had a positivty rate of 11.8 per cent.

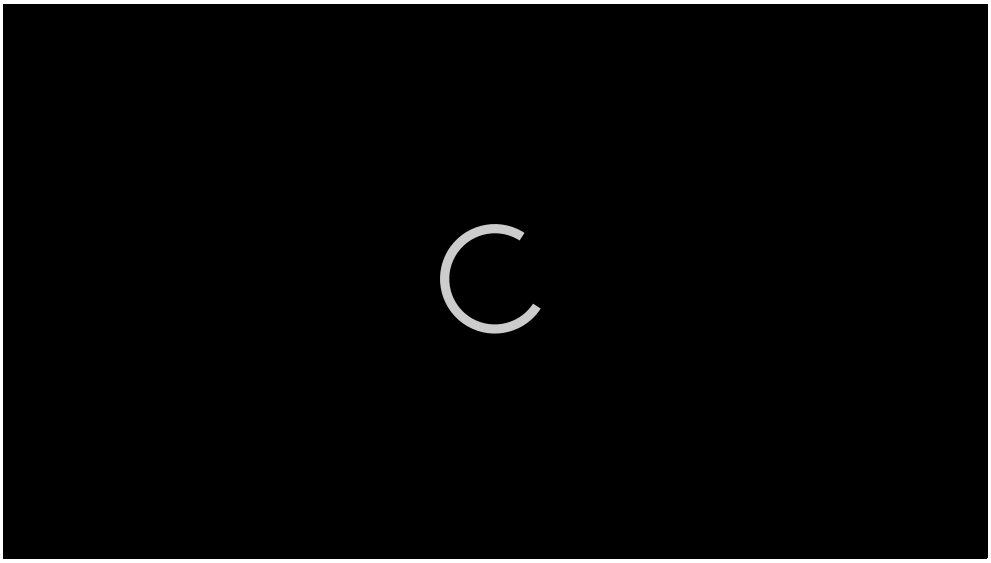
The data also showed a growing spike among those 80 years of age and above since the virus resurged in late summer.

- **Ontario preps for eventual vaccine distribution as province reports 1,487 new COVID-19 cases**
- **Trust, support are missing ingredients in curbing COVID-19 in Toronto's hardest-hit areas, experts say**

HEALTH

‘Show me the evidence’: Doug Ford rejects calls to close indoor dining amid spike in COVID-19 cases

By **Ryan Rocca** · **Global News**
Posted October 5, 2020 4:31 pm · Updated October 5, 2020 8:34 pm



WATCH ABOVE: (Oct. 4) Toronto Public Health has suspended some of its contact tracing as it deals with a major backlog of cases. Medical officials are questioning the move as many experts agree the process is a key component to combatting the spread of the novel coronavirus. Morganne Campbell has more in this report – Oct 4, 2020

MORE FROM GLOBAL NEWS

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Sask. Health warns of high COVID-19 exposure risk at Good Soil restauran

-A A+

Ontario Premier Doug Ford is rejecting calls for indoor dining to be ordered closed at restaurants in some areas of the province amid rising coronavirus cases, saying there isn't enough evidence to make such a decision.

"We need the data and I always make a judgment (that's) evidence-based," Ford said during a press conference Monday.

"For any region that's seeing a spike, be it Ottawa, Toronto ... York and Peel, and if there's a request to shut down restaurants, I have to sit back and look at evidence."

READ MORE: Toronto Public Health calls for restricting indoor dining, indoor gym classes

On Friday, Toronto medical officer of health Dr. Eileen de Villa called for the province to, among other measures, temporarily ban indoor dining at bars and restaurants in the city in a bid to help stop the spread of COVID-19.

The Registered Nurses' Association of Ontario and a group of doctors who released a joint statement are among those who have also called for those measures.

Ontario has seen a spike in cases in recent weeks, with most of them occurring in Toronto, neighbouring Peel Region, and Ottawa.

“The city is at risk of experiencing exponential growth of COVID-19 infections,” de Villa warned in her letter Friday.

She said that between Sept. 20 and 26, there were 45 active community outbreaks, 44 per cent of which were in restaurants, bars, and entertainment venues.

Toronto’s top doctor asks province for more restrictions

Toronto remains at odds with province over additional COVID-19 restrictions

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Dr. David Williams, Ontario’s chief medical officer of health, said Monday that he had been in contact with De Villa about her requests and was still in the process of reviewing them.

TRENDING

Meghan Markle to miss Prince Philip’s funeral, Harry planning to attend: reports
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Pfizer’s COVID-19 shot less effective against South African variant: study
5910 READ

Here’s how home prices compare

Williams noted that the province implemented new restrictions on bars and restaurants in Toronto, Peel Region, and Ottawa over the weekend, including lower capacity limits, limiting tables to six people, and earlier closing times.

[Sign up for our Health IQ newsletter for the latest coronavirus updates]

He said he wants to see what impact that has on cases in those settings and also noted that the province must consider any adverse effects before deciding to close indoor dining.

Williams said the premier has been looking for evidence that patrons have contracted the virus at restaurants or bars, but has only seen outbreaks involving staff members interacting with each other. He said there hasn't been evidence that the establishments are contributing to outbreaks in the community.

Williams noted that when there were increases in outbreaks in different settings like private homes, strip clubs, and bars operating at late hours, they reacted by introducing targeted restrictions.

160 to incomes across Canada
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Mother arrested after 3 kids found dead in Los Angeles home: police
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TOP VIDEOS

“I look at the command table that is made up with a lot of bright, bright doctors and also public officials are sitting around there, and I can’t see the evidence,” Ford said.

“These are people that have put their life in these small restaurants and they have put everything they had. … I have to see the evidence before I take someone’s livelihood away from them and shut their lives down. That’s a huge, huge decision that weighs on my shoulders and our team’s shoulders and it’s tough.”

Ford said the “vast majority” of restaurants are following health and safety protocols including ensuring physical distancing.

“We’ve asked the Minister of Labour to ramp up the inspections to these restaurants and we’re going to go after the bad actors and we’re going to shut the bad actors down,” Ford said.

De Villa was asked about Ford’s comments Monday afternoon. She said she hasn’t spoken directly to Ford, but has been in

touch with Williams.

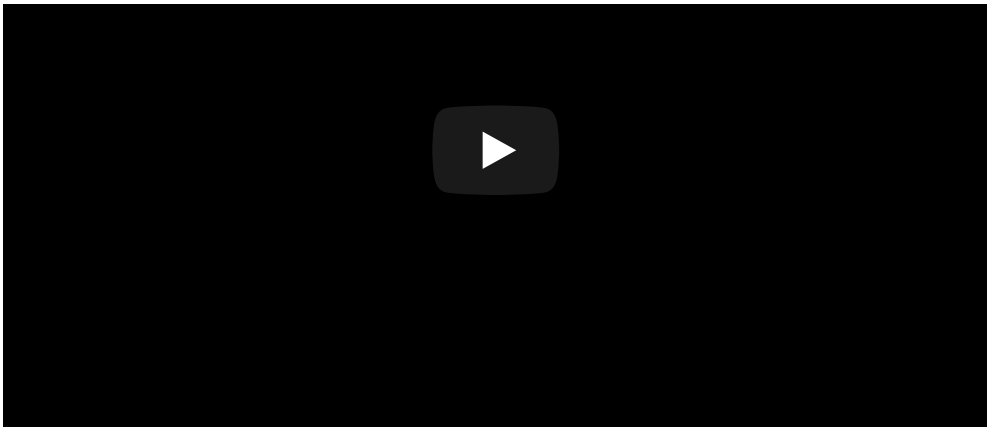
READ MORE: Toronto Public Health suspends some contact tracing due to 'high level' of coronavirus cases

"Certainly in my conversation with Dr. Williams, it's been clear," De Villa said. "We are very happy to continue to provide the information that the province needs to understand what's happening here on the frontline. Here … at the local level."

De Villa said there are real concerns with regards to restaurants and bars in Toronto.

"There are certain conditions that make the likelihood of transmission higher, that actually create the conditions that give rise to COVID-19 or make it easy, let's say, for COVID-19 to spread," she said.

"We have seen exposures within the context of bars and restaurants — closed, indoor settings — where you have many people together gathered in a way where … it can be difficult to physically distance and it's certainly difficult to wear a mask as the activity involves eating and drinking."



De Villa said she has spoken to legal counsel and it does not appear that she has the authority to implement a ban on indoor dining herself under current legislation, hence why she is asking the province.

“Anytime they have made a request for data, we have provided it,” she noted.

Ford said that if there comes a time when he and his health table deem it necessary to close down restaurants and bars, he’ll do it “in 10 seconds.”

“I want to exhaust every single avenue before I ruin someone’s life,” he said.

“It’s easy to go in there and say I’m just shutting down everything. Show me the evidence.”

Ontario

Cumulative | New

New confirmed cases by day

— Line shows 7-day average

Ontario has **2,645 confirmed cases per 100k** residents.

Sometimes provinces update several days at once, such as after a weekend. We average that data over the missing days (i.e. Zero cases Saturday and Sunday and 3,000 cases Monday becomes 1,000 Saturday, Sunday, and Monday) to create a smoother, more accurate graph.

Canadian cases

CONFIRMED	DEATHS
1,052,543	23,287
RECOVERED	**VACCINE DOSES GIVEN**
958,639	7,785,807

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COVID-19 Coronavirus coronavirus news covid-19 news +10

COMMENTS

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Exhibit "M"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

COVID-19: Modelling Update

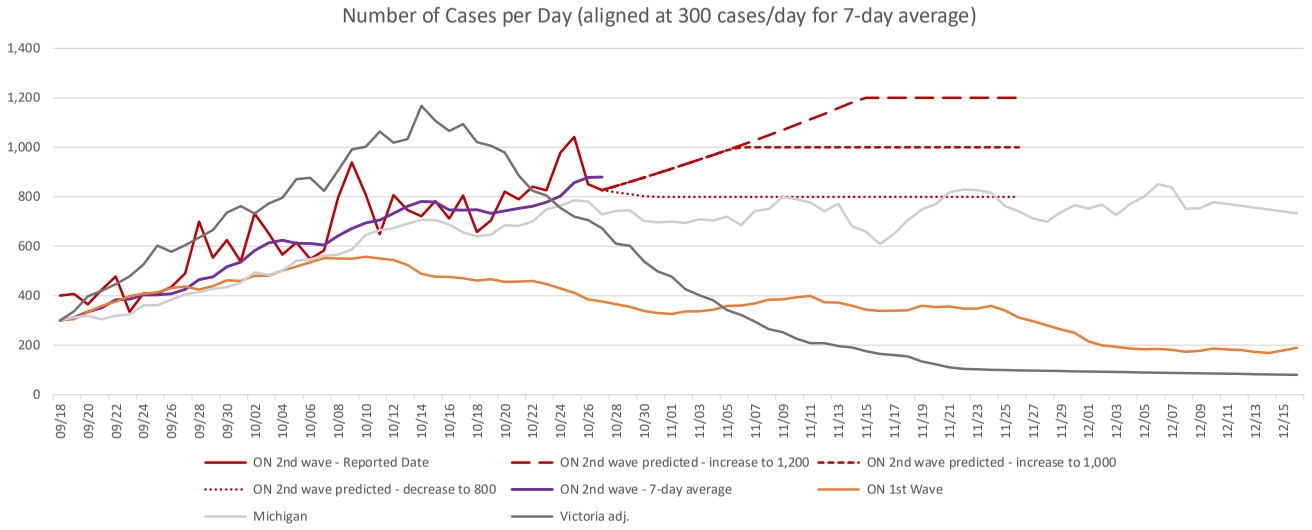
Advice from the Science Advisory and Modelling Consensus Tables

October 29, 2020

Purpose

- Share latest trends in Ontario epidemiology, health system indicators
- Provide an update on progress in controlling pandemic

Current projections show slower growth, similar to Michigan



Positivity rates continue to increase in older age groups with significant health and health system consequences

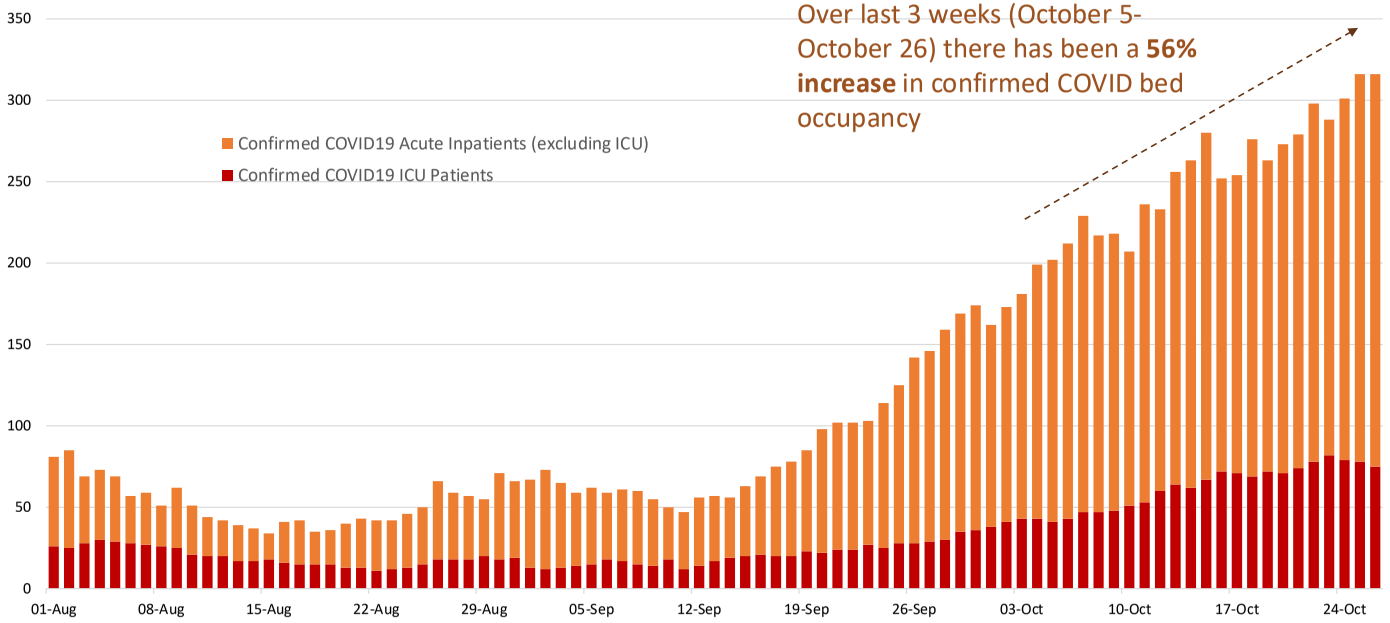
Week ending Oct 24

Weekly % positivity by age group

Month	Apr2020				May2020					Jun2020				Jul2020				Aug2020					Sep2020				Oct2020			
Week No	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42
Age Group																														
75+	15.4	16.4	11.0	5.0	4.3	3.4	4.7	5.3	3.2	2.9	1.8	1.0	0.9	0.6	0.6	0.4	0.4	0.3	0.2	0.2	0.3	0.4	0.3	0.5	0.5	1.1	1.3	1.4	1.8	2.3
65to74	12.7	11.4	7.2	5.5	4.4	3.6	4.1	3.8	1.9	1.3	0.9	0.5	0.5	0.4	0.4	0.4	0.3	0.4	0.2	0.3	0.3	0.4	0.5	0.5	0.7	1.0	1.2	1.3	1.7	1.8
55to64	12.1	11.4	8.6	6.2	4.8	3.7	4.9	5.7	2.8	2.0	1.0	0.9	0.6	0.6	0.4	0.6	0.5	0.4	0.4	0.3	0.4	0.3	0.5	0.6	0.8	1.1	1.4	1.6	2.3	2.5
45to54	10.5	10.8	8.1	6.2	5.3	4.2	4.6	6.6	3.3	2.2	1.2	1.1	0.7	0.8	0.7	0.7	0.7	0.5	0.5	0.4	0.5	0.5	0.6	0.8	1.0	1.4	1.9	1.9	2.7	2.8
35to44	7.1	8.3	7.1	5.7	4.3	3.3	3.9	5.7	3.4	2.3	1.3	1.4	1.0	0.9	0.8	0.7	0.7	0.5	0.5	0.5	0.4	0.5	0.7	0.7	1.0	1.2	1.5	1.7	2.4	2.6
25to34	7.7	8.7	7.4	6.1	5.2	4.0	4.8	6.3	3.7	2.4	1.4	1.5	1.2	1.0	0.9	1.0	0.9	0.6	0.5	0.6	0.6	0.6	0.9	1.3	1.7	2.0	2.5	2.2	2.9	3.1
18to24	10.6	9.2	7.8	6.5	4.1	3.7	4.3	6.3	3.7	2.5	1.4	1.4	1.2	0.9	0.8	0.9	1.1	0.8	0.7	0.5	0.7	0.9	0.8	1.6	2.4	2.8	3.6	2.6	3.5	3.8
14to17	8.3	5.9	7.1	4.8	3.7	3.4	5.0	6.6	2.2	2.9	1.5	1.6	1.4	1.3	1.1	1.4	1.3	1.4	1.2	1.1	0.8	1.3	1.7	1.8	1.7	1.5	1.9	2.1	2.9	4.3
9to13	7.5	5.7	6.2	4.9	5.8	5.0	5.5	6.5	4.3	3.7	3.4	2.4	1.9	1.0	1.5	1.2	1.7	1.3	0.8	1.4	1.0	1.5	1.4	1.4	0.9	0.8	0.8	1.2	1.8	2.8
4to8	2.7	1.9	4.0	2.3	4.1	2.2	3.0	3.4	3.5	3.4	2.1	2.7	1.7	1.2	0.9	1.1	1.2	1.0	1.0	0.7	0.8	0.5	0.9	0.6	0.5	0.3	0.4	1.0	1.5	2.6
0to3	4.6	1.5	1.6	1.5	1.7	1.6	2.2	2.2	1.4	1.1	1.9	1.4	1.3	0.7	1.0	0.8	1.3	0.4	0.5	0.6	0.3	0.6	0.6	0.3	0.4	0.6	0.8	1.3	2.2	2.3
Total	10.7	11.3	8.5	5.7	4.6	3.6	4.5	5.6	3.1	2.3	1.3	1.1	0.9	0.7	0.7	0.7	0.7	0.5	0.5	0.4	0.5	0.5	0.7	0.9	1.2	1.3	1.6	1.8	2.4	2.8

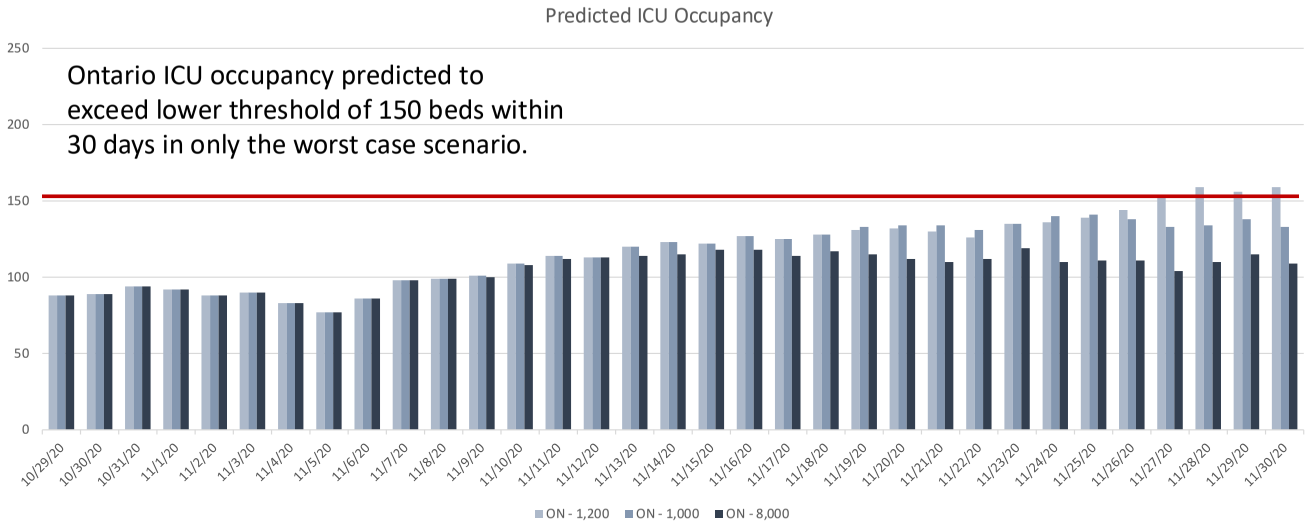
Data Source: Ontario Laboratory Information System (OLIS), MOH – extracted from SAS VA October 25.
Note: Includes all data submitted to OLIS up to October 24, 2020. The last six days are considered interim data (week 42) and subject to change
Weekly % positivity = total number of positive tests within the week (based on reported date)/COVID tests within the week

Growth in hospitalizations is slowing, but spillover risk persists



Data Sources: Daily Bed Census Summary COVID-19 Report + Critical Care Information System. Extracted via MOH SAS VA Oct. 27

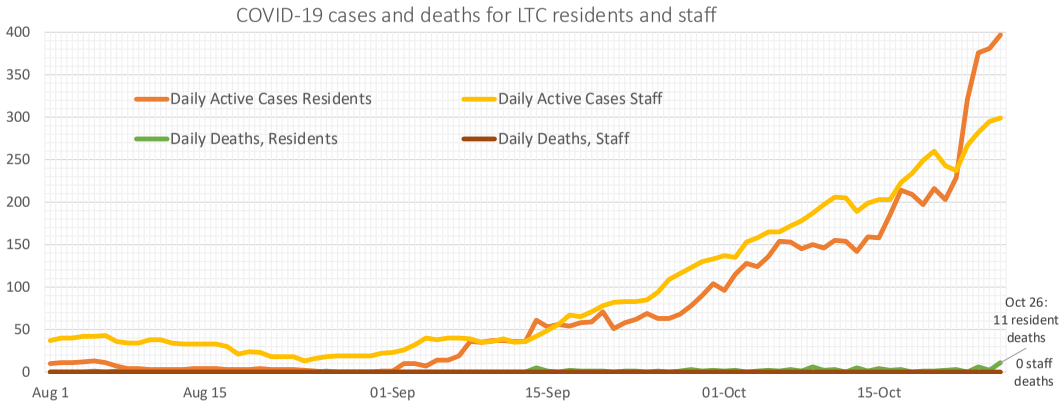
Slower growth means that risk to ICUs is lower



Cases in LTC continue to increase with cumulative mortality up substantially (85 deaths since August 15)

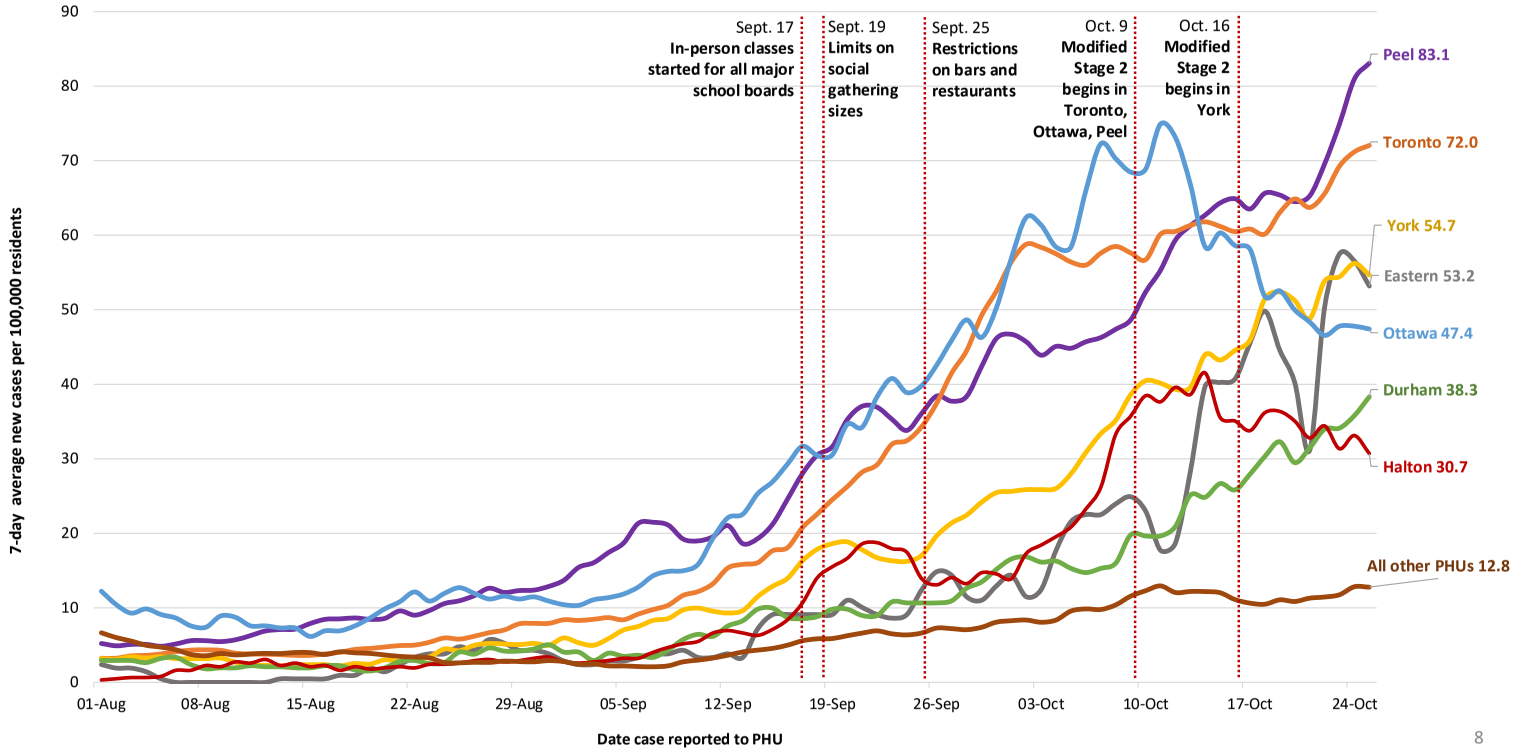
Current status (Oct 27)

- **87 homes currently in outbreak, 677 active confirmed cases in these homes**
- **396 residents, 281 staff active cases**
- **1,934 cumulative resident deaths, 8 cumulative staff deaths**
- **21 of the 87 homes in outbreak are based on 1 staff case**
- **Oct 26 showed the highest daily count of deaths since Aug 1 (11 deaths), with 27 deaths in the past 7 days.**



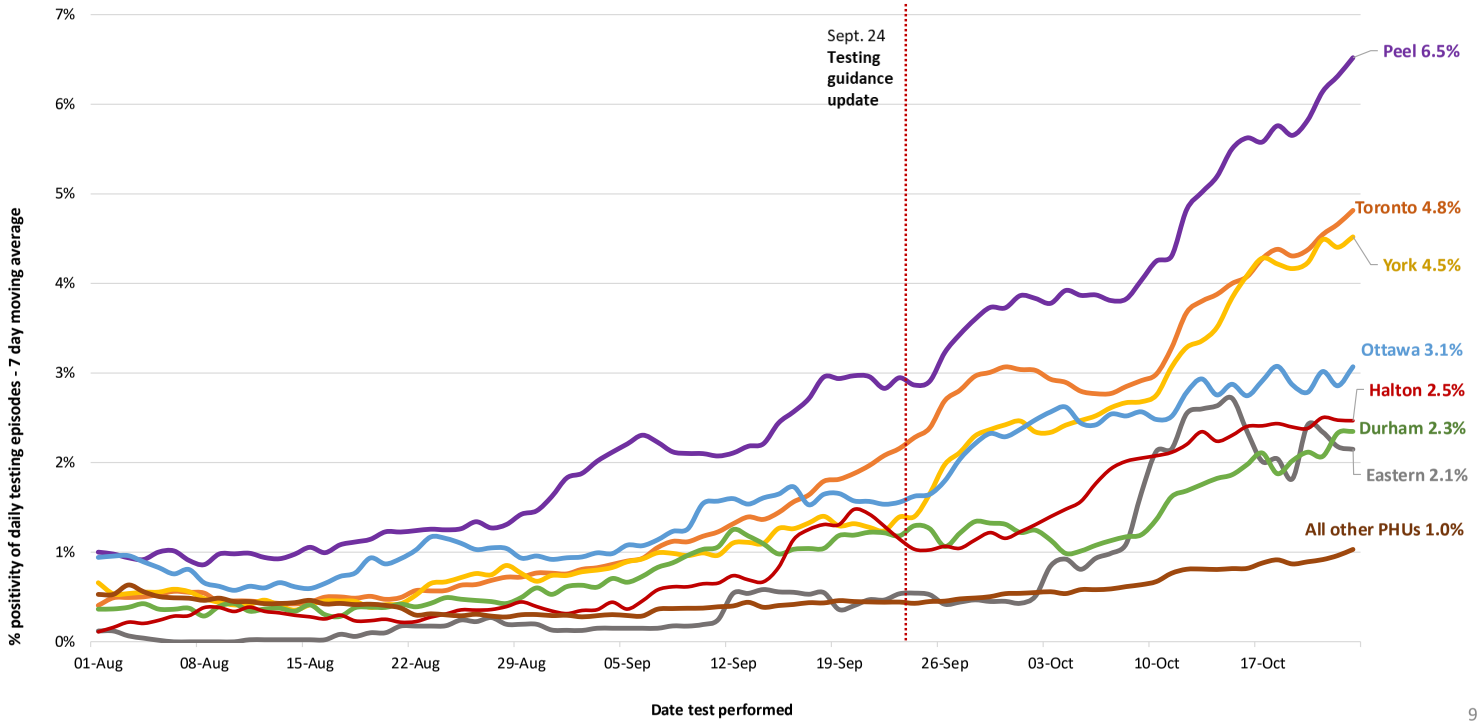
Active cases are the number of people who have tested positive for COVID-19covid 19. This number **does not** include cases that have been changed to resolved or deaths.

Substantial variation in new cases per 100,000 population by PHU



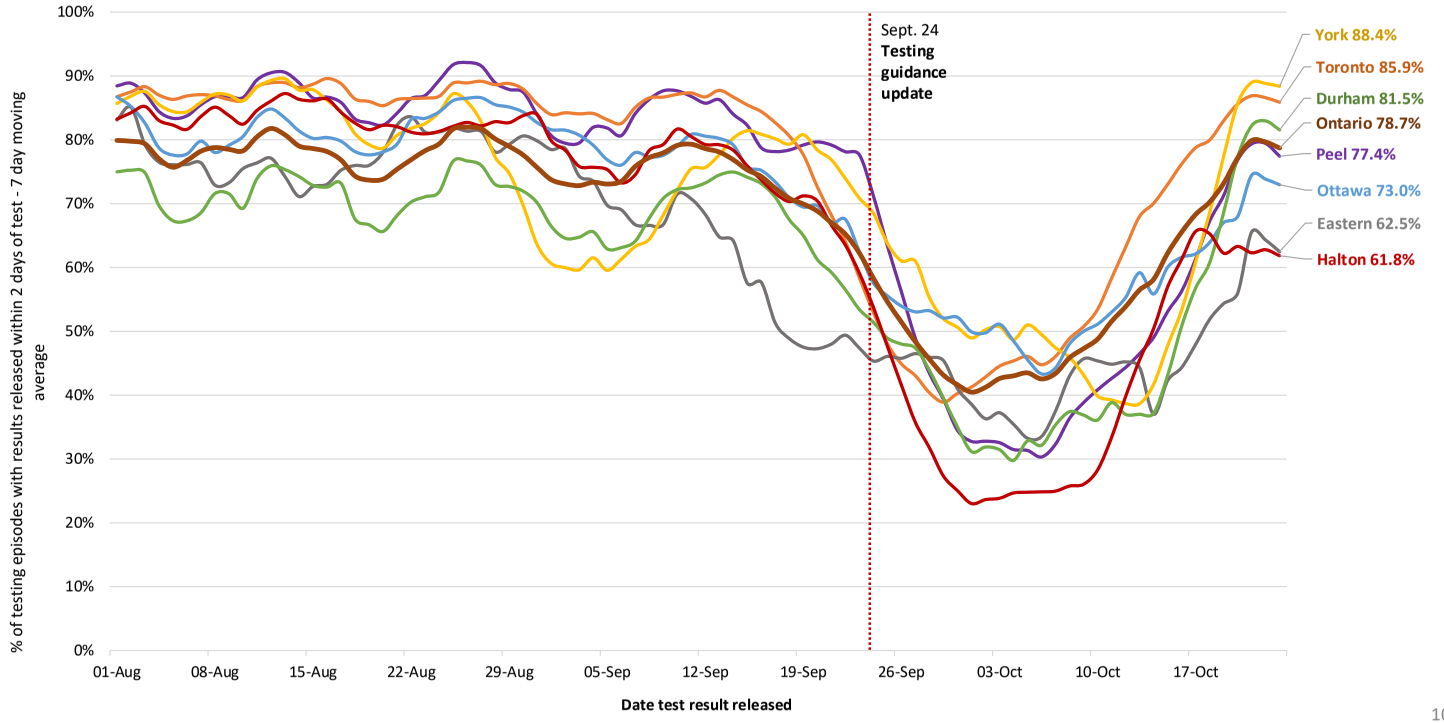
Data Source: Case and Contact Management System (CCM), extracted Oct 27

Substantial variation in percent positivity by PHU



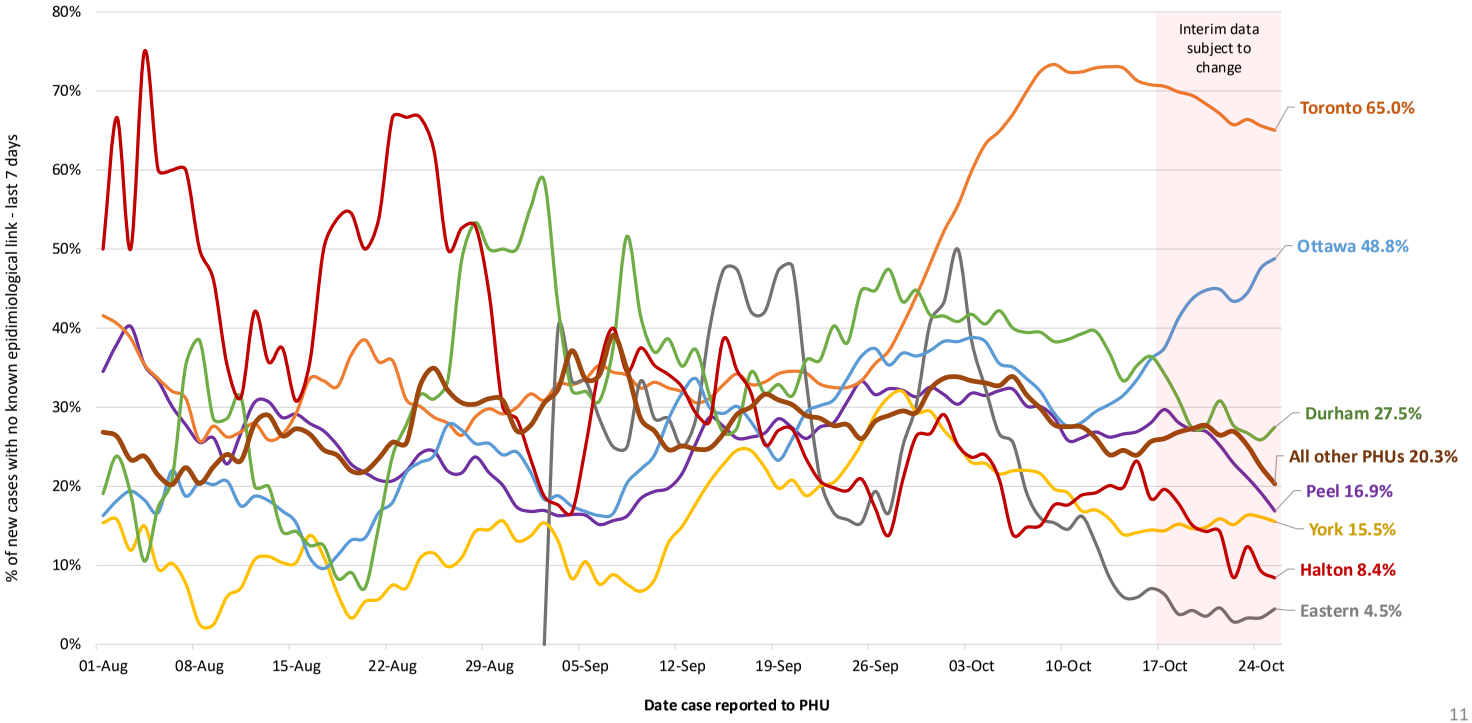
Data Source: Ontario Laboratory Information System (OLIS), extracted via MOH SAS VA Oct 27

Substantial variation in % 2-day test turnaround by PHU



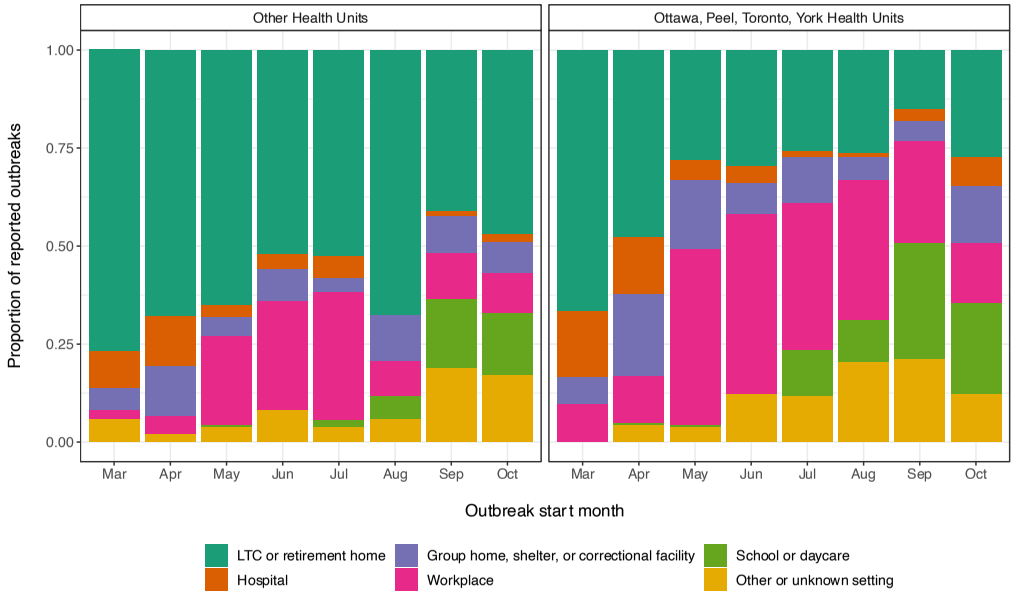
Data Source: Ontario Laboratory Information System (OLIS), extracted via MOH SAS VA Oct 27

Substantial variation in % of cases with no epidemiological link by PHU

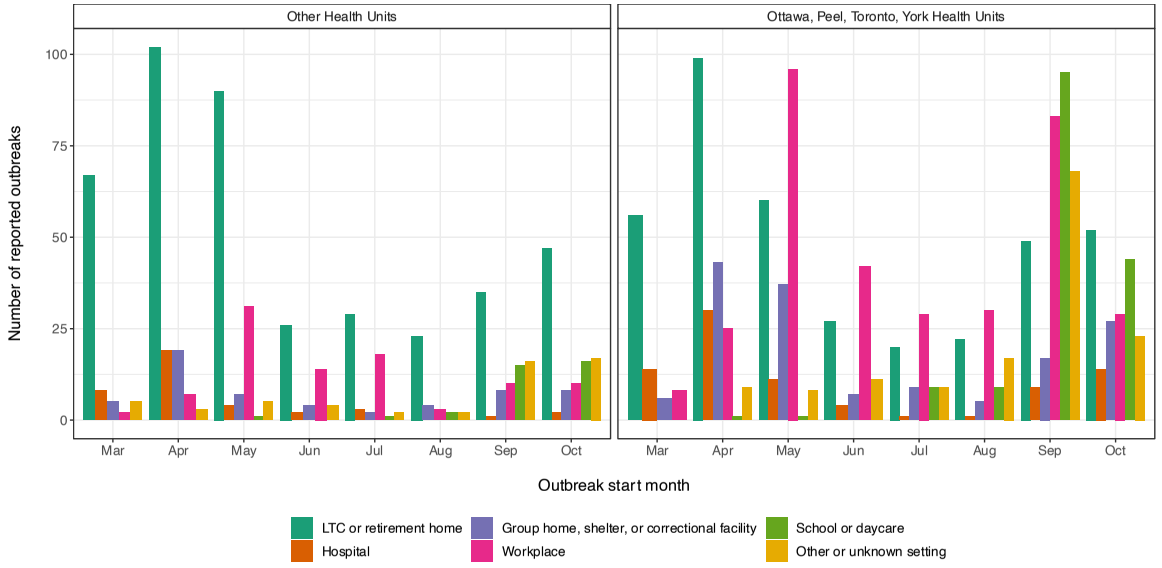


Data Source: Case and Contact Management System (CCM), extracted Oct 27

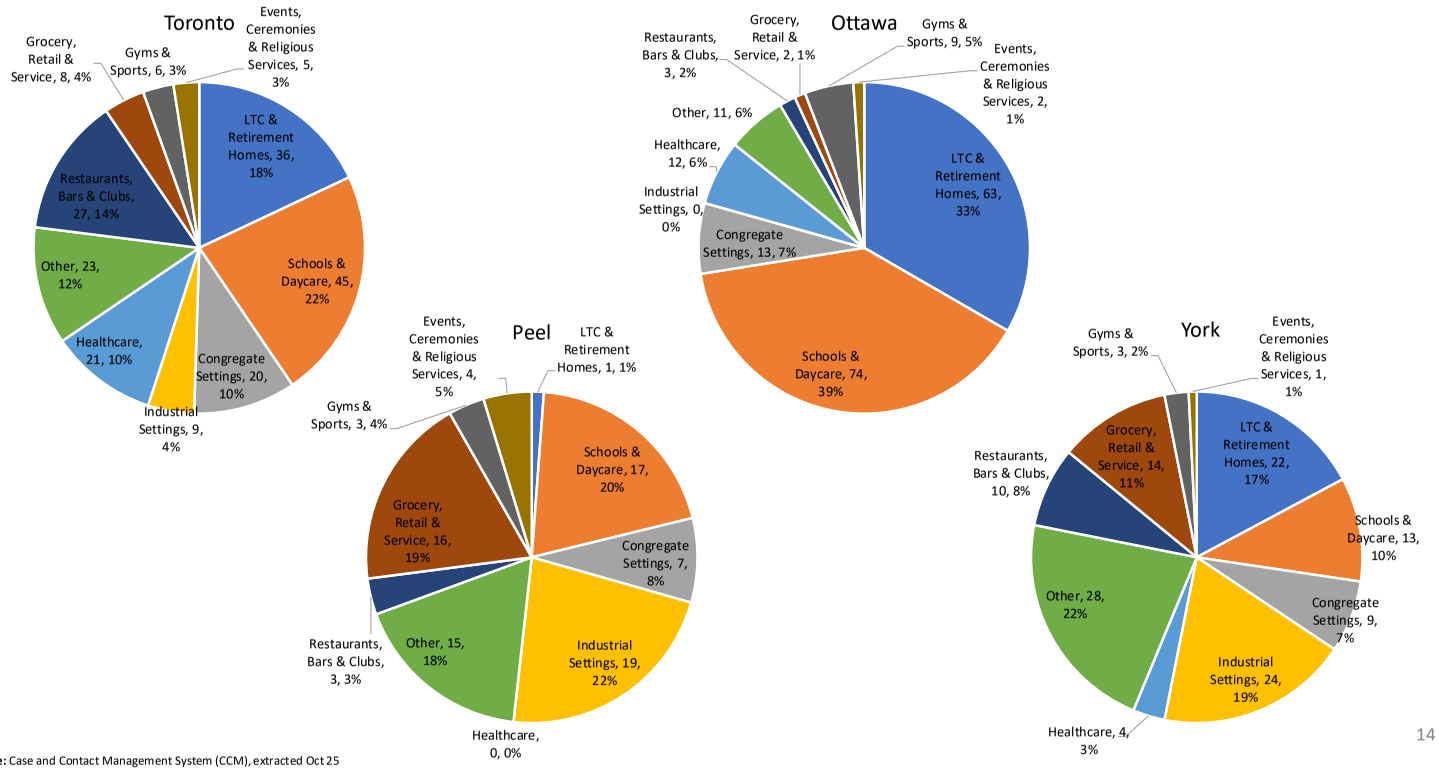
Changes in outbreak location suggest impact from shifts to modified Stage 2 (1 of 2)



Changes in outbreak location suggest impact from shifts to modified Stage 2 (2 of 2)

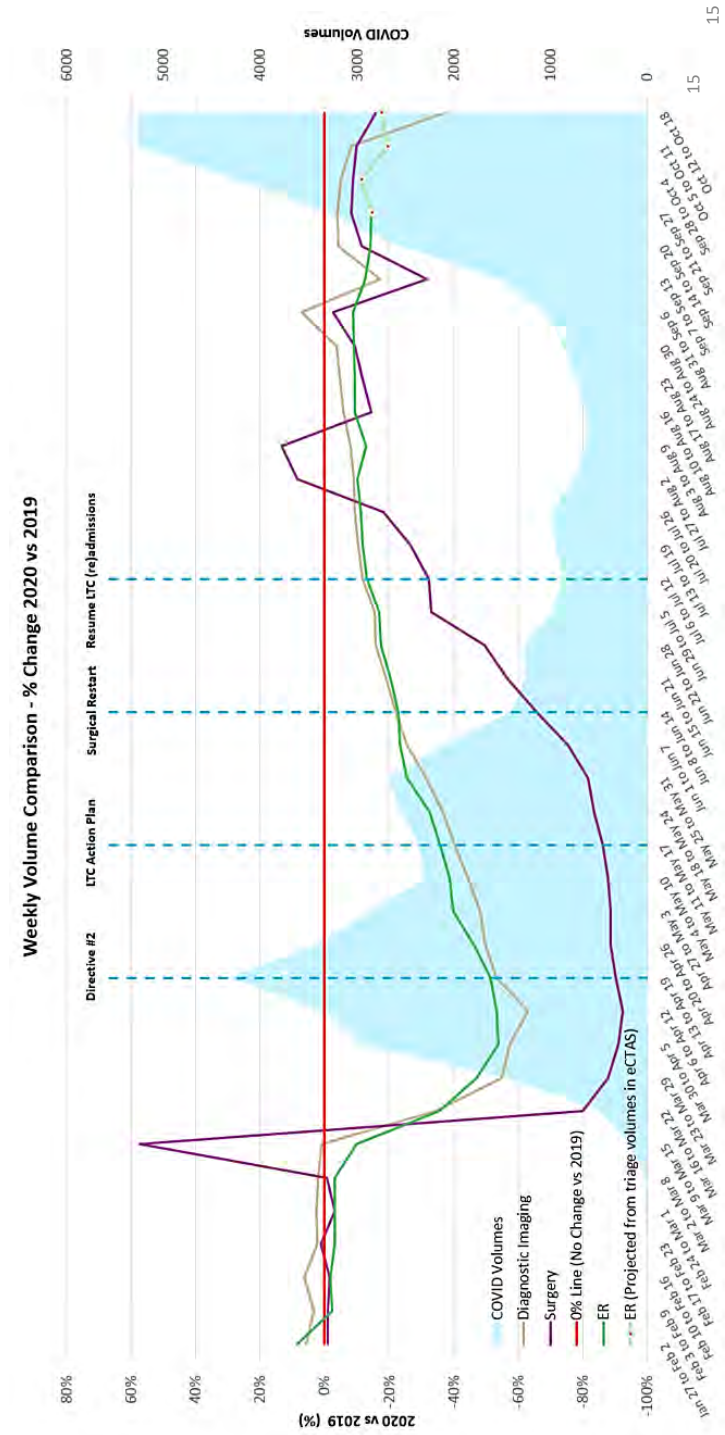


Substantial variation in source of outbreak by PHU since August 1, reported October 24



Data Source: Case and Contact Management System (CCM), extracted Oct 25

Access to care continues well below 2019 volumes



Key Findings: pandemic spread continues according to several indicators but is slowing

- Most indicators show slowing growth in COVID-19 cases, trajectory appears to be moving away from worst case but cases are continuing to climb
- Levelling up public health capacity to respond to the disease is necessary to respond to and control disease spread
- Continuing to respond on a PHU by PHU basis to account for regional variations will be important
- Health system able to respond to pandemic at current levels of growth but pandemic trajectory can change quickly
- Long-term consequences of COVID-19 pandemic continue:
  - Case growth and spillover into older age groups will increase mortality due to COVID-19
  - Potential for long-term health system burden from COVID-19 “long-haulers”
  - Access to necessary care continues below 2019 levels
  - Mental health and long-term consequences of economic impacts deserve further study

TORONTO | News

New modelling shows where COVID-19 outbreaks are happening in hot spots

Katherine DeClerq Multi-Platform Writer, CTV News Toronto
@KateDeClerq | Contact

Published Thursday, October 29, 2020 7:54AM EDT
Last Updated Friday, October 30, 2020 10:01AM EDT

Ontario officials release COVID-19 modelling

NOW PLAYING

Provincial health officials say Ontario's battle against COVID-19 has plateaued.

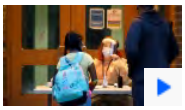
Ontario to release new COVID-19 projections

The Ontario government is expected to release new COVID-19 projections today.

COVID numbers moving in right direction: Ford

Premier Doug Ford says health officials will release information showing that the COVID-19 curve is going down.

Ontario reports 834 new COVID-19 cases; 5 deaths



Ontario reported 834 new COVID-19 cases on Wednesday and five new deaths.

1 2 >

TORONTO -- Ontario health officials say that while COVID-19 cases continue to climb, modelling data indicates the province may have avoided the worst-case scenario.

At the same time, officials say they expect to see at least 800 new COVID-19 cases a day for most of the next month.

"What is important here though is that although cases are continuing to grow, that growth has slowed," co-chair of the Ontario COVID-19 Science Advisory Table Adalsteinn Brown said at a news conference. "We're starting to see a more gentle curve there."

Provincial health officials released modelling data on Thursday showing three different scenarios for Ontario's second wave of COVID-19.

In the worst-case scenario, officials said the province could see its seven-day average rise to 1,000 or 1,200 cases a day for

io's stay-at-home order:
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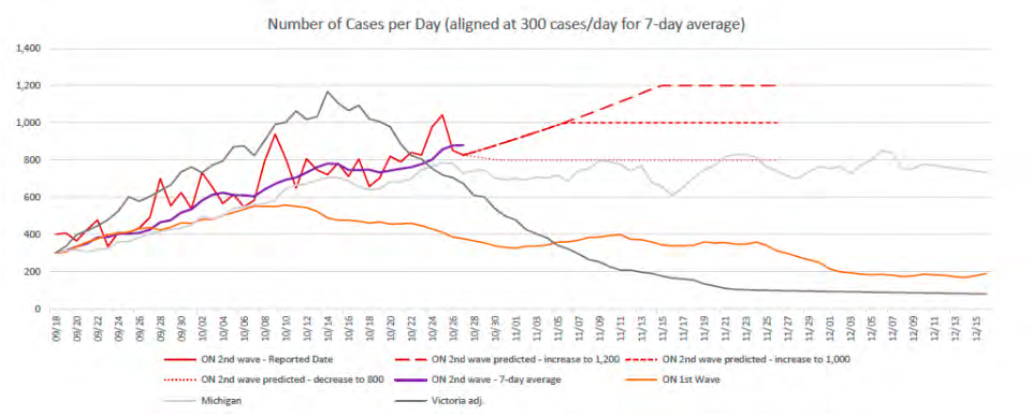
most of November. The best case scenario would see about 800 new COVID-19 cases a day.

Previous projections, released late September, showed the province could see 1,000 new COVID-19 cases daily by mid-October.

Ontario recorded more than 1,000 new infections in a single day for the first time on Sunday. Since then, the daily case count has fallen below the quadruple-number mark.

There were 851 new cases logged on Monday, 827 on Tuesday, 834 on Wednesday and 936 on Thursday.



Ontario not expected to exceed ICU threshold for COVID-19 patients

According to the data presented on Thursday, the province is not expected to exceed the 150-bed threshold for COVID-19 occupancy in intensive care units (ICU) in the next month, unless the situation gets rapidly worse.

The provincial government has previously said that when there are less than 150 COVID-19 patients being treated in intensive care in Ontario hospitals, the province can "maintain non-COVID-19 capacity and all scheduled surgeries."

How COVID-19 restrictions will be enforced

People wait hours at Toronto pop-up vaccine sites

Ontarians urged to get outside during lockdown

MOST-READ

Full list of Ontario neighbourhoods where the COVID-19 vaccine will be available to those 18+

Once the number rises above 150 it becomes harder to support non-COVID-19 needs, the government said. Once it exceeds 350 people, it becomes "impossible" to handle.

Furthermore, according to the data, there has been a 56 per cent increase in confirmed COVID-19 bed occupancy in the province over the last three weeks. The majority has not required treatment in intensive care.

Officials said they now only expect to exceed 150 COVID-19 patients in the ICU within the next 30 days "in the worst-case scenario."

Brown stressed that while growth has slowed, the data does not show that COVID-19 cases have peaked or that Ontario is on a downward curve.

"We're just getting to a slower period of growth within that curve. It's going to be critical to level up public health system capacity across every public health unit to be able to respond effectively to the disease and control the spread."

'Sharper increase' in cases, deaths in long-term care

Brown went on to state that despite avoiding the worst-case scenario as outlined in previous projections, the spread of COVID-19 "can dramatically turn" leading to "rapid, rapid growth quite quickly."

Long-term care homes, which were hardest hit in the first wave of the disease, are now starting to see "a much sharper increase" in cases, Brown added.

According to the province's data, there are 396 active COVID-19 cases among long-term care residents as of Oct. 27 and 281 active cases in staff.

There has also been a "sharply increasing curve of reported deaths" in long-term care, according to Brown.

Eighty-five long-term care and retirement home residents have

Ontario will be hit with 'sweltering heat' this summer, Farmers' Almanac forecast says

Doctor urges Ford government, feds to coordinate transfer of ICU nurses from other provinces to Ontario

COVID-19 cases in Ontario drop below 4,000, but positivity rate rises slightly

Ontario records more than 4,200 new COVID-19 cases, highest daily count ever

TORONTO TOGETHER

died after contracting COVID-19 since Aug. 15, the data showed. The cumulative death toll associated with COVID-19 in long-term care homes has surpassed 1,900 in Ontario.

"We have more deaths in the last week – 27 deaths - than we did between August 15 and October 8," Brown said.

The data presented on Thursday did not include any death projections.

In the spring, officials said that Ontario could see anywhere between 3,000 and 15,000 deaths related to the disease.

"I believe if we keep it on the current trajectory we will see far fewer than that high-level estimate of deaths but I do worry given how quickly you have seen thing turn in a number of other jurisdictions that any prediction is going to be challenging," Brown said.

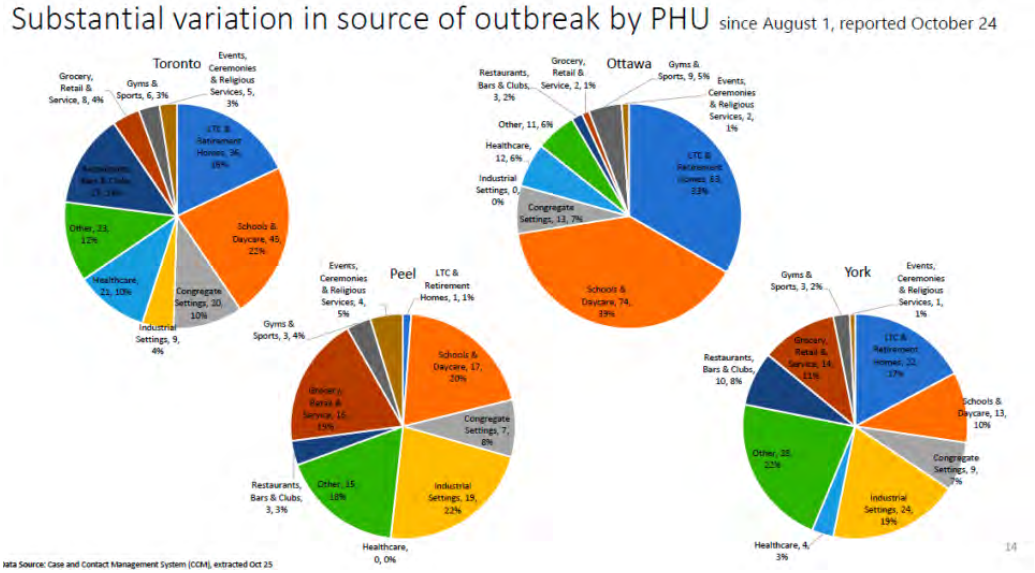
Majority of COVID-19 outbreaks in Stage 2 regions are not in restaurants and bars, data shows

Four regions in Ontario—Toronto, Peel Region, York Region and Ottawa—have been designated COVID-19 hot spots and have been reverted back to a modified Stage 2 of the province's economic reopening plan in an effort to curb the spread of the disease.

Under Stage 2, indoor dining has been prohibited and large facilities such as gyms and cinemas have been closed.

In the data presented on Thursday, the number of outbreaks associated with restaurants and bars since Aug. 1 appears to be much lower than the percentage associated with schools, child-care centres or long-term care facilities.

An outbreak is defined as two COVID-19 cases within a 14-day period, where both cases could reasonably be acquired at a single facility or event.



In Toronto, restaurants, bars and clubs accounted for 14 per cent of outbreaks between Aug. 1 and Oct. 24. compared to long-term care (18 per cent) and schools and daycares (22 per cent).

Gyms and sports accounted for roughly three per cent of Toronto outbreaks within that time period.

The difference becomes more drastic in other hot spots.

In Peel Region, restaurants accounted for about three per cent of all outbreaks compared to grocery and retail (19 per cent), schools and daycares (20 per cent), and industrial settings (22 per cent).

Restaurants and bars accounted for eight per cent of outbreaks in York and two per cent of outbreaks in Ottawa since Aug. 1.

When asked why restaurants, bars and gyms were closed in those four regions considering the number of outbreaks associated with the facilities, health officials said that it was based on evidence presented to their science table and the fact that those facilities are considered “social settings.”

“We were picking those settings where it's indoors, where people are unable to mask for long periods of time,” Ontario Chief Medical Officer of Health Dr. David Williams said.

Williams added that facilities such as schools and long-term care homes have “proper steps and (personal protective equipment) in

place."

For his part, Brown called the data regarding outbreaks "complicated."

"The variation in the source of outbreaks across those four public health units that had restrictions reasonably showing us that there's not one consistent pattern," Brown told reporters at the news conference.

"There's often concern that we need to wait to see outbreaks in a particular public health unit before instituting restrictions. That would be akin to waiting to close the barn door until after the horses left."

At the same time, there is still a large percentage of COVID-19 cases in which there is no epidemiological link to a source, particularly in the four Stage 2 regions.

The data shows that in the last seven days, about 65 per cent of cases in Toronto have not been traced back to a concrete source.

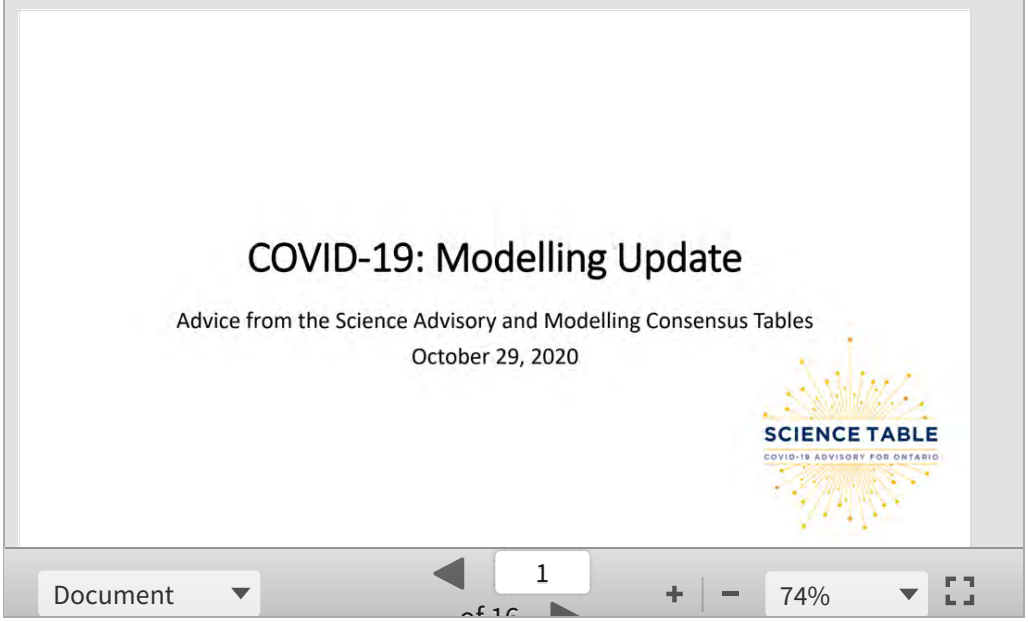
That number drops significantly in Ottawa (48.8 per cent), Durham (27.5 per cent) and Peel (16.9 per cent.)

Peel Region is reporting the highest seven-day rolling average in COVID-19 positivity rates at 6.5 per cent, followed by Toronto (4.8 per cent), York (4.5 per cent) and Ottawa (3.1 per cent).

Halton Region is teetering at a 2.5 per cent positivity rate.

More than 73,000 novel coronavirus cases have been confirmed in Ontario since the first case was detected in late January. That number includes more than 3,000 deaths and more than 63,000 recovered patients.

COVID-19 Updated Modelling Oct. 29, 2020



Document 1 of 16 74%

TORONTO TOP STORIES

COVID-19 cases in Ontario drop below 4,000, but positivity rate rises slightly

Two-vehicle collision in Brampton leaves man dead

Two people in life-threatening condition after separate shootings in North York

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Motorcyclist in critical condition after crash in

Toronto plans to vaccinate education workers

Exhibit "N"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

GTA

Toronto Public Health to stop tracing close contacts of COVID cases in the community as infections soar

By May Warren Staff Reporter
Sat., Oct. 3, 2020 | 3 min. read

Toronto Public Health will no longer reach out to close contacts of people with confirmed COVID-19 infections in the community, to triage resources amid an overwhelming number of new cases in the city.

Known as contact tracing, finding and isolating those who have been in contact with people who have tested positive is seen as a crucial part of the strategy to fight the virus in clusters from the White House to local bars and restaurants.

Outside of outbreak settings, the agency will now focus on finding people who have been diagnosed with COVID-19 through a lab test, assessing their symptoms and determining if they can self-isolate away from others, spokesperson Lenore Bromley said in an email Saturday.

The contact tracers may make a referral to Toronto's new Voluntary Isolation Centre if people can't self-isolate safely at home, she added.

But in a huge shift, they will no longer ask for that person's contacts, to call them and tell them to isolate and get tested.

Instead they will "provide instructions to the person to notify their high-risk contacts," Bromley said.

A high-risk contact, clarified Associate Medical Officer of Health Dr. Vinita Dubey, in a followup email, is sometimes also called a close contact. That's anyone who spent at least 15 minutes, in "close proximity" without physical distancing, with an infected person.

That could be, for example, someone who lives in the same house, a friend who came over for a board game night, an extended family member who dropped by for dinner or even a stranger at a fitness class.

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Toronto Public Health will continue to investigate and report on outbreaks in hospitals, long-term care, retirement homes, shelters, schools, and child-care settings, Bromley said. There is no change to contact tracing policy or procedures there.

They will also continue to report on the number of positive cases each day, the number of people who've recovered and the number of deaths.

"In a pandemic, data tells public health which tools to use when," Bromley added.

"We are focusing on people whose infection poses the most risk to others."

On Friday, Toronto's Medical Officer of Health Dr. Eileen de Villa, said in a letter to the province that public health needed to make a "strategic shift" and "temporarily reprioritize case and contact management to focus on the highest risk scenarios."

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Oct. 03, 2020

She added that this is a "temporary measure," due to "very high case counts."

The Toronto contact tracing team has expanded in response to COVID and is the largest in the country, she added, with almost 700 people dedicated to the work.

In the same letter, she warned more must be done to "protect Toronto against the dangerous extent of COVID-19 resurgence." She asked the province to temporarily restore the ban on indoor dining at bars and restaurants, and on indoor sports practices and fitness classes, in response.

"The current high case count demands that we make this change and push for new public health measures outlined on Friday," Bromley added in her email.

"At this point in the pandemic these are the most effective tools to fight this virus."

Coun. Joe Cressy, who chairs Toronto's Board of Health, said the "volume of cases in our city is putting our hospital sector and public health sector at risk."

He added that "in the absence of immediate measures undertaken by the provincial government, that will get worse not better."

After a record-setting 732 infections reported Friday, the province has put a pause on social circle bubbles, placed more restrictions on gyms, bars, restaurants and banquet halls in COVID-19 hot zones and made masks mandatory across Ontario.

May Warren is a Toronto-based breaking news reporter for the Star. Follow her on Twitter: @maywarren11

Toronto is cutting back on contact tracing though COVID-19 numbers are on the rise

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Cases of COVID-19 are spiking, testing is high, and new restrictions are coming into effect across Ontario — yet in the province's biggest urban centre of Toronto, the only thing not ramping up as far as the pandemic is concerned is, perhaps counterintuitively, contact tracing.

Residents were informed on Friday that Toronto Public Health (TPH) simply doesn't have the resources to conduct thorough contact tracing for all cases while also taking care of said patients in a time when turnaround times for test results and contact tracing are already concerningly low.

As infections "have risen dramatically and consistently," Toronto's case and contact management team — which is apparently the largest in the country, with 700 hands on deck — will now "make a strategic shift and temporarily re-prioritize case and contact management to focus on the

highest risk scenarios," Dr. 196
Eileen de Villa, the city's medical officer of health, said at a press conference.

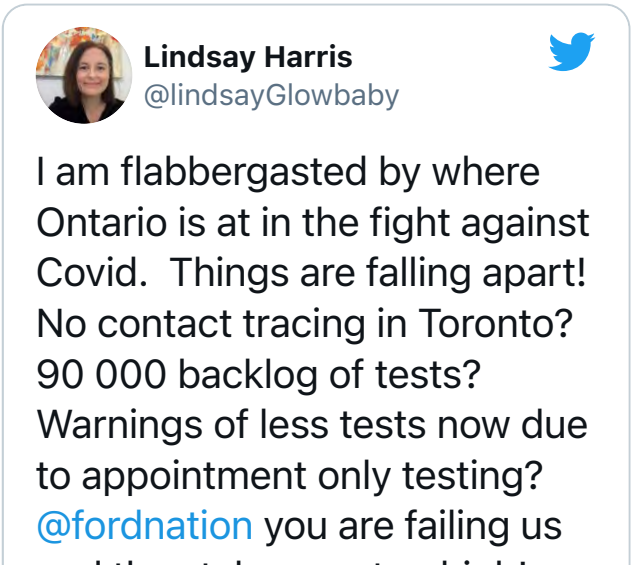
She added that the temporary move, implemented on Friday, is absolutely necessary, and par for the course of typical outbreak management.

Those diagnosed with the highly contagious illness in Toronto will now have to reach out to contacts themselves and notify them of potential exposure, except in the cases of school and long-term care settings, which will still be handled by the city.

In response to the news, the provincial government has vowed to step in to help within the next month, adding another 200 officials to the TPH team.

In the most recent case numbers from Oct. 3, 566 new cases were confirmed among 39,661 tests, with 35 per cent of those cases in Toronto, one of three key hot spots in the province.

Recent outbreaks among staff and customers in a number of bars, restaurants, gyms and retailers have served to heighten COVID-19 fears as we move into flu season.



De Villa is among those officials

calling for even stricter lockdown measures — including an end to indoor dining and directives to only leave home for essential trips — due to rising case numbers, though the percentage of those tested who are indeed found to have COVID-19 has actually remained very low in the second wave thus far.

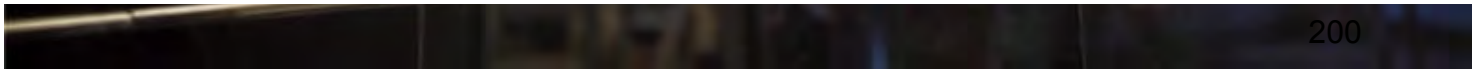
Lead photo by @priscilladupreez

Toronto

Toronto Public Health halts contact tracing outside of COVID-19 outbreaks in facilities

Public health to focus efforts on calling and isolating confirmed cases as case numbers rise rapidly

CBC News · Posted: Oct 03, 2020 4:50 PM ET | Last Updated: October 3, 2020



Toronto Public Health says it will no longer notify close contacts of people infected with COVID-19 outside of outbreaks in hospitals, long-term care homes, retirement homes, homeless shelters, schools and child care centres for now. (Cole Burston/The Canadian Press)

Toronto Public Health says it has halted contact tracing outside of outbreaks in what are called congregate settings because of a rapid rise in COVID-19 infections.

The "strategic shift" means TPH will no longer notify close contacts of people infected with COVID-19 outside of outbreaks in such facilities as hospitals, long-term care homes, retirement homes, homeless shelters, schools and child care centres for now, according to a report by The Globe and Mail.

TPH said on Saturday it will be now up to the infected person, if not connected to these settings, to call their close contacts.

- **Toronto suspends contact tracing outside outbreak settings to focus on isolating confirmed cases**

The public health unit added there is no change in policy and procedures for congregate settings and TPH will continue to notify close contacts of infected people in these facilities.

Lenore Bromley, spokesperson for TPH, said in an email on Saturday that the change in policy is due to the dramatic rise in the number of COVID-19 infections in Toronto in the past month and the need for the public health unit to focus its efforts on calling and isolating people confirmed to have the virus.

"As part of the usual course of outbreak management, when cases reach a high level, public health must make a strategic shift and temporarily re-prioritize case and contact management to focus on the highest risk scenarios," she said.

"At Toronto Public Health, we're implementing this prioritization now."

Bromley said TPH will continue to contact people diagnosed with COVID-19. Staff will do the following, she said:

- Confirm a positive COVID-19 lab test result.
- Assess signs and symptoms and determine when symptoms first presented themselves.
- Assess and confirm the person's ability to go into isolation safely and make a referral to the Toronto Voluntary Isolation Centre if the person cannot isolate safely at home.
- Provide instructions to the person to notify his or her high risk contacts.

Move is 'temporary response,' medical officer says

Dr. Eileen de Villa, the city's medical officer of health, alluded to the new policy on Friday, saying TPH has nearly 700 staff people dedicated to case and contact management and has worked with Toronto hospitals to improve its response. But she said case counts are rising dramatically and consistently and TPH must focus its resources.

"This is a temporary measure in response to very high case counts," she told reporters at a city hall news briefing.

"The reason I am asking the Province to undertake additional public health measures is to drive overall case counts down. When this happens, we will return to the previous case and contact management strategies."

Dr. Eileen de Villa, the city's medical officer of health, says: 'The reason I am asking the Province to undertake additional public health measures is to drive overall case counts down. When this happens, we will return to the previous case and contact management strategies.' (Michael Wilson/CBC)

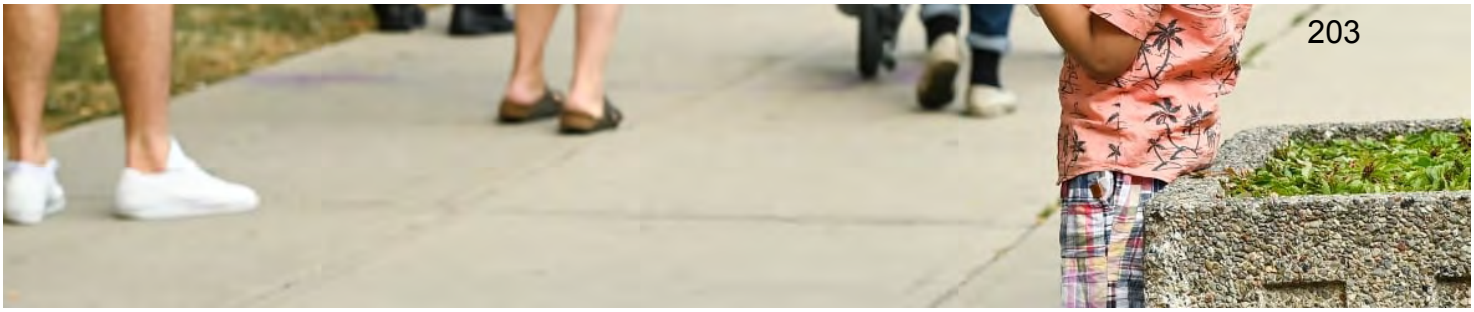
Coun. Joe Cressy, who represents Ward 10 Spadina-Fort York and is chair of the Toronto Board of Health, said the volume of cases in Toronto has forced TPH to make adjustments so that full contact tracing is now being done only for people in high risk congregate settings.

"For individuals in the broader community, TPH is still following up to check on them and to provide support to positive cases, but it is not doing full case and contact management after the fact," Cressy said on Saturday.

Cressy said the public health system is close to becoming overwhelmed at the moment because of the sheer number of cases and additional measures are needed now to slow the spread of the virus.

"This is an indication that the system is reaching its breaking point," Cressy said.

In the absence of stronger public health measures, hospitals and public health systems are at risk, he added.



A young boy plays on a phone as he waits in line for hours at a COVID-19 assessment centre at Mount Sinai Hospital in Toronto. (Nathan Denette/The Canadian Press)

Colin Furness, infection control epidemiologist and assistant professor in the faculty of information at the University of Toronto, said not doing contact tracing with certain people means the city will not be limiting spread as much as it would otherwise. The more contact tracing that can be done, the better, he said.

"This is certainly not what one wants to hear. Contact tracing is a really, really important tool in public health to make epidemics go away or at least to constrain them," Furness said.

There is a danger of losing control over the pandemic, he added. Contact tracing explains how spread is happening and provides important data, he said. He noted the amount of work to be done with contact tracing is greater now because people are moving around more than they were in the spring.

But Dr. David Fisman, an epidemiologist and a professor at the Dalla Lana School of Public Health at the University of Toronto, said TPH is making the right move, given the growth in cases.

"It's absolutely the right thing to do. In the first place, you could hire 5,000 people and they wouldn't be able to keep with the numbers and do this meaningfully," he said.

"For contact tracing to be meaningful, it has to be rapid and we can't do that right now."

Public unit calling on province to take stronger action

On Friday, de Villa called on the province to implement stronger public health measures to slow the spread of the virus. She suggested that the province ban indoor restaurant dining, close gyms and ask people to only leave their homes for essential trips.

De Villa said while she has some authority to make such changes under existing public health regulations, she received legal advice that it would be "unprecedented" for a local medical officer of health to enact such broad changes.

"I am therefore urging you to act in collaboration with the City of Toronto to implement these measures in as timely a fashion as possible," she said in a letter on Friday to the province.

On its website, which lists daily status of COVID-19 cases, Toronto reported 335 new COVID-19 infections as of Friday. The number brings the city's cumulative total to 20,473. A total of 16,842 are said to have recovered from the virus. A total of 1,299 people have died of COVID-19. There are 85 people currently in hospital with COVID-19.

With files from Muriel Draaisma, Angelina King, Ieva Lucs, Farrah Merali, The Canadian Press

Exhibit "O"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

Stay at home except for essential travel and follow the restrictions and public health measures.

Ontario

COVID-19 response framework: keeping Ontario safe and open

Learn about the public health and workplace safety measures for each zone under the colour-coded response framework.

Stay-at-home order

A declaration of emergency and provincewide stay-at-home order are in effect as of **April 8 at 12:01 a.m**. The COVID-19 Response Framework (colour-coded zones) is paused during this time.

Find out about the public health measures and restrictions during this time (https://covid-19.ontario.ca/zones-and-restrictions) .

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1. Prevent
2. Protect
3. Restrict
4. Control
5. Lockdown

Ontario's priorities

Limit the transmission of COVID-19

Put measures in place that work to limit transmission and sickness and prevent death.

Avoid closures

Enable businesses to sustain operations while reducing the risk of transmission.

Keep schools and childcare open

Enable schools across the province to sustain a safe environment for classroom learning.

Maintain health care and public health system capacity

Ensure the health care and public health system are meeting the needs of their communities.

Protect vulnerable populations

Put measures in place to protect those most vulnerable to COVID-19.

Provide additional supports where possible

Develop equitable responses, including financial tools for groups and sectors disproportionately affected by the pandemic.

Key risk factors of potential transmission

There are several risk factors that help drive transmission of COVID-19, including:

- close contact
- closed spaces
- crowded places
- forceful exhalation

Close contact is the highest risk. Limiting these risks is critical to keeping Ontario open and safe.

Personal and public health measures — such as physical distancing, staying home when ill even with mild symptoms, frequent handwashing and surface cleaning — have significant benefits and have been proven to limit COVID-19 transmission.

It is critical the people of Ontario understand the risks of gatherings (crowds) in close contact in enclosed and indoor spaces to understand how to mitigate those and make informed choices.

Principles for keeping Ontario safe and open

Responsible

Protecting the **health and safety of the people of Ontario**, especially those who are most vulnerable. Keeping child care centres and schools open are priorities.

Proactive, graduated and responsive

Proactive measures, including enforcement, will work to prevent transmission, thereby protecting our health care system and helping businesses stay open. **Graduated measures should be targeted and informed by regional circumstances.**

Evidence-informed

Best-available scientific knowledge, public health data, defined criteria and consistent measures will inform public health advice and government decisions.

Clear

Plans and responsibilities for individuals, businesses and organizations (employers) will **be clear and outline what happens in each zone**.

Adjusting and tightening public health measures

Indicators will generally be assessed based on the previous two weeks of information. However, measures will be applied sooner than two weeks if there is a rapidly worsening trend.

Local context and conditions will inform movement, including potential regional application of measures.

Thresholds within a region may not all be met at the same time. Decisions about moving to new measures will require overall risk assessment by government.

If a public health region experiences a rapid increase in COVID-19 transmission or if its health system is at risk of becoming overwhelmed, the Chief Medical Officer of Health, in consultation with the local medical officer of health, can request the government activate the "emergency brake" and move the region into the Shutdown zone

(https://www.ontario.ca/page/enhancing-public-health-and-workplace-safety-measures-provincewide-shutdown).

Indicators and thresholds

Green – Prevent

Epidemiology

- Weekly incidence rate is less than 10 per 100,000
- Percent positivity is less than 0.5%
- Effective reproduction number (Rt) is less than 1
- Outbreak trends/ observations
- Level of community transmission and non-epi linked cases stable

Health system capacity

- Hospital and Intensive Care Unit (ICU) capacity adequate

Public health system capacity

- Case and contact follow-up within 24 hours adequate

Yellow – Protect

Epidemiology

- Weekly incidence rate is 10 to 24.9 per 100,000
- Percent positivity is 0.5 to 1.2%
- Rt is approximately 1
- Repeated outbreaks in multiple sectors and settings **or** increasing number of large outbreaks
- Level of community transmission and non-epi linked cases stable or increasing

Health system capacity

- Hospital and ICU capacity adequate

Public health system capacity

- Case and contact follow-up within 24 hours adequate

Orange – Restrict

Epidemiology

- Weekly incidence rate is 25 to 39.9 per 100,000
- Percent positivity is 1.3 to 2.4%
- Rt is approximately 1 to 1.1
- Repeated outbreaks in multiple sectors and settings, increasing number of large outbreaks
- Level of community transmission and non-epi linked cases stable or increasing

Health system capacity

- Hospital and ICU capacity adequate or occupancy increasing

Public health system capacity

- Case and contact follow-up within 24 hours adequate or at risk of becoming overwhelmed

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Red – Control

Epidemiology

- Weekly incidence rate is 40 per 100,000 or more
- Percent positivity is 2.5% or more
- Rt is 1.2 or more
- Repeated outbreaks in multiple sectors and settings, increasing number of large outbreaks
- Level of community transmission and non-epi linked cases increasing

Health system capacity

- Hospital and ICU capacity at risk of being overwhelmed

Public health system capacity

- Public health unit capacity for case and contact management at risk or overwhelmed

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Grey – Lockdown

Epidemiology

Adverse trends after entering red – control, such as:

- increasing weekly case incidence and/or test positivity
- increasing case incidence and/or test positivity among people aged 70 or over
- increasing outbreaks among vulnerable populations, such as long-term care residents and residents of other congregate settings

Health system capacity

- Hospital and ICU capacity at risk of being overwhelmed

Public health system capacity

- Public health unit capacity for case and contact management at risk or overwhelmed

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Sector-specific public health and workplace safety measures and public health advice

This is only a summary of the measures in effect in Ontario. It is not intended to be legal advice or an interpretation of the law. Read the regulations for more details on the requirements for each zone:

- O. Reg. 82/20 (https://www.ontario.ca/laws/regulation/200082) : Grey-Lockdown (and Shutdown (https://www.ontario.ca/page/enhancing-public-health-and-workplace-safety-measures-provincewide-shutdown))
- O. Reg. 263/20 (https://www.ontario.ca/laws/regulation/200263) : Red-Control
- O. Reg. 364/20 (https://www.ontario.ca/laws/regulation/200364) : Green-Prevent, Yellow-Protect, and Orange-Restrict

General public health measures and advice for all zones

General advice

Staying home is the best way to protect yourself and others. You are strongly advised to:

- stay home as much as possible and leave only for essential purposes (work, school, food, health care, assisting vulnerable individuals or physical activity)
- avoid social gatherings
- limit close contacts to your household (the people you live with)
- work from home if possible, and allow your employees to work from home if they can
- avoid travel except for essential reasons

Follow public health advice:

- stay home if you have symptoms (https://www.ontario.ca/page/covid-19-stop-spread) , even if they are mild
- wash your hands thoroughly and regularly
- cover your cough
- download the COVID Alert mobile app (https://covid-19.ontario.ca/covidalert)
- get tested if you have symptoms compatible with COVID-19, or if you've been advised of exposure by your local public health unit or through the COVID Alert mobile app

Close contact, face coverings, gatherings and events

Limit close contact to your household (the people you live with).

Individuals who live alone, including seniors, may consider having exclusive, close contact with another household to help reduce the negative impacts of social isolation.

Maintain at least two metres of physical distancing from everyone else.

Wear a face covering or mask:

- any time you are with someone who is not in your household
- if physical distancing cannot be maintained
- if wearing one is required

You must wear a face covering or mask and maintain physical distancing during permitted organized public events or social gatherings with individuals outside of your household.

Follow provincial and local restrictions on public and private gatherings.

Additional advice for Red–Control

- Families should not visit any other household or allow visitors in their homes – people who live alone can gather with one household
- Everyone should avoid social gatherings

Additional advice and measures for Grey–Lockdown

- No indoor organized public events and social gatherings are permitted, except with members of the same household – people who live alone can gather with one household

Travel

Staying home is the best way to protect yourself and others. Avoid travel except for essential reasons.

Within Ontario

Travel between regions will greatly increase the potential for spikes in community spread and can undo the progress we have made.

You should avoid travelling outside your region except for essential reasons.

Ontario's Chief Medical Officer of Health strongly advises that travel out of the province should be limited to essential purposes only.

If you must travel to another province for essential reasons, you should:

- consider the risk associated with travelling – this includes COVID-19 transmission in the other province or country, and entry requirements (for example, quarantine)
- self-quarantine, or drastically reduce close contact with others 10 to 14 days before travelling out of the province and after returning home, to help lower the risk of exposure to COVID-19
- follow general public health advice, rules and regulations of Ontario and the other province or country

When you return to Canada from abroad, you must:

- follow federal government rules related to testing and quarantine
- quarantine and stay home for 14 days whether you have symptoms or not

Public health advice, recommendations and instructions for businesses

Businesses and organizations must operate in compliance with legal requirements and the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.

Check with your local public health unit and municipality for any additional advice, recommendations or instructions.

Screening

Businesses and organizations must operate in compliance with the advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health on screening individuals as well as any of the screening requirements explicitly set out in legislation that applies to them.

For patrons

Businesses post signs at all entrances informing people to screen themselves for symptoms of COVID-19 before entry.

Active screening is required in accordance with instructions by the Office of the Chief Medical Officer of Health or the regulations. Where this is required, it is noted in the sections below.

Customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to meet this requirement.

For workers

Workplaces must screen all workers or visitors entering the work environment. See the COVID-19 worker and employee screening tool (https://covid-19.ontario.ca/screening/worker/) for more information.

Face coverings and personal protective equipment, including eye protection

Everyone must wear a mask or face covering that covers their mouth, nose and chin inside any business or place that is open, with some exceptions.

Workers must wear appropriate personal protective equipment (PPE) that protects their eyes, nose and mouth, if in the course of providing services they are:

- required to come within 2 metres of another person who is not wearing a mask or face covering
- in an indoor area and are not separated by plexiglass or some other impermeable barrier

Physical distancing

Businesses that are open must not permit patrons to line up:

- inside
- outside, unless they are maintaining a physical distance of at least two metres from others and wearing a face covering or mask (with limited exceptions (https://www.ontario.ca/page/face-coverings-and-face-masks#section-1))

Capacity limits

All businesses or facilities must limit capacity so that every member of the public is able to maintain two metres of physical distancing from every other person.

Some businesses and facilities have additional capacity restrictions. Where additional capacity restrictions are in place, it is noted in the sections for each zone below.

Cleaning and disinfection

Businesses and places that are open shall ensure that equipment, washrooms, locker rooms, change rooms and showers that are accessible to the public are cleaned and disinfected as frequently as is necessary to maintain a sanitary condition.

Safety plans

All businesses must have safety plans (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) , no matter what zone they are in.

Schools, childcare and post-secondary institutions

Schools, child care centres and post-secondary institutions remain open in all zones, subject to reopening plans and epidemiology of the virus.

In Grey–Lockdown and Shutdown (https://www.ontario.ca/page/enhancing-public-health-and-workplace-safety-measures-provincewide-shutdown) , post-secondary institutions may open for virtual instruction. In-person instruction is limited (for example, clinical training, trades) and includes examinations. In-person cannot exceed 10 persons, with limited exceptions.

Green – Prevent 

Organized public events, social gatherings and wedding, funeral and religious services, rites and ceremonies

- Limits for certain organized public events and social gatherings such as functions, parties, dinners, gatherings, barbeques or wedding receptions held in private residences, backyards, or parks, where physical distancing can be maintained:
  - Indoors: 10 people
  - Outside: 25 people
- Limits for organized public events and gatherings in staffed businesses and facilities, where physical distancing can be maintained:
  - Indoors: 50 people
  - Outside: 100 people
- Limits for religious services rites or ceremonies, including wedding services and funeral services, where physical distancing can be maintained (applies in any venue other than a private dwelling):
  - Indoors: 30% capacity of the room

You must wear a mask or face covering and maintain physical distancing during events or social gatherings with individuals outside of your household.

Restaurants, bars and other food and drink establishments

- Require patrons to be seated; 2 metres minimum or impermeable barrier required between tables
- No buffet style service
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance and face covering required
- Mask or face coverings required except when eating or drinking
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf)
- Require contact information for one patron per seated party
- Dancing, singing and performing music is permitted, with restrictions
- Karaoke permitted, with restrictions (including no private rooms)
- Personal protective equipment, including eye protection, required when a worker must come within 2 metres of another person who is not wearing a face covering or separated by plexiglass
- Night clubs only permitted to operate as restaurant or bar
- safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Sports and recreational fitness facilities

- Maintain 2 metres physical distancing, unless engaged in a sport
- Capacity limits per venue, where physical distancing can be maintained:
  - Classes: 50 people indoors or 100 people outdoors
  - Areas with weights or exercise equipment: 50 people indoors
  - Spectators: 50 indoors or 100 outdoors
- Capacity limits apply on a per-room basis if operating in compliance with a plan approved by the Office of the Chief Medical Officer of Health (Guidance for Facilities for Sport and Recreational Fitness Activities During COVID-19 (https://www.ontario.ca/page/guidance-facilities-sports-and-recreational-fitness-activities-during-covid-19))
- Team and individual sports must be modified to avoid physical contact (with exemptions for certain high-performance athletes, parasport athletes and professional leagues) — maximum 50 people per league
- Exemptions for high performance athletes and parasports
- Limit volume of music to be low enough that a normal conversation is possible; measures to prevent shouting by both instructors and members of the public
- Mask or face coverings required except when exercising or playing sports
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations) (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Meeting and event spaces

- Capacity limits per venue, where physical distancing can be maintained:
  - Indoors: 50 people
  - Outside: 100 people
- Booking multiple rooms for the same event not permitted
- Maximum of 50 people per room indoors if venue operates in accordance with the approved plan from the Office of the Chief Medical Officer of Health (Guidance for Meeting and Event Facilities During COVID-19 (https://www.ontario.ca/page/guidance-meeting-and-event-facilities-during-covid-19))
- Capacity limits for religious services rites or ceremonies, including wedding services and funeral services apply if held in meeting and event spaces:
  - Indoors: 30% capacity of the room
  - Outside: the number of people that can maintain two metres physical distance from each other
- Exceptions for court and government services
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations) (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Retail

- Stores must have passive screening for patrons (for example, post signs (http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf) at all entrances informing people how to screen themselves for COVID-19 before entry
    - This does not apply to indoor malls, which are required to actively screen their customers before they enter the mall. Malls can use the patron screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement.
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request
- Fitting rooms must be limited to non-adjacent stalls
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance and face covering required

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Personal care services

- Oxygen bars, steam rooms and saunas closed
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Casinos, bingo halls and gaming establishments

- Maximum of 50 people per facility permitted, where physical distancing can be maintained
- Table games are prohibited
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations) (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Cinemas

- Capacity limits per venue, where physical distancing can be maintained:
    - 50 people indoors or
    - 100 outdoors
- 50 people per indoor auditorium if cinema operates in accordance with the approved plan from the Office of the Chief Medical Officer of Health (Guidance for Movie Theatres During COVID-19 (https://www.ontario.ca/page/guidance-movie-theatres-during-covid-19))
- Face coverings except when eating or drinking only
- Drive-in cinemas permitted to operate, subject to restrictions
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations) (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Performing arts facilities

- Capacity limits per venue, where physical distancing can be maintained:
    - 50 people indoors or
    - 100 outdoors
- Singers and players of wind or brass instruments must be separated from spectators by plexiglass or some other impermeable barrier
- Rehearsal or performing a recorded or broadcasted event permitted
- Performers and employees must maintain 2 metres physical distance except for purposes of the performance

- Drive-in performances permitted
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf))
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Yellow – Protect 

Organized public events, social gatherings and wedding, funeral and religious services, rites and ceremonies

- Limits for certain organized public events and social gatherings such as functions, parties, dinners, gatherings, barbeques or wedding receptions held in private residences, backyards, or parks, where physical distancing can be maintained:
  - Indoors: 10 people
  - Outside: 25 people
- Limits for organized public events and gatherings in staffed businesses and facilities, where physical distancing can be maintained:
  - Indoors: 50 people
  - Outside: 100 people
- Limits for religious services rites or ceremonies, including wedding services and funeral services, where physical distancing can be maintained (applies in any venue other than a private dwelling):
  - Indoors: 30% capacity of the room indoors
- Outside: The number of people that can maintain two metres physical distance from each otherWearing a mask or face covering and maintaining physical distancing is required during events or social gatherings with individuals outside of your household

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Restaurants, bars and other food and drink establishments

- Require patrons to be seated; 2 metres minimum or impermeable barrier required between tables
- Limit of 6 people may be seated together indoors, unless they are:
  - members of the same household
  - a member of one other household who lives alone
  - a caregiver for any member of either household
- No buffet style service
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance and face covering required
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf))
- Require contact information for all seated patrons
- Mask or face coverings required except when eating or drinking only
- Establishments must be closed from 12 a.m. to 5 a.m.
- Liquor sold or served only between 9 a.m. and 11 p.m.
- No consumption of liquor permitted between 12 a.m. and 9 a.m.
- Limit volume of music to be low enough that a normal conversation is possible
- Dancing, singing and performing music is permitted, with restrictions
- Karaoke permitted, with restrictions (including no private rooms)
- Personal protective equipment, including eye protection, required when a worker must come within 2 metres of another person who is not wearing a mask or face covering or separated by plexiglass
- Night clubs only permitted to operate as restaurant or bar
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Sports and recreational fitness facilities

- Maintain 2 metres physical distancing, unless engaged in a sport
- Increase spacing between patrons to 3 metres for areas of a sport or recreational facility where there are weights or exercise equipment and in exercise and fitness classes
- Capacity limits per venue, where physical distancing can be maintained:
  - 50 people in indoor classes, however each indoor fitness or exercise class can only have a maximum of 10 people and must take place in a separate room or
  - 100 people in outdoor classes, however each outdoor fitness or exercise class can only have a maximum of 25 people
  - 50 people indoors in areas with weights or exercise equipment
  - 50 spectators indoors or 100 outdoors
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf))
- Capacity limits apply on a per-room basis if operating in compliance with a plan approved by the Office of the Chief Medical Officer of Health (Guidance for Facilities for Sport and Recreational Fitness Activities During COVID-19 (https://www.ontario.ca/page/guidance-facilities-sports-and-recreational-fitness-activities-during-covid-19))
- Team and individual sports must be modified to avoid physical contact (exemption for certain high-performance athletes, parasport athletes, and professional leagues; maximum 50 people per league
- Limit volume of music to be low enough that a normal conversation is possible; measures to prevent shouting by both instructors and members of the public
- Masks or face coverings required except when exercising or playing sports
- Require contact information for all members of the public that enter the facility
- Require reservation for entry; one reservation for teams
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Meeting and event spaces

- Capacity limit for the venue, where physical distancing can be maintained:
  - Indoors: 50 people
  - Outside: 100 people
- Booking multiple rooms for the same event not permitted
- Capacity limits on a per room basis
- Limits for wedding, funeral and religious services, rites or ceremonies in meeting and event spaces:
  - Indoors: 30% capacity of the room
  - Outside: the number of people that can maintain two metres physical distance from each other
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf))
- Maximum of 50 people per room indoors if venue operates in accordance with the approved plan from the Office of the Chief Medical Officer of Health (Guidance for Meeting and Event Facilities During COVID-19 (https://www.ontario.ca/page/guidance-meeting-and-event-facilities-during-covid-19))
- Establishments must be closed from 12 a.m. to 5 a.m.
- Liquor sold or served only between 9 a.m. and 11 p.m.
- No consumption of liquor permitted between 12 a.m. and 9 a.m.
- Require contact information for all seated patrons
- Limit of 6 people may be seated together unless they are
- Limit volume of music to be low enough that a normal conversation is possible
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request
- Exceptions for court and government services

Retail

- Stores must have passive screening for patrons (post signs (http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf)

at all entrances informing people to screen themselves for COVID-19 before entry
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request
- Fitting rooms must be limited to non-adjacent stalls
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance and face covering required
- Limit volume of music to be low enough that a normal conversation is possible

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Personal care services

- Oxygen bars, steam rooms and saunas closed
- Require contact information from all patrons
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf))
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Casinos, bingo halls and gaming establishments

- Maximum of 50 people per facility permitted, where physical distancing can be maintained
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf))
- Table games are prohibited
- Liquor sold or served only between 9 a.m. and 11 p.m.
- No consumption of liquor permitted between 12 a.m. and 9 a.m.
- Require contact information from all patrons
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Cinemas

- Capacity limits per venue, where physical distancing can be maintained:
  - 50 people indoors or
  - 100 outdoors
- 50 people per indoor auditorium if cinema operates in accordance with the approved plan from the Office of the Chief Medical Officer of Health (Guidance for Movie Theatres During COVID-19 (https://www.ontario.ca/page/guidance-movie-theatres-during-covid-19))
- Mask or face coverings except when eating or drinking only
- Drive-in cinemas permitted to operate, subject to restrictions
- Liquor sold or served only between 9 a.m. and 11 p.m.
- No consumption of liquor permitted between 12 a.m. and 9 a.m.
- Patron screening (passive)
- Require contact information from all patrons
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Performing arts facilities

- Capacity limits per venue, where physical distancing can be maintained:
  - 50 spectators indoors or
  - 100 spectators outdoors
- Singers and players of wind or brass instruments must be separated from spectators by plexiglass or some other impermeable barrier

- Rehearsal or performing a recorded or broadcasted event permitted
- Performers and employees must maintain 2 metres physical distance except for purposes of the performance
- Drive-in performances permitted
- Liquor sold or served only between 9 a.m. and 11 p.m.
- No consumption of liquor permitted between 12 a.m. and 9 a.m.
- Passive patron screening (see COVID-19 Signage Questions for Businesses and Organizations (https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf))
- Require contact information from all patrons
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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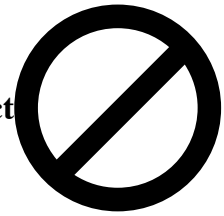
Orange – Restrict 

Organized public events, social gatherings and wedding, funeral and religious services, rites and ceremonies

- Limits for certain organized public events and social gatherings such as functions, parties, dinners, gatherings, barbeques or wedding receptions held in private residences, backyards, or parks, where physical distancing can be maintained:
  - Indoors: 10 people
  - Outside: 25 people
- Limits for organized public events and gatherings in staffed businesses and facilities, where physical distancing can be maintained:
  - Indoors: 50 people indoors
  - Outside: 100 people
- Limits for religious services rites or ceremonies, including wedding services and funeral services, where physical distancing can be maintained (applied in any venue other than a private dwelling):
  - Indoors: 30% capacity of the room
- Outside: The number of people that can maintain two metres physical distance from each otherWearing a mask or face covering and maintaining physical distancing is required during events or social gatherings with individuals outside of your household

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Restaurants, bars and other food and drink establishments

- Capacity limits:
  - Indoors: approximately 50% of indoor dining area or 100 people (whichever is less), providing patrons can maintain 2 metres distance
  - Outdoors: the number of people that can be seated providing tables are spaced 2 metres apart or are separated by impermeable barriers
- Indoor and outdoor dining, takeout, drive through and delivery permitted, including alcohol
- No buffet style service
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance and face covering required
- A sign posted by the establishment in a location visible to the public that states the maximum capacity (number of patrons) they are permitted to operate under
- Active screening of patrons is required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Require patrons to be seated; 2 metres minimum or impermeable barrier required between tables
- For indoor dining, patrons may only be seated with members of their same households, with limited exceptions for caregivers and people who live alone
- Require contact information for all seated patrons
- Mask or face coverings required except when eating or drinking only
- Personal protective equipment, including eye protection, required when is a worker must come within 2 metres of another person who is not wearing a face covering

- Establishments must be closed from 10 p.m. to 5 a.m.
- Liquor sold or served only between 9 a.m. and 9 p.m.
- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Dancing, singing and performing music is permitted, with restrictions
- Karaoke permitted, with restrictions (including no private rooms)
- Limit volume of music to be low enough that a normal conversation is possible
- Night clubs and strip clubs only permitted to operate as a restaurant or bar
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Sports and recreational fitness facilities

- Maintain 2 metres physical distancing, unless engaged in a sport
- Increase spacing between patrons to 3 metres in areas where there are weights or exercise equipment and in exercise and fitness classes
- Capacity limits, where physical distancing can be maintained:
  - Classes: 50 people indoors (10 per class) or 100 people (25 per class)
  - Areas with weights and exercise equipment: 50 people
  - No spectators permitted (except for one parent or guardian per child)
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)

Meeting and event spaces

- Capacity limit for the venue, where physical distancing can be maintained:
  - 50 people indoors or
  - 100 people outdoors
- Limits for wedding, funeral and religious services, rites or ceremonies apply if held in meeting and event spaces:
  - 30% capacity of the room indoors
  - The number of people that can maintain two metres physical distance from each other outdoors
- Booking multiple rooms for the same event not permitted
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Establishments must be closed from 10 p.m. to 5 a.m.
- Liquor sold or served only between 9 a.m. and 9 p.m.
- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Require contact information for all seated patrons
- Limit of 4 people may be seated together
- Limit volume of music to be low enough that a normal conversation is possible
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request
- Exceptions for court and government services

Retail

- Stores must have passive screening for patrons (post signs (http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf) at all entrances informing people to screen themselves for COVID-19 before entry)
  - This does not apply to indoor malls, which are required to actively screen their customers (https://covid-19.ontario.ca/covid19-cms-assets/2021-02/ENScreening%20-%20PatronFeb10v2.pdf) before they enter (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request
- Fitting rooms must be limited to non-adjacent stalls
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance and face covering required
- Limit volume of music to be no low enough that a normal conversation is possible

- For malls, a safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Personal care services

- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request
- Oxygen bars, steam rooms, saunas, bath houses and other adult venues, closed
- Sensory deprivation pods closed (some exceptions)
- Services requiring removal of face coverings prohibited
- Require contact information from all patrons
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Casinos, bingo halls and gaming establishments

- Maximum of 50 people per facility permitted, where physical distancing can be maintained
- Table games are prohibited
- Liquor sold or served only between 9 a.m. and 9 p.m.
- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Require contact information from all patrons
- Screening of patrons is required, in accordance with instructions issued by the Office of the Chief Medical Officer of Health (https://covid-19.ontario.ca/screening/customer/)
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Cinemas

- Capacity limits per venue, where physical distancing can be maintained:
  - Indoors: 50 people indoors
  - Outside: 100 people
- Masks or face coverings required except when eating or drinking
- Liquor sold or served only between 9 a.m. and 9 p.m.
- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Require contact information from all patrons
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Drive-in cinemas permitted to operate, subject to restrictions
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared posted in a place where workers and patrons will see it, and made available upon request

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Performing arts facilities

- Capacity limits per venue, where physical distancing can be maintained:
  - Indoors: 50 spectators
  - Outside: 100 spectators
- Singers and players of wind or brass instruments must be separated from spectators by plexiglass or some other impermeable barrier
- Performers and employees must maintain 2 metres physical distance except for purposes of the performance
- Liquor sold or served only between 9 a.m. and 9 p.m.

- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Require contact information from all patrons
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Rehearsal or performing a recorded or broadcasted event permitted
- Drive-in performances permitted
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Organized public events, social gatherings and wedding, funeral and religious services, rites and ceremonies

- Limits for all organized public events and social gatherings, where physical distancing can be maintained:
  - Indoors: 5 people
  - Outside: 25 people
- Limits for religious services rites or ceremonies, including wedding services and funeral services, where physical distancing can be maintained (applies in any venue other than a private dwelling):
  - Indoors: 30% capacity of the room
- Outside: the number of people that can maintain two metres physical distance from each otherWearing a mask or face covering and maintaining physical distancing is required during events or social gatherings with individuals outside of your household.

Restaurants, bars and other food and drink establishments

- Capacity limits
  - Indoors: approximately 50% of indoor dining area or 50 people (whichever is less), providing patrons can maintain 2 metres distance
  - Outside: the number of people that can be seated providing tables are spaced 2 metres apart or are separated by impermeable barriers
- Indoor and outdoor dining, take out, drive through, and delivery permitted, including alcohol
- No buffet style service
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance and face covering required
- A sign posted by the establishment in a location visible to the public that states the maximum capacity (number of patrons) they are permitted to operate under
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Require patrons to be seated; 2 metres minimum or impermeable barrier required between tables
- For indoor dining, patrons may only be seated with members of their same households, with limited exceptions for caregivers and people who live alone
- Require contact information for all seated patrons
- Masks or face coverings required except when eating or drinking only
- Personal protective equipment, including eye protection required when is a worker must come within 2 metres of another person who is not wearing a face covering and is not protected by plexiglass
- Establishments must be closed from 10 p.m. to 5 a.m.
- Liquor sold or served only between 9 a.m. and 9 p.m.
- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Dancing, singing and the live performance of music is prohibited
- Limit volume of music to be low enough that a normal conversation is possible
- Night clubs and strip clubs only permitted to operate as restaurant or bar
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

Sports and recreational fitness facilities

- Maintain 2 metres physical distancing at all times
- Increase spacing between patrons to 3 metres in areas where there are weights or exercise equipment and in exercise and fitness classes
- Capacity limits, where physical distancing can be maintained:
  - 10 people in indoor areas with weights and exercise machines
  - 10 people in all indoor classes or
  - 25 people in outdoor classes
  - No spectators permitted, however each person under 18 may be accompanied by one parent or guardian
- Team sports must not be practiced or played except for training (no games or scrimmage)
  - Exemptions for high performance athletes and parasport
- Activities that are likely to result in individuals coming within 2 metres of each other are not permitted; no contact permitted for team or individual sports
- Patrons may only be in the facility for 90 minutes except if engaging in a sport
- Limit volume of music to be low enough that a normal conversation is possible; measures to prevent shouting by both instructors and members of the public
- Face coverings required except when exercising
- Require contact information for all members of the public that enter the facility
- Require reservation for entry; one reservation for teams
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Meeting and event spaces

- Capacity limit for the venue, where physical distancing can be maintained:
  - 10 people indoors
  - 25 people outdoors
- Limits for wedding, funeral and religious services, rites or ceremonies in meeting and event spaces:
  - Indoors: 30% capacity of the room indoors
  - Outside: the number of people that can maintain two metres physical distance from each other
- Establishments must be closed from 10 p.m. to 5 a.m.
- Liquor sold or served only between 9 a.m. and 9 p.m.
- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Face coverings required except when eating or drinking only
- Require contact information for all seated patrons
- Limit of 4 people may be seated together
- Limit volume of music to be low enough that a normal conversation is possible
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared posted in a place where workers and patrons will see it and made available upon request

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Retail

- Capacity limits of:
  - 75% for supermarkets and other stores that primarily sell groceries, convenience stores and pharmacies
  - 50% for all other retail, including discount and big box retailers, liquor stores, cannabis stores, hardware stores and garden centres
- Stores must post capacity limit publicly
- Stores must have passive screening for patrons (post signs (http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf) at all entrances informing people to screen themselves for COVID-19 before entry)
  - This does not apply to indoor malls, which are required to actively screen their customers (https://covid-

19.ontario.ca/covid19-cms-assets/2021-02/ENScreening%20-%20PatronFeb10v2.pdf) before they enter (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Stores within the malls subject to appropriate retail measures
- Curbside pick-up and delivery permitted, including for cannabis stores
- Fitting rooms must be limited to non-adjacent stalls
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance required inside and outside; face covering also required while in line
- Limit volume of music to be low enough that a normal conversation is possible
- Maximum 10 patrons permitted to be seated indoors in mall food court
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Personal care services

- Oxygen bars, steam rooms, saunas, bath houses and other adult venues closed
- Sensory deprivation pods closed (some exceptions)
- Services requiring removal of face coverings prohibited
- Require contact information from all patrons
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Casinos, bingo halls and gaming establishments

- Capacity limit for the venue, where physical distancing can be maintained:
  - 10 people indoors or
  - 25 people outdoors
- Table games are prohibited
- Masks or face coverings required except when eating or drinking only
- Liquor sold or served only between 9 a.m. and 9 p.m.
- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Require contact information from all patrons
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Cinemas

- Closed, except for:
  - drive-in cinemas
  - rehearsal or performing a recorded or broadcasted event, with restrictions, which include:
    - Performers and employees must maintain 2 metres physical distance except for purposes of the performance
    - Singers and players of brass or wind instruments must be separated from any other performers by plexiglass or other impermeable barrier
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Performing arts facilities

- Closed to spectators (except for drive-in performances)
- Rehearsal or performing a recorded or broadcasted event permitted, with restrictions, which include:
  - Performers and employees must maintain 2 metres physical distance except for purposes of the performance

    - Singers and players of brass or wind instruments must be separated from any other performers by plexiglass or other impermeable barrier
- Drive-in performances permitted
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Organized public events, social gatherings and wedding, funeral and religious services, rites and ceremonies

- No indoor organized public events and social gatherings, except with members of the same household
    - Individuals who live alone, including seniors, may consider having exclusive, close contact with another household to help reduce the negative impacts of social isolation
- Limit for outdoor organized public events and social gatherings, where physical distancing can be maintained:
    - Outside: 10 people
- Limits for COVID-19 services rites or ceremonies, including wedding services and funeral services (but not receptions), in all venues, where physical distancing can be maintained:
    - Indoors: 15% capacity of the room
    - Outside: the number of people that can maintain two metres physical distance from each other
- Virtual and drive-in events and COVID-19 services, rites or ceremonies permitted
- Wearing a mask or face covering and maintaining physical distancing is required during events or social gatherings with individuals outside of your household

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Restaurants, bars and food or drink establishments

- Indoor dining prohibited
- Outdoor dining, take out, drive through, and delivery permitted, including alcohol
- Capacity limited to allow physical distancing of 2 metres to be maintained
- No buffet style service
- Line-ups and patrons congregating outside venues managed by venue; 2 metres distance and face covering required
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Require patrons to be seated; 2 metres minimum or impermeable barrier required between tables
- Patrons may only be seated with members of their same households, with limited exceptions for caregivers and people who live alone
- Require contact information for all seated patrons
- Masks or face coverings required except when eating or drinking
- Personal protective equipment, including eye protection required when is a worker must come within 2 metres of another person who is not wearing a face covering
- Establishments must be closed from 10 p.m. to 5 a.m.
- Liquor sold or served only between 9 a.m. and 9 p.m.
- No consumption of liquor permitted between 10 p.m. and 9 a.m.
- Dancing, singing and the live performance of music is prohibited
- Limit volume of music to be low enough that a normal conversation is possible
- Night clubs and strip clubs only permitted to operate as restaurant or bar
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request

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Sports and recreational fitness facilities

- Facilities for indoor sports and recreational fitness activities are closed except for:

    - the sole use of high-performance athletes, including parasport athletes, and specified professional leagues (for example, NHL, CFL, MLS, NBA)
    - specified purposes (for example, day camps, child care)
- Outdoor fitness classes, team training personal training permitted with the following rules:
    - No patrons are permitted to be inside a facility
    - Reservations required (no walk-ins)
    - Maximum 10 patrons
    - Everyone must maintain at least 3 metres physical distance from each other
    - Activities that are likely to result in coming within 3 metres of others are not permitted
    - Contact information must be provided and maintained for at least one month, and be made available for disclosure if required
    - Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
    - Limit volume of music and implement other measures to prevent loud talking, singing or shouting
    - No playing or practising team sports, except for training sessions for members of a sports team (no games or scrimmage)
    - Equipment that is rented to, provided to or provided for the use of patrons must be cleaned and disinfected between each use (avoid using any equipment or fixed structures that cannot be cleaned and disinfected between each use)
    - No spectators, except for one parent or guardian per child
    - Masks or face coverings required
    - A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it, and made available upon request
- Outdoor recreational amenities (for example, parks, golf courses, ski hills) open with restrictions (for example, no team sports)
- Community centres and multi-purpose facilities (for example, YMCA) allowed to be open for permitted activities (for example, child care services, day camps, social services)

Meeting and event spaces

- Closed with limited exceptions for:
    - child care and day camps for children
    - court services
    - government services
    - mental health and addiction support services (for example, Alcoholics Anonymous) permitted to a maximum of 10 people
    - provision of social services

Retail

- In person shopping permitted for all retail, subject to capacity limits of:
    - 50% for supermarkets and other stores that primarily sell groceries, convenience stores and pharmacies
    - 25% for all other retail, including discount and big box retailers, liquor stores, cannabis stores, hardware stores and garden centres
- Curbside pick-up and delivery permitted, including for cannabis stores
- Stores must post capacity limit publicly
- Stores must have passive screening for patrons (post signs (http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/COVID_19_bus_orgs_question_signage.pdf) at all entrances informing people to screen themselves for COVID-19 before entry)
    - This does not apply to indoor malls, which are required to actively screen their customers (https://covid-19.ontario.ca/covid19-cms-assets/2021-02/ENScreening%20-%20PatronFeb10v2.pdf) before they enter (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Individuals must physically distance and wear a face covering, with some exceptions
- No loitering in shopping malls, and stores within the malls subject to appropriate retail measures
- Food courts in malls must be closed
- A safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared,

posted in a place where workers and patrons will see it and made available upon request

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Personal care services

- **As of April 12, personal care service establishments permitted**
- Capacity limited to 25% or 5 patrons (whichever is less), subject to two metre physical distancing
- Appointments required and must only be made by individuals or with members of the same household
- Entry must be limited to patrons who are receiving a service, with exceptions for a caregiver or children of the patron
- Services requiring removal of face coverings that covers the mouth, nose and chin prohibited
- Prohibiting patrons from lining up or congregating outside of the establishment unless patrons are able to maintain a physical distance of at least two metres and are wearing a face covering;
- Require contact information from all patrons
- Active screening of patrons required (customers can use the online screening tool (https://covid-19.ontario.ca/screening/customer/) to help meet this requirement)
- Appropriate personal protective equipment must be worn by people providing personal care services
- safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request
- Oxygen bars, steam rooms, saunas, bath houses and other adult venues closed
- Sensory deprivation pods closed (some exceptions)
- Locker rooms, change rooms and showers must be closed (except for access to washrooms or first aid)

Casinos, bingo halls and gaming establishments

- Closed

Cinemas

- Closed, except for:
  - drive-in cinemas
  - rehearsal or performing a recorded or broadcasted event, with restrictions, which include:
    - Performers and employees must maintain 2 metres physical distance except for purposes of the performance
    - Singers and players of brass or wind instruments must be separated from any other performers by plexiglass or other impermeable barrier
- If open, a safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Performing arts facilities

- Closed to spectators
- Rehearsal or performing a recorded or broadcasted event permitted, with restrictions, which include:
  - Performers and employees must maintain 2 metres physical distance except for purposes of the performance
  - Singers and players of brass or wind instruments must be separated from any other performers by plexiglass or other impermeable barrier
- Drive-in performances permitted
- If open, a safety plan (https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan) is required to be prepared, posted in a place where workers and patrons will see it and made available upon request

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Amusement parks, water parks

- Closed

Animal services

- Services that are permitted include:
  - Veterinary services and other businesses that provide for the health and welfare of animals, including farms, boarding kennels, stables, animal shelters and research facilities
  - Businesses that provide services for the training and provision of service animals
  - Businesses that provide pet services, including pet grooming services, pet sitting services, pet walking services and pet training services

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Bathhouses and sex clubs

- Closed

Boarding kennels and stables

- Permitted to open for animal's owner, or their representative, to visit the animal, assist in the care or feeding of the animal or, as applicable, ride the animal

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Campgrounds

- Available for trailers and recreational vehicles that are used by individuals who are in need of housing, or are permitted to be there by the terms of a full season contract
- Only campsites with electricity, water service and facilities for sewage disposal may be provided for use
- All recreational facilities in the campground and all other shared facilities in the campground, other than washrooms and showers, must be closed
- Short-term campground rentals that were reserved on or before November 22, 2020 are permitted; no new reservations after November 22, 2020 permitted, except for individuals who are in need of housing

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Driving instruction

- In-person driving instruction not permitted
- Virtual permitted

Household services

- Domestic and cleaning and maintenance services permitted, including:
  - housekeepers, cooks, maids and butlers
  - personal affairs management
  - nanny services and babysitters
  - other domestic personnel
  - house cleaning
- Outdoor cleaning and maintenance services permitted, including:
  - indoor or outdoor painting
  - pool cleaning
  - general repairs

Horse racing

- Training only, no races
- No spectators

Hotels, motels

- Permitted to operate except for any pools, fitness centres, meeting rooms and other recreational facilities that may be part of the operations of these businesses

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Libraries

- Open for curbside, delivery and pick-up
- Patrons permitted to enter libraries for contactless drop-off and pick-up, and to access computers, photocopiers, or similar services
- May open for permitted services (for example, day camp, child care services, mental health and addiction support services to a limit of 10 persons [AA meetings], provision of social services)
- No classes

Marinas, boating clubs, golf courses and driving ranges

- Marinas and boating clubs permitted
- Clubhouses, restaurants permitted to open for outdoor dining, take out, drive through or delivery only
- Pools, meeting rooms, fitness centres or other recreational facilities on the premises closed to the public, with limited exceptions
- Golf courses and driving ranges:
  - Outdoors permitted
  - Indoors closed
- Shooting ranges:
  - Outdoors permitted
  - Indoors closed

Media industries

- Sound recording, production, publishing and distribution businesses
- Commercial film and television production, including all supporting activities such as hair, makeup and wardrobe, are permitted to open if they meet the following conditions:
  - No studio audiences may be permitted to be on the film or television set
  - The set must be configured and operated in such a way as to enable persons on the set to maintain a physical distance of at least two metres from other persons, except where necessary for the filming of the film or television production
  - The film or television set may be located in any business or place, including those that are required to be closed
  - Persons who provide hair or makeup services must wear appropriate personal protective equipment
  - Singers and players of brass or wind instruments must be separated from any other performers by plexiglass or some other impermeable barrier
  - The person responsible for the film or television production must ensure that the production operates in accordance with the Film and television industry health and safety during COVID-19 (https://www.filmsafety.ca/wp-content/uploads/2021/01/S21-Film-Television-COVID19-Guidance-Revised-Jan.25.21-Final2.pdf)
- Film and television post-production, visual effects and animation studios are permitted
- Book and periodical production, publishing and distribution businesses are permitted
- Interactive digital media businesses, including computer system software or application developers and publishers, and video game developers and publishers are permitted

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Motorsports

- Closed

Museums and other cultural amenities (for example, art galleries, science centres)

- Closed (indoors) to members of the public
- Drive-in or drive through only

Nightclubs

- Only permitted to open if they operate as a restaurant, bar, or other food and drink establishment (take-out, drive-through and delivery service only)

Personal services

- In-person personal services not permitted, including:
  - personal shoppers
  - party and wedding planners
  - personal organizer services
  - house sitters

Photography studios and services

- Commercial and industrial photography permitted
- Retail photo studios closed

Real estate agencies (including pre-sale construction)

- Permitted to operate; property showings by appointment only

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Short-term rentals

- Existing reservations as of November 22, 2020 honoured regardless of when the rental occurs
- No new reservations after November 22, 2020 permitted, except for individuals who are in need of housing
- This does not apply to hotels, motels, lodges, resorts and other shared rental accommodation, including student residences

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Strip clubs

- Only permitted to open if they operate as a restaurant, bar, or other food and drink establishment (take-out and delivery service only)

Tour and guide services

- Closed

Zoos and aquariums

- Closed (indoors) to members of the public except for drive-in or drive through events
- Permitted to operate for the care of animals

Contact us

If you have questions about what will be open or impacts to your business or employment, call the Stop the Spread Business

NEWS CORONAVIRUS

Here's what Ontario's new colour-coded system means for COVID-19 hotspots

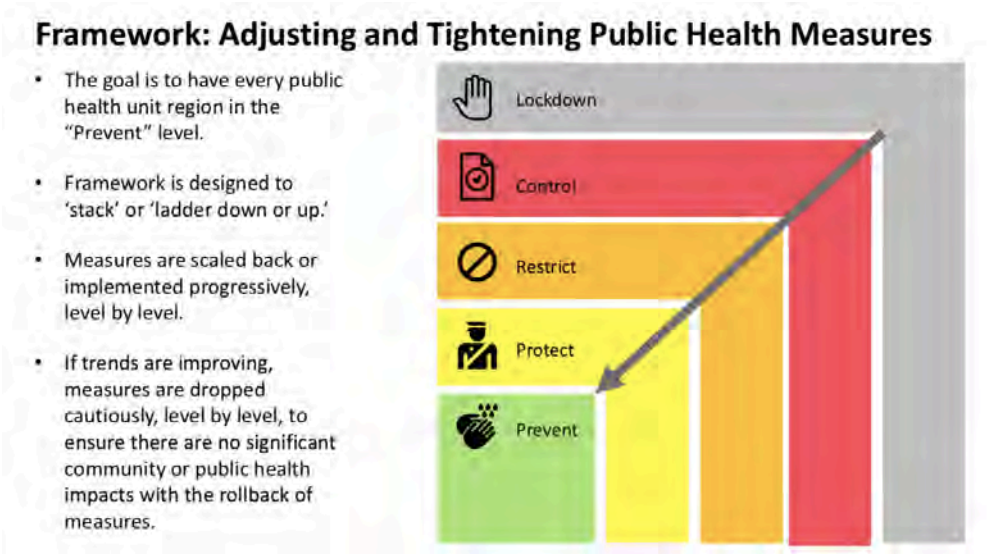
Clarrie Feinstein | Nov 10 2020, 8:47 am

JL IMAGES/Shutterstock

Update: As of November 30, some regions will be entering a different colour-coded zone in Ontario's framework. Read about that update in *How to understand Ontario's confusing colour-coded system.*

Ontario's new colour-coded system can be a bit difficult to decode. Different regions are in different colours and knowing exactly what the new restrictions are in each category can be a challenge to follow.

Last week, Premier Doug Ford announced the *Keeping Ontario Safe and Open Framework*, which places every region into five categories. Each has distinct guidelines to help stop the spread of the virus. The five categories are prevent (green), protect (yellow), restrict (orange), control (red), and lockdown (grey).



Government of Ontario

There are four identified COVID-19 hotspots: Ottawa, York, Peel Region, and Toronto.

Currently, Ottawa is in the orange category, York is in the yellow category, Peel is in the red category, and Toronto is still in the modified Stage 2 until November 14.

Jan 12, 2021

07 Second doses erroneously administered at Toronto COVID-19 vaccination clinics
Apr 9, 2021

08 There's an Ontario map to easily show you colour-coded COVID-19 restrictions
Dec 14, 2020

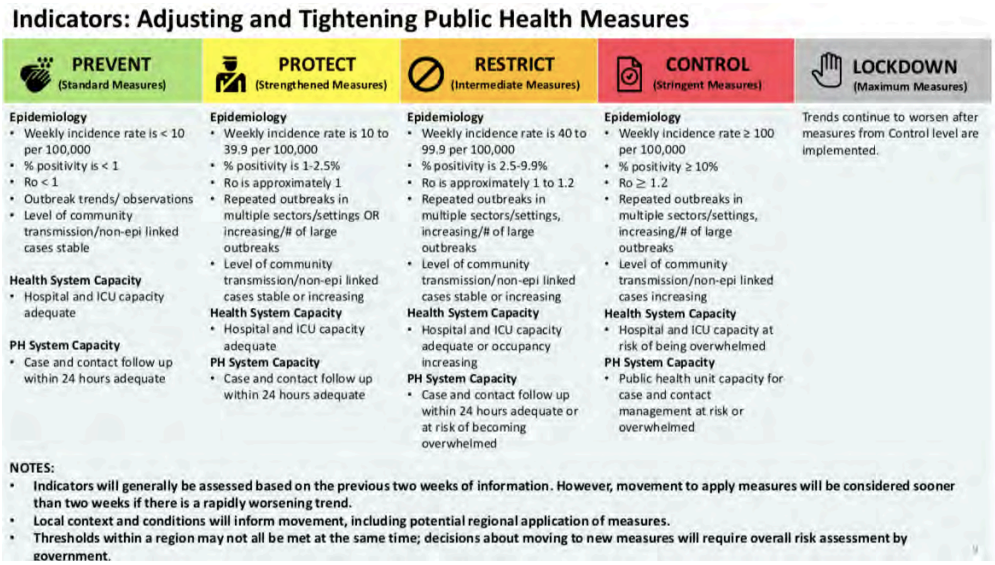
09 Here's how much you can be fined for

It's important to note that the colour categorizations are more like guidelines, meaning local medical officers of health can loosen or tighten restrictions for their region.

On Monday, Peel Region did just that, with Dr. Lawrence Loh implemented more stringent health measures than what were already in place with the red category.

The City of Toronto is expected to provide an update on their enhanced measures on Tuesday at 4 pm.

In order to be placed in each category there must be certain epidemiological criteria met.



Indicators: Adjusting and Tightening Public Health Measures

PREVENT (Standard Measures)	PROTECT (Strengthened Measures)	RESTRICT (Intermediate Measures)	CONTROL (Stringent Measures)	LOCKDOWN (Maximum Measures)
Epidemiology • Weekly incidence rate is < 10 per 100,000 • % positivity is < 1 • Ro < 1 • Outbreak trends/ observations • Level of community transmission/non-epi linked cases stable **Health System Capacity** • Hospital and ICU capacity adequate **PH System Capacity** • Case and contact follow up within 24 hours adequate	**Epidemiology** • Weekly incidence rate is 10 to 39.9 per 100,000 • % positivity is 1-2.5% • Ro is approximately 1 • Repeated outbreaks in multiple sectors/settings OR increasing/# of large outbreaks • Level of community transmission/non-epi linked cases stable or increasing **Health System Capacity** • Hospital and ICU capacity adequate **PH System Capacity** • Case and contact follow up within 24 hours adequate	**Epidemiology** • Weekly incidence rate is 40 to 99.9 per 100,000 • % positivity is 2.5-9.9% • Ro is approximately 1 to 1.2 • Repeated outbreaks in multiple sectors/settings, increasing/# of large outbreaks • Level of community transmission/non-epi linked cases stable or increasing **Health System Capacity** • Hospital and ICU capacity adequate or occupancy increasing **PH System Capacity** • Case and contact follow up within 24 hours adequate or at risk of becoming overwhelmed	**Epidemiology** • Weekly incidence rate ≥ 100 per 100,000 • % positivity ≥ 10% • Ro ≥ 1.2 • Repeated outbreaks in multiple sectors/settings, increasing/# of large outbreaks • Level of community transmission/non-epi linked cases increasing **Health System Capacity** • Hospital and ICU capacity at risk of being overwhelmed **PH System Capacity** • Public health unit capacity for case and contact management at risk or overwhelmed	Trends continue to worsen after measures from Control level are implemented.

NOTES:
- **Indicators will generally be assessed based on the previous two weeks of information. However, movement to apply measures will be considered sooner than two weeks if there is a rapidly worsening trend.**
- **Local context and conditions will inform movement, including potential regional application of measures.**
- **Thresholds within a region may not all be met at the same time; decisions about moving to new measures will require overall risk assessment by government.**

Government of Ontario

Yellow – Protect

You must have 10 to 39.9 range of people with the virus per 100,000 with a positivity rate of 1 to 2.5%. And the reproductive number must be around 1, meaning the virus is not spreading.

When it comes to restaurants and bars there must be limited operating hours, with establishments closing at midnight. Liquor can be sold or served only between 9 am to 11 pm and there can be no consumption of liquor permitted between 12 am to 9 am.

There must also be contact information from all seated patrons with a limit of six people

seated together.

For sports and recreational fitness, you can have 50 people indoors for classes, as well as for areas with weights or exercise equipment. And there can be 100 people outdoors for classes.

However, there must be increased spacing between patrons of 3 metres and recreational programs are limited to 10 people per room indoors and 25 outdoors. There must also be requirements for contact information for all patrons and attendees for team sports and reservations are needed for entry.

Cinemas, casinos, and performing arts venues can all reopen with 50 people indoors. And there are strict requirements for liquor being sold and consumed.

Orange – Restrict

In the "restrict" phase, the region must have 40 to 99.9 range of people with the virus per 100,000 with a positivity rate of 2.5% to 9.9%. The reproductive number must be between 1 and 1.2 meaning the virus is not spreading or spreading mildly.

Indoor dining can resume with just 50 people maximum, and establishments must close at 10 pm. Liquor can only be sold from 9 am to 9 pm and there can be no consumption of liquor between 10 pm to 9 am.

Only four people can be seated together, and all patrons must be screened.

Strip clubs remain closed.

For sports and recreational facilities there can be a maximum of 50 people per facility in all combined recreational fitness spaces or programs (not pools, rinks or arenas, community centres, or multi-purpose facilities).

There is also a required screening of all patrons and a maximum duration of stay of 60 minutes, exempt for sports.

When it comes to personal care services, if it requires the patron to remove a face covering, then the service is prohibited.

Cinemas, casinos, and performing arts venues can all reopen with 50 people indoors. And there are strict requirements for liquor being sold and consumed.

Red – Control

In order to be in the red zone, the positivity rate must be more than 10%, and there must be more than 100 people with the virus out of 100,000.

In the red zone, social gathering limits remain the same, with 10 people indoors and 25 people outdoors.

Also, restaurants and bars can reopen for indoor dining at this level but can only have a maximum of 10 people inside. However, interior dining spaces in malls will be closed.

When it comes to gyms, there can be 10 people indoors for classes and 10 people indoors for areas that have weight and exercise equipment.

All sports and recreational programs in other facilities (arenas and multiplexes) will be limited to 10 people per room indoors and 25 people outdoors.

Team sports must not be practiced or played except for training (no games or scrimmage), and there is no contact permitted for team or individual sports.

Casinos can remain open with the same limit for patrons and cinemas remain closed along with performing arts venues (they can stay open for rehearsal as long as people are distanced).

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NEWS POLITICS CORONAVIRUS

Ford says Toronto will move into red zone this weekend as cases surge

 Clarrie Feinstein | Nov 9 2020, 10:55 am

CPAC/YouTube

UPDATE as of November 10: *Toronto has announced it will continue closures of indoor dining, prohibit group fitness for 28 days. It is also recommending only interacting with your own household. These restrictions are in addition to the province's Red-Control level. Read more on this update here.*

Premier Doug Ford said that Toronto will move into the Red – Control level this weekend as COVID-19 cases continue to surge in the city.

On Monday, Ford said that Toronto, which is currently in a modified Stage 2, will move into the Red – Control level, which will see the reopening of some businesses like indoor dining and gyms, but with tighter restrictions.

During the city's press briefing on Monday, Mayor John Tory and Medical Officer of Health Dr. Eileen de Villa did not confirm this plan and said more news will be announced on Tuesday for the city's new restrictions.

Ford did say that local medical officers will have the power to add or change the guidelines if they feel the provinces are not adequate.

"It's a good framework," Ford said. "We are in close collaboration with Dr. de Villa, that is the health table and Dr. Williams are. I am in close communication with Tory. We need to make sure we're on the same page. Dr. de Villa has the authority and power to change things in the red zone as we call it."

Last week, Ford announced the *Keeping Ontario Safe and Open Framework*, which places every region in five categories that each have distinct guidelines to help stop the spread of the virus. The five categories are prevent (green), protect (yellow), restrict (orange), control (red), and lockdown (grey).

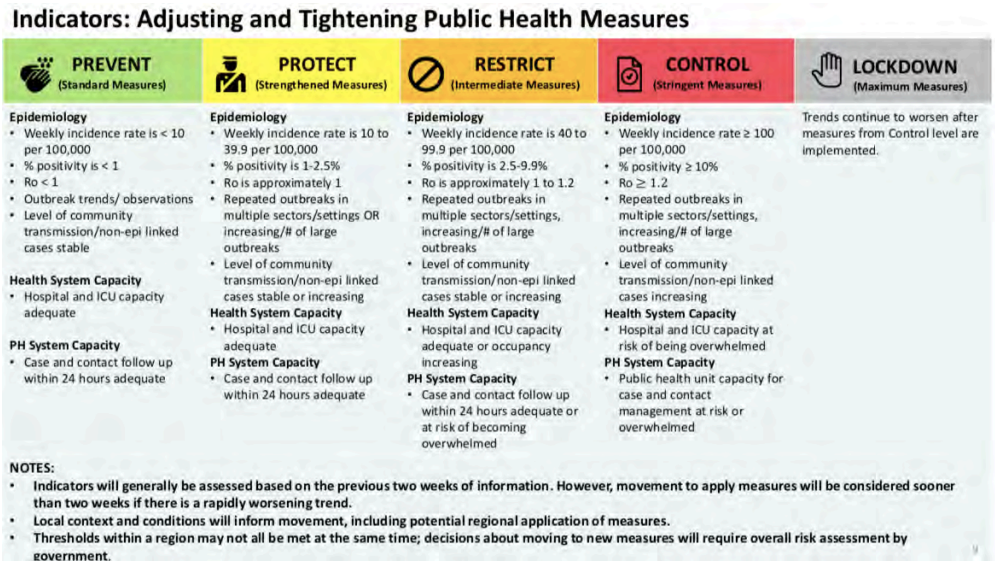
- *See also:*
  - *Ontario reports 1,242 new coronavirus cases, 483 in Toronto*
  - *Peel Region getting additional COVID-19 testing centres, adding walk-ins*

For the four COVID-19 hotspots that were in modified Stage 2, Peel Region was moved into the red zone on Saturday, as Ottawa moved into the orange zone and York moved into the yellow zone.

Toronto was originally slated to move into the orange zone on November 14, but cases have been increasing over the last week.

On Monday, Toronto reported 483 cases and has a seven-day moving average of over 300, which has been increasing.

In order to be in the red zone, the positivity rate must be more than 10%, and there must be more than 100 people with the virus out of 100,000.



Government of Ontario

In the red zone, social gathering limits remain the same, with 10 people indoors and 25 people outdoors.

Also, restaurants and bars can reopen for indoor dining at this level but can only have a maximum of 10 people indoors. However, interior dining spaces in malls will be closed.

When it comes to gyms, there can be 10 people indoors for classes and 10 people indoors for areas that have weight and exercise equipment.

All sports and recreational programs in other facilities (arenas and multiplexes) will be limited to 10 people per room indoors and 25 people outdoors.

Team sports must not be practiced or played except for training (no games or scrimmage), and there is no contact permitted for team or individual sports.

Exhibit "P"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

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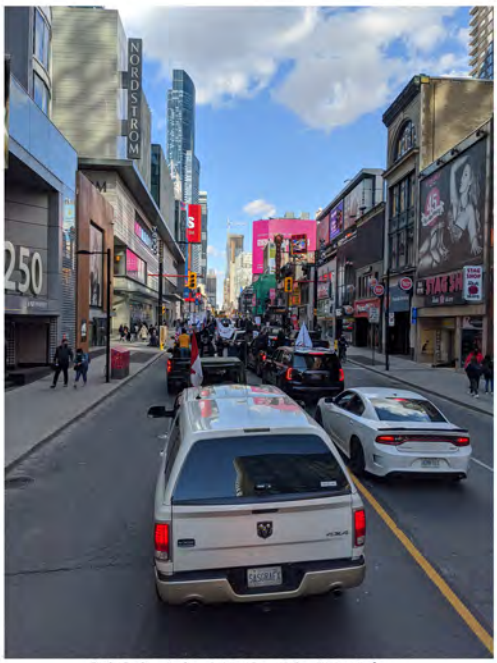

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Exhibit "Q"

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William Adamson Skelly

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Commissioner of Oaths

Katherine Kowalchuk
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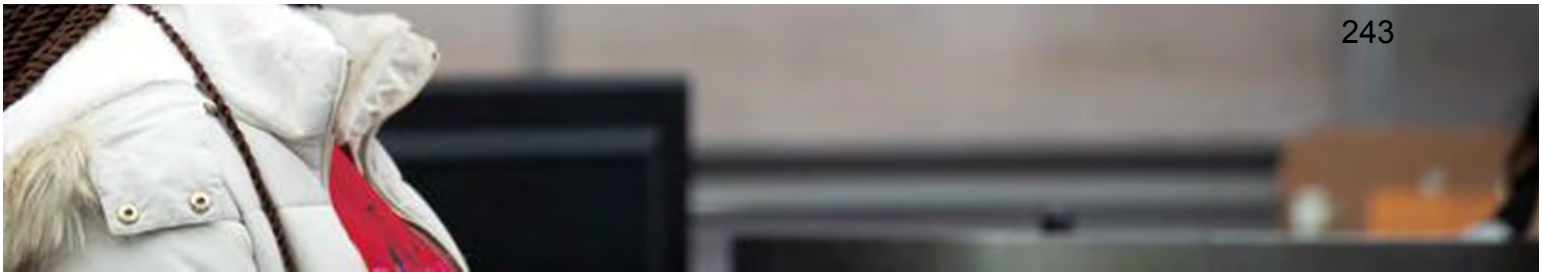
Local News

Coronavirus: Why masks don't work

Quebec's public health director and medical experts say they can do more harm than good.

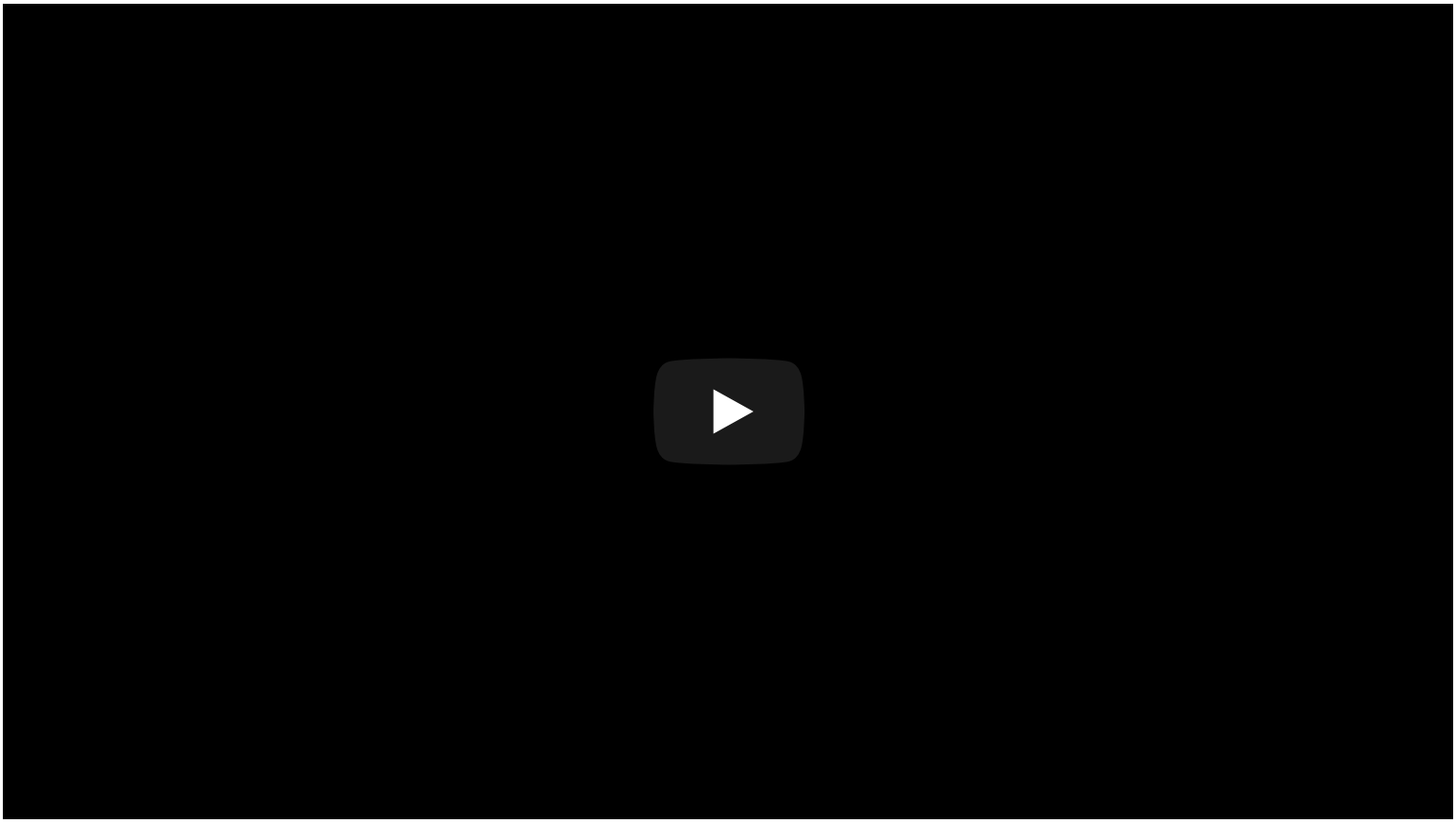
René Bruemmer
Mar 18, 2020 • November 3, 2020 • 3 minute read • Join the conversation



A woman covers her face with a mask as she waits at the Air Canada ticketing counter at Pierre Elliott Trudeau Airport in Montreal, on Wednesday, March 11, 2020. PHOTO BY ALLEN MCINNIS /Montreal Gazette

EDITOR'S NOTE: *This story was published March 19, 2020. The Quebec government subsequently mandated masks in all indoor public spaces and when physical distancing of two metres cannot be maintained.*

In his ongoing defensive war against COVID-19, Quebec's increasingly popular public health director Horacio Arruda launched a multi-pronged attack Wednesday on a target many might consider surprising: masks.



The health ministry issued a press release and a video Wednesday featuring Arruda inciting the general population to stop using them, unless they're sick. He reiterated the message during Premier François Legault's daily update to the population.

"Don't think that masks are the miracle solution," he said. "They are useful for those who are sick to not contaminate others. It's all about hygiene of the hands."

Arruda warned that masks give users a false sense of security, when in fact they might increase the odds of contracting the virus. Users tend to reposition them frequently, he said, bringing their hands in contact with their face.

https://youtu.be/cBeBM-4toJE

Masks have been selling out at pharmacies in Montreal since the end of January. Arruda urged Quebecers who are not sick to leave the masks for health-care workers, who use them according to a strict protocol in order not to infect themselves, and need thousands of them because they are discarded after each use. The focus should be on hand hygiene, he said.

“I don’t wear a mask. I wash my hands. I wash my hands,” he said. “We wash our hands, because that is what can save lives.”

Why masks don’t work

- The coronavirus is spread through tiny microdroplets emitted through coughs and sneezes that float through the air, or rest on surfaces and can remain infectious for several days. Standard flat surgical masks don’t give full coverage, so very small droplets suspended in the air can still get through.
- If a person’s hand has come in contact with the virus, and they touch their mask to adjust it in the vicinity of their eyes, nose and mouth, it can transmit the disease.
- Masks get saturated with moisture from the mouth and nose after about 20 minutes. Once they’re wet, they no longer form a barrier against viruses trying to come through or exit.

When are they useful?

- Studies done during the SARS epidemic of 2003 found that for medical professionals, wearing any type of mask compared with none can reduce chances of getting sick by about 80 per cent.
- The N95 mask, which gives better facial coverage and guards against smaller droplets, appears to be somewhat more effective than standard surgical masks. But medical professionals follow strict guidelines in taking masks on and off, discard them after each use, and use additional safeguards like eye protection and gowns to shield themselves.
- They can help to prevent sick individuals from transmitting the virus by blocking droplets. But again, they are only useful until they get saturated.

Why is hand-washing so effective?

STORY CONTINUES BELOW

- Individuals are most likely to pick up the virus from touching a remnant of it left behind on a surface and then touching their face, which we do thousands of times a day, as opposed to contracting it from droplets in the air. Washing hands properly ensures the virus will be killed.
- Good old-fashioned soap is the most effective virus killer, because it is made up of molecules with microscopic pin-like protuberances that pierce the oily, lipid membrane of many viruses and bacteria, including the coronavirus, prying them apart and killing them.
- Soap also works to dislodge bacteria and viruses from the skin, allowing them to be washed down the sink.

Sources: Montreal's Public Health Department, McMaster University, Public Health Agency of Canada

rbruemmer@postmedia.com

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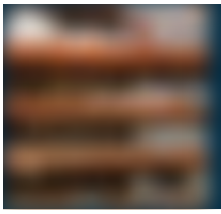
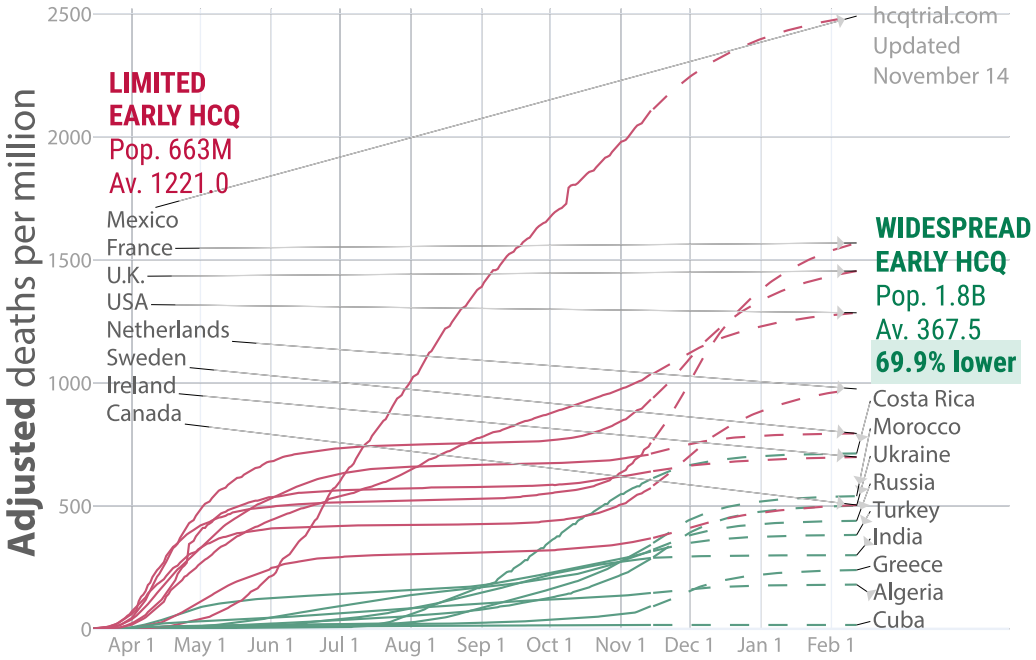


Masks: A poor use of a limited resource

Note to readers: *We know the speed and volume of coronavirus-related news is overwhelming and a little frightening. To help with that, we will dedicate a Montreal Gazette reporter each day to devote their time to synthesizing the most important coronavirus-related news, especially as it relates to life in Montreal and Quebec. Follow their live updates from March 18 here. All our coronavirus-related news can always be found here: montrealgazette.com/tag/coronavirus.*



Many countries either adopted or declined early treatment with HCQ, effectively forming a large trial with 1.8 billion people in the treatment group and 663 million in the control group. As of November 14, 2020, an average of 138.5 per million in the treatment group have died, and 588.4 per million in the control group, relative risk 0.235. After adjustments, treatment and control deaths become 267.8 per million and 889.8 per million, relative risk 0.30. The probability of an equal or lower relative risk occurring from random group assignments is 0.030. Accounting for predicted changes in spread, we estimate a relative risk of 0.30. **The treatment group has a 69.9% lower death rate.** Confounding factors affect this estimate. We examined diabetes, obesity, hypertension, life expectancy, population density, urbanization, BCG vaccine use, testing level, and intervention level, which do not account for the effect observed.

Trial Setup

Treatment. We investigate early or prophylactic treatment for COVID-19 with hydroxychloroquine (HCQ), which has been adopted or declined in different countries. Since the severity of COVID-19 varies widely based on age and comorbidities, treatment was generally only initiated in higher risk individuals. The primary endpoint was death.

Treatment groups. Entire countries made different decisions regarding treatment with HCQ based on the same information, thereby assigning their residents to the treatment or control group in advance. Since assignment is done without regard to individual information such as medical status, assignment of individuals is random for the purposes of this study.

We focus here on countries that chose and maintained a clear assignment to one of the groups for a majority of the duration of their outbreak, either adopting widespread use, or highly limiting use. Some countries have very mixed usage, and some countries have joined or left the treatment group during their outbreak. We searched government web sites, Twitter, and Google, with the assistance of several experts in HCQ usage, to confirm assignment to the treatment or control group, locating a total of 265 relevant references, shown in Appendix 13. We excluded countries with <1M population, and countries with <0.5% of people over the age of 80. COVID-19 disproportionately affects older people and the age based adjustments are less reliable when there are very few people in the high-risk age groups. We also excluded countries that quickly adopted aggresive intervention and isolation strategies and consequently have very little spread of the virus to date. This exclusion, based on analysis by *[Leffler]*, favors the control group and is discussed in detail below. We also present results without these exclusions for comparison.

Collectively the countries we identified with stable and relatively clear assignments account for 31.1% of the world population (2.4B of 7.8B). Details of the groups and evidence, including countries identified as having mixed use of HCQ, can be found in Appendix 13.

Analysis. We analyze deaths per capita with data from *[Our World in Data]*. To determine the effectiveness of treatment we could compare the death rates for the entire populations in the treatment and control groups, however we use the average of the individual country rates in each group in order to minimize effects due to differences between countries. Since randomization was done at a coarse country level, we adjust for differences between countries and analyze confounding factors.

Case statistics. We analyze deaths rather than cases because case numbers are highly dependent on the degree of testing effort, criteria for testing, the accuracy and availability of tests, accuracy of reporting, and because there is very high variability in case severity, including a high percentage of asymptomatic cases.

Results

As of November 14, 2020, an average of 138.5 per million in the treatment group have died, and 588.4 per million in the control group, relative risk 0.235. After adjustments, treatment and control deaths become 267.8 per million and 889.8 per million, relative risk 0.30. If we combine all countries into single treatment and control groups, the relative risk is 0.25. Since the sample sizes are very large, $p < 0.0001$ (for the case of single combined treatment and control groups). While the difference in death rates is statistically very significant, other factors affecting the results are more important which we analyze in the next section.

We ran a simulation to compute the probability of an equal or lower relative risk occurring due to to chance. We randomly assigned the same number of countries to the treatment and control groups 1,000,000 times, from all countries reporting deaths to OWID. The probability of an equal or lower relative risk occurring is 0.030.

Accounting for predicted changes in spread as detailed below, we estimate a relative risk of 0.30. The treatment group has a 69.9% lower death rate. For comparison, if there are no country exclusions, the estimated relative risk is 0.26. We examined diabetes, obesity, hypertension, life expectancy, population density, urbanization, BCG vaccine usage, testing level, and intervention level, which do not account for the effect observed.

Figure 1 shows cumulative demographic adjusted death rates by country and trial group. Adjustments are detailed in the next section. Some analyses adjust graphs for the date since a specific milestone was reached, such as 0.1 deaths per million. We do not do this because an effective treatment will alter the time that such a milestone is reached.

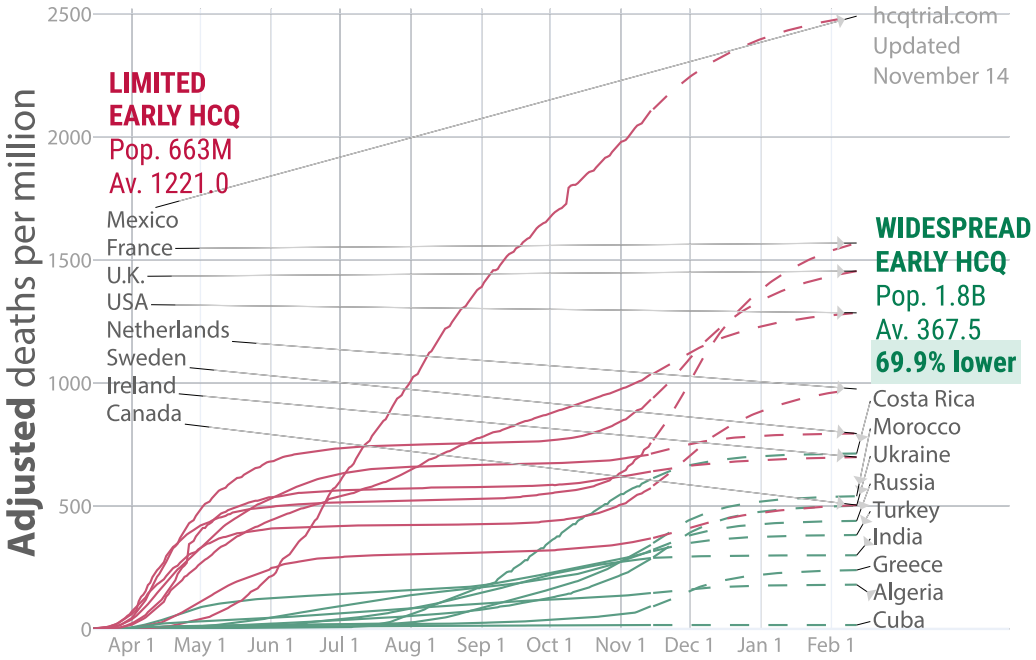


Figure 1. *Adjusted deaths per million for countries using widespread early HCQ versus those that do not, with a prediction for the following 90 days. As of November 14, 2020, countries using early HCQ are predicted to have a 69.9% lower death rate after adjustments.*

Confounding Factors

A number of confounding factors affect the results, which we investigate here. For reference, the results before adjustments are shown in Figure 2.

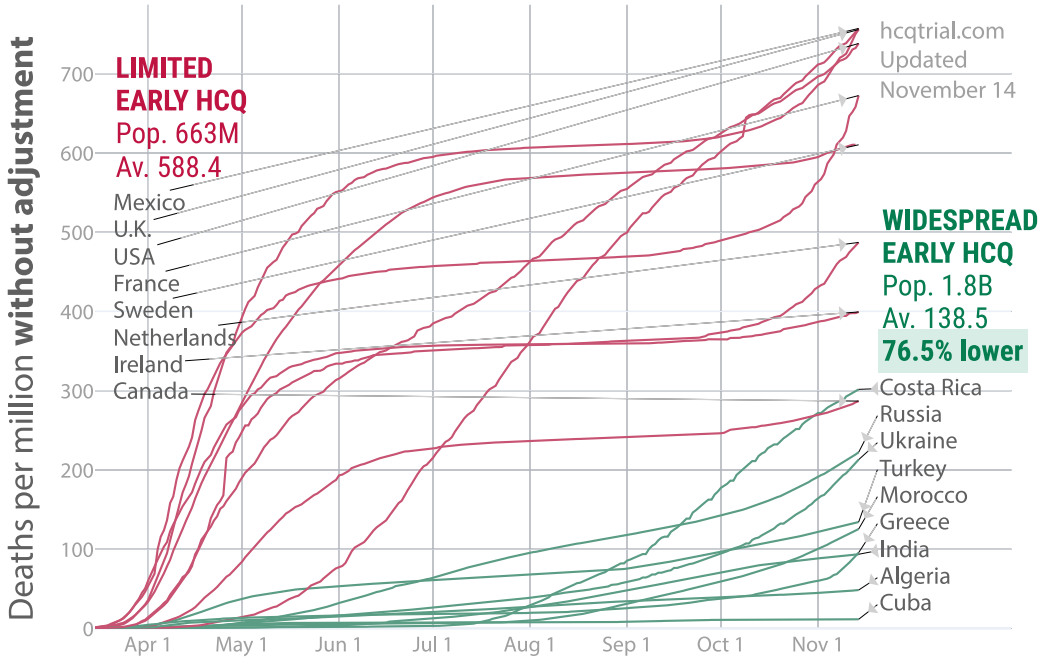


Figure 2. *Deaths per million for countries using widespread early HCQ versus those that do not,* ***before adjustments****.*

Age. The COVID-19 IFR varies around four orders of magnitude depending on age. Since the proportion of older adults varies significantly between countries, this is likely to have a significant effect on the results *[**Leffler**]*. We approximate the relative risk based on age using the infection fatality rates provided in *[**Verity**]*, and shown in Figure 3. Due to the distribution, simple adjustment based on the median age, the proportion of people over 65, or similar may not be very accurate. We obtained age demographics from *[**United Nations**]* which provides a breakdown within 5 year age groups. Using the 9 age groups provided by *[**Verity**]*, we computed an age adjustment factor for each country to normalize the observed deaths to the predicted number of deaths if the country's age distribution matched that of the country with the oldest population. The age distributions and computed age factors are provided in Appendix 1. These adjustments are relatively significant as in *[**Leffler**]*.

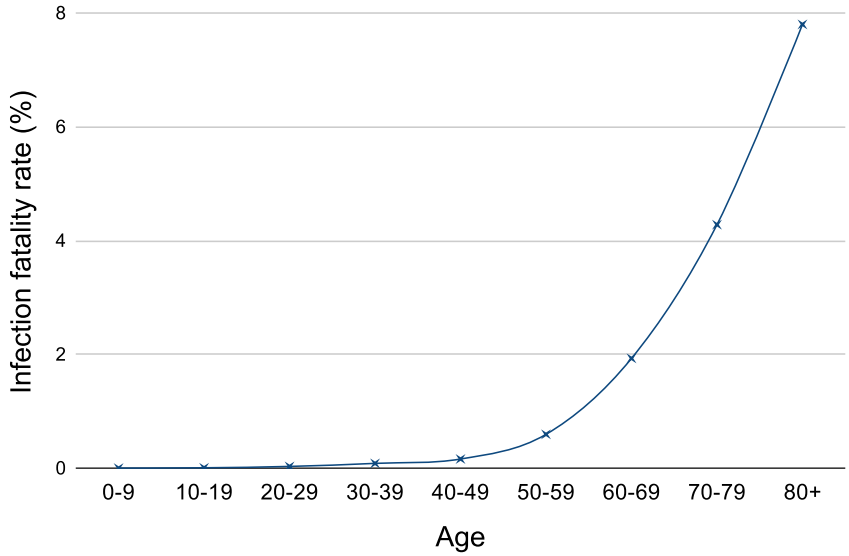


Figure 3. *Infection fatality rates from [**Verity**].*

Gender. Risk differs significantly based on gender *[**Gebhard**]*, so we also normalized for this in a similar fashion. Data is from *[**United Nations**]*, and using the hazard ratio of 1.78 from *[**Williamson**]* the resulting adjustment factors are shown in Appendix 1. These adjustments are relatively minor as in *[**Leffler**]*. After adjusting for age and gender we obtain the results in Figure 4. Adusted mean treatment and control deaths become 267.8 per million and 889.8 per million, relative risk 0.30.

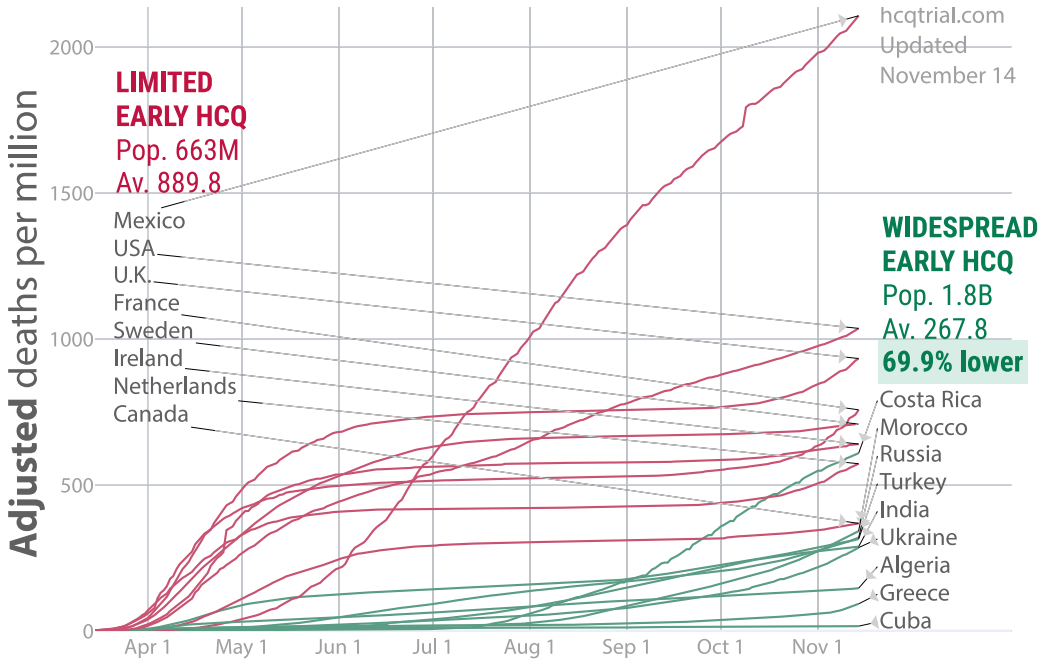


Figure 4. *Deaths per million for countries with widespread early HCQ versus those that do not, after adjustment for differences in demographics.*

Early isolation and masks. Many countries have taken an isolation approach, isolating themself from the world quickly and aggresively preventing any spread. With a very small and unknown

fraction of the population infected, we can not easily analyze these countries. Many of these countries have also not taken a strong position on HCQ use. Mask usage was analyzed in *[Leffler]*, which found 29 countries that widely and quickly adopted masks, as shown in Appendix 12. These countries in general took swift action with interventions and travel restrictions in order to prevent spread and have significantly lower spread of the virus to date. We excluded countries on this list, this excluded South Korea, Czech Republic, Indonesia, and Venezuela, which were provisionally identified as countries using early HCQ. This favors the control group. If we do not exclude these countries, the treatment group adjusted mean deaths is 258.5 per million, and the relative risk decreases to 0.29.

Population health. Health conditions such as diabetes, obesity, and hypertension significantly increase the risk of death with COVID-19 *[Gao, Williamson]*. This could affect the results because the prevalence of these conditions differs between countries. These conditions often occur together, for example *[Iglay]* found the most common comorbid conditions for diabetes were hypertension (82%) and obesity (78%), which makes combined country-level adjustment difficult, however we can first analyze the conditions individually. We examined the relationship of the diabetes, obesity, and hypertension levels with the adjusted deaths per million for the countries in our study, with data from *[International Diabetes Federation]*, *[CIA]*, and *[Mills]* respectively. Appendix 2, Appendix 3, and Appendix 4 show scatter plots, and the data can be found in Appendix 1. There was no significant correlation for diabetes, r^2 = 0.12, obesity, r^2 = 0.07, or hypertension, r^2 = 0.08. Based on this we do not expect adjustments to significantly affect the results. We re-ran the analysis adjusting for each of these factors individually (HR estimates: diabetes 1.63 *[Williamson]*, obesity 1.4 *[Williamson]*, hypertension 2.12 *[Gao (B)]*), which resulted in a relative risk of 0.313, 0.309, 0.316 respectively for diabetes, obesity, and hypertension. We also examined life expectancy with data from *[Our World in Data (B)]*. Appendix 5 shows a scatter plot and the data can be found in Appendix 1. The correlation, r^2 = 0.00, is relatively low, and is in the direction of higher life expectancy resulting in higher deaths. Therefore we do not find evidence that country-level differences in health have a significant effect on the results.

Testing. Countries with more widespread testing could potentially be more successful in minimizing deaths. We examined the relationship of testing per capita with adjusted deaths, with data from *[Our World in Data (C)]*. Appendix 11 shows a scatter plot, and the data can be found in Appendix 1. The correlation r^2 = 0.01, is very low and is also in the opposite direction of the expected potential correlation (we find that more testing is correlated with higher deaths). Therefore differences in testing do not appear to significantly affect the results.

BCG vaccine. Research suggests that the BCG vaccine may provide some protection against COVID-19 *[Escobar]*. A correlation was shown between a country's BCG vaccine use and mortality, although causation has not been established *[de Freitas e Silva, Escobar, Hegarty, Sharquie]*, and more recent analysis found the correlation was no longer significant *[Lindestam Arlehamn]*. We examined the correlation between the adjusted deaths and the mean BCG vaccine coverage as defined by *[Escobar]*. Appendix 7 shows the scatter plot for the BCG vaccine coverage and the adjusted deaths per million and the data is shown in Appendix 1. The correlation r^2 = 0.04 is low. Excluding countries with a BCG vaccine coverage below 50 (5 countries) reduces the correlation, r^2 = 0.01. Re-running the analysis in this case results in a relative risk of 0.23, i.e., the treatment group has 77.1% lower chance of death. Therefore we do not find evidence that differences in BCG vaccine use significantly affect the results.

Co-administered treatments. Several theories exist for why HCQ is effective *[Andreani, Brufsky, Clementi, de Wilde, Derendorf, Devaux, Fantini, Grassin-Delyle, Hoffmann, Hu, Keyaerts, Kono, Liu, Pagliano, Savarino, Savarino (B), Scherrmann, Sheaff, Vincent, Wang, Wang (B)]*, some of which involve co-administration of other medication or suppplements. Most commonly used are zinc *[Derwand, Shittu]* and Azithromycin (AZ) *[Guérin]*. *In vitro* experiments report a synergistic effect of HCQ and AZ on antiviral activity *[Andreani]* at concentrations obtained in the human lung, and *in vivo* results are consistent with this *[Gautret]*. Zinc reduces SARS-CoV RNA-dependent RNA polymerase activity *in vitro [te Velthuis]*, however it is difficult to obtain significant intracellular concentrations with zinc alone *[Maret]*. Combining it with a zinc ionophore such as HCQ increases cellular uptake, making it more likely to achieve effective intracellular concentrations *[Xue]*. Zinc deficiency varies and inclusion of zinc may be more or less important based on an individual's existing zinc level. Zinc consumption varies widely based on diet *[NIH]*. To the extent that the co-administration of zinc, Azithromycin, or other medication or supplements is important, we may underestimate the effectiveness of HCQ because not all countries and locations are using the optimal combination.

Population density and urbanization. We tested the effect of population density *[Our World in Data (D), Our World in Data (E)]* and urbanization *[World Bank]*, with scatter plots shown in Appendix 10 and Appendix 6, and data shown in Appendix 1. The correlation for population density r^2 = 0.00, and for urbanization, r^2 = 0.08. Differences in population density and urbanization do not appear to significantly affect the results.

Treatment regimen. There are differences in treatment regimens between and within countries. Details of timing, determination of risk, and dosages differ. Because not all locations are using the optimal regimen, this may reduce the effect observed.

Adherence. Some people in the control group obtained the treatment. This may reduce the effect observed.

Counterfeit medication. Counterfeit HCQ has been reported *[Covid19Crusher]*. This may reduce the effect observed.

Seasonality. Seasonality could affect results, although *[Jamil]* show there is currently little evidence for a large temperature dependence. We also note that the pandemic already covers more than one season and over time is likely to cover all seasons.

Accuracy of death statistics. The accuracy of reported death statistics varies across and within countries. Excess death statistics may be used in the future if they become available for more countries, however it may be difficult to separate deaths due to COVID-19 and changes to other causes of death related to interventions.

Degree of spread. The virus has spread throughout countries at different rates, due to differences in the initial number of infected persons arriving at the country, differences in treatments, population dynamics, cultural differences, and interventions including masks, social distancing, lockdowns, quarantine, and border restrictions. This factor is likely to be significant but will decline over time. Since it is unlikely that the virus will be eliminated soon, we expect that increasingly similar percentages of people will have been exposed over time, and we will update this analysis periodically to reflect the latest data. While interventions can temporarily slow the spread of the virus, it is unlikely that high intervention levels can be sustained indefinitely. Some

countries, such as New Zealand, have highly contained the virus to date, essentially by quickly isolating themselves from the world with travel restrictions and strictly enforced quarantine rules. These countries may avoid significant spread while they remain isolated, however all of the countries in the treatment and control groups here have experienced significant spread of the virus.

We tested the effect of interventions using the average intervention stringency index *[**University of Oxford**]* over the period analyzed, as provided by *[**Our World in Data (E)**, **Our World in Data (F)**]*. Appendix 9 shows a scatter plot, the correlation r^2 = 0.00, suggesting that the differences in non-medical interventions have a relatively minor affect on the results at present.

The treatment group countries generally show significantly slower growth in mortality which may be due to treatment, interventions, differences in culture, or the initial degree of infections arriving into the country. Over time we expect that increasingly similar percentages of people will have been exposed, since it is unlikely that the virus will be eliminated soon.

To account for future spread, we created an estimate of the future adjusted deaths per million for each country, 90 days in the future, based on a second degree polynomial fit according to the most recent 30 days, enforcing the requirement that deaths do not decrease, and using an assumption of a progressively decreasing maximum increase over time. Figure 5 shows the results, which predicts a future relative risk of 0.30, i.e., the treatment group has 69.9% lower chance of death.

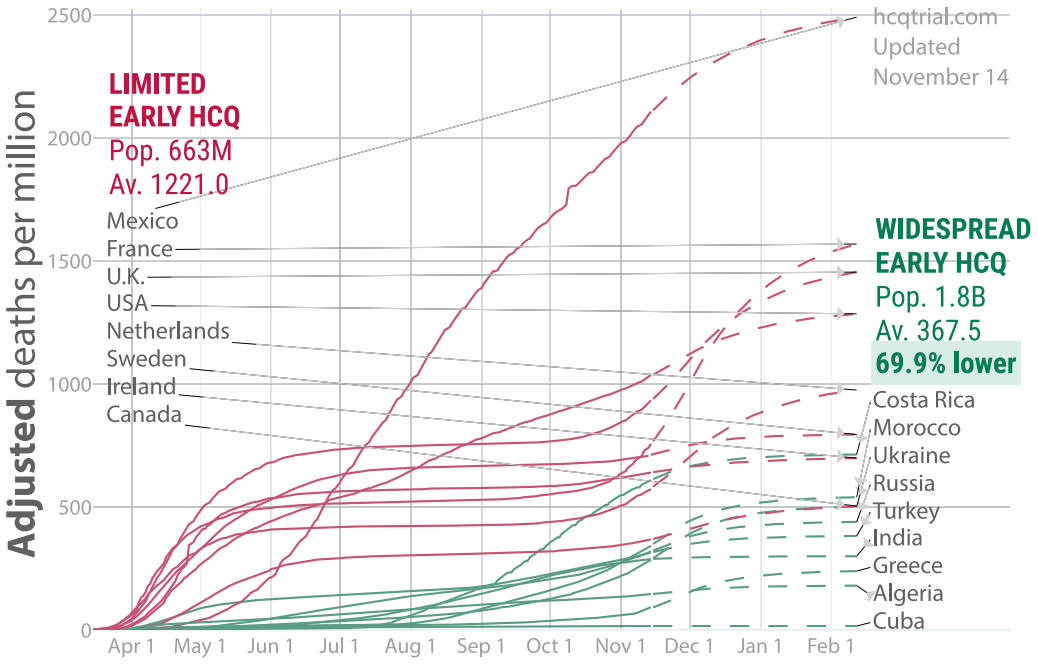


Figure 5. *Demographic adjusted deaths per million for countries using widespread early HCQ versus those that do not, with an extended prediction for the following 90 days.*

Introduction. CQ and HCQ are 4-aminoquinoline synthetic alternatives to quinine, a naturally occurring compound found in cinchona bark, which has long been used for respiratory infections and other conditions *[**Burrows**]*. The cost of HCQ is around $0.28 per dose according to *[**Centers for Medicare and Medicaid Services**]*. CQ, HCQ, and quinine are on the World Health Organization's list of essential medicines, the safest and most effective medicines needed in a health system *[**World Health Organization**]*.

HCQ is effective against SARS-CoV-2 and related viruses *in vitro* *[**Keyaerts**, **Savarino**, **Savarino (B)**, **Vincent**, **Wang**]*, plasma concentrations that have been shown to be effective *in vitro* can be achieved safely *[**Keyaerts**, **Savarino**, **Vincent**, **Wang**]*, and it has decades of use and a very well established safety profile *[**CDC**]*.

Theory, *in vitro*, and *ex vivo* results. Several *in vitro* studies *[**Andreani**, **Clementi**, **de Wilde**, **Hoffmann**, **Keyaerts**, **Kono**, **Liu**, **Savarino**, **Sheaff**, **Vincent**, **Wang**, **Wang (B)**]* show that CQ inhibits related viruses and SARS-CoV-2, supported by several related theory articles *[**Brufsky**, **Derendorf**, **Devaux**, **Fantini**, **Hu**, **Pagliano**, **Savarino (B)**, **Scherrmann**]*. Theories for the mechanism of action include HCQ/CQ protonation and accumulation in the endosome which prevents the acidification required for genome release *[**Fitch**]*; acting as an ionophoric agent that transports zinc ions into infected cells, where they inhibit viral RNA replicase enzyme *[**Xue**]*; dampening excess immune responses thereby mitigating the hyperactive immune response sometimes associated with COVID-19 *[**Schrezenmeier**]*; and inhibiting oxidative phosphorylation in mitochondria, likely by sequestering protons needed to drive ATP synthase *[**Sheaff**]*. *[**Savarino (B, 2003)**]* reviews the antiviral effects of CQ, noting that CQ inhibits the replication of several viruses including members of the flaviviruses, retroviruses, and coronaviruses. They note that CQ has immunomodulatory effects, suppressing the production/release of tumour necrosis factor α and interleukin 6, which mediate the inflammatory complications of several viral diseases; *[**Keyaerts (2004)**]* show that the IC50 of CQ for inhibition of SARS-CoV *in vitro* approximates the plasma concentrations of CQ reached during treatment of acute malaria, suggesting that CQ may be considered for immediate use in the prevention and treatment of SARS-CoV; *[**Vincent (2005)**]* show that CQ has strong antiviral effects on SARS CoV infection when cells are treated either before or after exposure, suggesting prophylactic and treatment use, and describing three mechanisms by which the drug could work; *[**Savarino (2006)**]* in an update to their 2003 paper discuss the *in vitro* confirmation of CQ inhibiting SARS replication via two studies, and note that CQ affects an early stage of SARS replication; *[**Kono (2008)**]* showed that CQ inhibits viral replication of HCoV-229E at concentrations lower than in clinical usage; *[**de Wilde (2014)**]* show that CQ inhibits SARS-CoV, MERS-CoV, and HCoV-229E-GFP replication in the low-micromolar range; *[**Wang (B, 2/4/20)**]* showed that CQ (EC50 = 1.13 μM; CC50 > 100 μM, SI > 88.50) potently blocked virus infection at low-micromolar concentration and showed high selectivity *in vitro*; *[**Devaux (3/12/20)**]* discusses mechanisms of CQ interference with the SARS-CoV-2 replication cycle; *[**Liu (3/18/20)**]* show that HCQ is effective *in vitro* and less toxic than CQ. They note that in addition to the direct antiviral activity, HCQ is a safe and successful anti-inflammatory agent that has been used extensively in autoimmune diseases and can significantly decrease the production of cytokines and, in particular, pro-inflammatory factors. Therefore, in COVID-19 patients, HCQ may also contribute to attenuating the inflammatory response. They note that based on the selectivity index, careful design of clinical trials is important to achieve efficient and safe control of the infection; *[**Hu (3/23/20)**]* note that CQ is known in nanomedicine research for

the investigation of nanoparticle uptake in cells, and may have potential for the treatment of COVID-19; *[**Pagliano (3/24/20)**]* note that CQ and HCQ inhibit replication at early stages of infection, that no similar effect is reported for other drugs which are only able to interfere after cell infection, and that there is a large volume of existing data on safety; *[**Clementi (3/31/20)**]* show a greater inhibition for combined pre and post-exposure treatment with Vero E6 and Caco-2 cells; *[**Fantini (4/3/20)**]* ; *[**Brufsky (4/15/20)**]* present a theory on HCQ effectiveness with COVID-19, wherein HCQ blocks the polarization of macrophages to an M1 inflammatory subtype and is predicted to interfere with glycosylation of a number of proteins involved in the humoral immune response, possibly including the macrophage FcR gamma IgG receptor and other immunomodulatory proteins, potentially through inhibition of UDP-N-acetylglucosamine 2-epimerase. In combination with potential other immunomodulatory effects, this could blunt the progression of COVID-19 pneumonia all to way up to ARDS; *[**Andreani (4/25/20)**]* show that HCQ and AZ have a synergistic effect *in vitro* on SARS-CoV-2 at concentrations compatible with that obtained in the human lung; *[**Derendorf (5/7/20)**]* discuss pharmacokinetic properties of HCQ+AZ as a potential underlying mechanism of the observed antiviral effects; *[**Grassin-Delyle (5/8/20)**]* use human lung parenchymal explants, showing that CQ concentration clinically achievable in the lung (100 μM) inhibited the lipopolysaccharide-induced release of TNF-α (by 76%), IL-6 (by 68%), CCL2 (by 72%), and CCL3 (by 67%). In addition to antiviral activity, CQ may also mitigate the cytokine storm associated with severe pneumonia caused by coronaviruses; *[**Scherrmann (6/12/20)**]* propose a new mechanism supporting the synergistic interaction between HCQ+AZ; *[**Sheaff (8/2/20)**]* present a new theory on SARS-CoV-2 infection and why HCQ/CQ provides benefits, which also potentially explains the observed relationships with smoking, diabetes, obesity, age, and treatment delay, and confirms the importance of accurate dosing. Metabolic analysis revealed HCQ/CQ inhibit oxidative phosphorylation in mitochondria (likely by sequestering protons needed to drive ATP synthase), inhibiting infection and/or slowing replication; and *[**Wang (9/2/20)**]* show that CQ and HCQ both inhibit the entrance of 2019-nCoV into cells by blocking the binding of the virus with ACE2.

*[**Hoffmann**]* perform an *in vitro* study of CQ and HCQ inhibition of SARS-CoV-2 into Vero (kidney), Vero-TMPRSS2, and Calu-3 (derived from human lung carcinoma) cells. They suggest a lack of effectiveness, but there appears to be three unsupported steps made to reach the conclusions in this paper. Firstly, authors conclude that CQ does not block infection of Calu-3 when the results show statistically significant inhibition at higher concentrations. Second, authors go from analysis of one specific type of pulmonary adenocarcinoma cells that resemble serous gland cells, *in vitro*, into a general claim of no inhibition in lung cells. Thirdly, they disregard existing theories of CQ/HCQ effectiveness to conclude a general lack of effectiveness.

Calu-3 is one of many cell lines derived from human lung carcinomas *[**Shen**]*. Calu-3 cells resemble serous gland cells (they do not express 15-lipoxygenase, an enzyme specifically localized to the surface epithelium, but they do express secretory component, secretory leukocyte protease inhibitor, lysozyme, and lactoferrin, all markers of serous gland cells). *[**Shen**]* note that the absence of systemic inflammation, circulatory factors, and other paracrine systemic influences is a potential limitation of the isolated cell system.

*[**Hoffmann**]* Fig. 1b @100uM shows CQ results in a ~4.5 fold decrease (note a log scale is used) in extracellular virus, p=0.05, after 24 hours (estimated from the graph). We note that the paper marks this as not significant because the value is 0.517, however the p value is unlikely to be accurate to this level. Additionally authors use Dunnett's test while other tests may have higher

power *[Sauder]*. We further note that the 95% significance level is just a convention and results do not magically go from non-significant at p=0.051 to significant at p=0.049. Results only apply to 24 hours later and we expect further decrease over time. Fig. 1a shows a ~45-50% entry inhibition @100uM for HCQ/CQ (p=0.0005/0.0045), ~10-30% @10uM (p=0.13/0.99). Inhibition is significantly better with Vero cells.

There are several theories on how HCQ may help with COVID-19, and we note that authors do not consider one of the most common theories where HCQ functions as a zinc ionophore, facilitating significant intracellular concentrations of zinc. Zinc is known to inhibit SARS-CoV RNA-dependent RNA polymerase activity, and is widely thought to be important for effectiveness with SARS-CoV-2 *[Shittu]*.

Animal *in vivo* studies. *[Keyaerts (B, 2009)]* showed that CQ inhibits HCoV-OC43 replication in HRT-18 cells in a mouse study. Lethal HCoV-OC43 infection in newborn C57BL/6 mice was treated with CQ acquired transplacentally or via maternal milk, with the highest survival rate (98.6%) found when mother mice were treated daily with a concentration of 15 mg of CQ per kg of body weight. Survival rates declined in a dose-dependent manner, with 88% survival when treated with 5 mg/kg CQ and 13% survival when treated with 1 mg/kg CQ. They conclude that CQ can be highly effective against HCoV-OC43 infection in newborn mice and may be considered as a future drug against HCoVs; *[Yan (2012)]* show that CQ can efficiently ameliorate acute lung injury and dramatically improve the survival rate in mice infected with live avian influenza A H5N1 virus; and *[Maisonnasse (5/6/20)]* study treatment in monkeys. They report no effect, however the data has several signs of effectiveness despite the very small sample sizes and 100% recovery of all treated and control monkeys. The final day lung lesion data shows 63% of control monkeys have lesions, while only 26% of treated monkeys do, p=0.095 (missing data for 7 monkeys is predicted based on the day 5 results and the trend of comparable monkeys). After one week, 74% of treated monkeys have recovered with <= 4 log10 copies/mL viral load, compared to 38% of control monkeys, p=0.095. 38% of control monkeys also have a higher peak viral load than 100% of the 23 treated monkeys post-treatment. The group with the lowest peak viral load is the PrEP group. All animals in this study were infected with the same initial viral load, whereas real-world infections vary in the initial viral load, and lower inital viral loads allow greater time to mount an immune response.

Human *in vivo* studies. We found 154 studies related to the human *in vivo* use of HCQ for treating COVID-19 *[Abd-Elsalam, Abella, Ahmad, Alamdari, Alberici, Almazrou, An, Aparisi, Arleo, Arshad, Ashinyo, Ashraf, Ayerbe, Barbosa, BaŞaran, Berenguer, Bernaola, Bhattacharya, Borba, Boulware, Bousquet, Carlucci, Carlucci (B), Catteau, Cavalcanti, Chamieh, Chatterjee, Chen, Chen (B), Chen (C), Chen (D), Choi, Coll, Cravedi, D'Arminio Monforte, Dabbous, Davido, de la Iglesia, Derwand (B), Derwand (C), Desbois, Di Castelnuovo, Dubee, Dubernet, Elbazidi, Esper, Faíco-Filho, Ferreira, Ferri, Fonseca, Fontana, Fried, Furtado, Gao (B), Gautret, Gautret (B), Geleris, Gendelman, Gentry, Giacomelli, Goenka, Goldman, Goldman (B), Gonzalez, Grau-Pujol, Guisado-Vasco, Gupta, Guérin, Heberto, Heras, Hong, Huang, Huang (B), Huang (C), Huh, Ip, Ip (B), Izoulet, Jiang, Kamran, Kelly, Khan, Khurana, Kim, Kirenga, Komissarov, Konig, Lagier, Lammers, Lano, Laplana, Lauriola, Lecronier, Lee, Lopes, Lopez, Luo, Ly, Lyngbakken, López, Macias, Magagnoli, Mahévas, Martinez-Lopez, McGrail, Membrillo de Novales, Meo, Mikami, Million, Mitchell, Mitjà, Mitjà (B), Molina, Nachega, Núñez-Gil, Okour, Otea, Paccoud, Peters, Pinato, Pirnay, Podder, Rajasingham, RECOVERY, Rentsch, Rivera, Roomi, Rosenberg, Saleemi, Sbidian, Self, Serrano, Sheshah, Shoaibi, Singh, Skipper, Solh, SOLIDARITY, Soto-Becerra, Sulaiman, Synolaki, Sánchez-Álvarez, Tang,*

Tehrani, *Trullàs*, *Ulrich*, *Wang (C)*, *Xia*, *Xue (B)*, *Yu*, *Yu (B)*, *Zhong*, *Zhong (B)*, *Ñamendys-Silva*]. 86 of these present positive results (of varying degrees and confidence) [*Ahmad*, *Alamdari*, *Alberici*, *Almazrou*, *Aparisi*, *Arleo*, *Arshad*, *Ashinyo*, *Ayerbe*, *Berenguer*, *Bernaola*, *Bhattacharya*, *Boulware*, *Bousquet*, *Carlucci*, *Carlucci (B)*, *Catteau*, *Chamieh*, *Chatterjee*, *Chen (B)*, *Chen (C)*, *Coll*, *D'Arminio Monforte*, *Davido*, *Derwand (B)*, *Derwand (C)*, *Di Castelnuovo*, *Dubernet*, *Elbazidi*, *Esper*, *Ferreira*, *Ferri*, *Fonseca*, *Fontana*, *Gao (B)*, *Gautret (B)*, *Goenka*, *Gonzalez*, *Guisado-Vasco*, *Guérin*, *Heberto*, *Heras*, *Hong*, *Huang*, *Huang (B)*, *Huang (C)*, *Ip*, *Izoulet*, *Jiang*, *Khan*, *Khurana*, *Kim*, *Lagier*, *Lammers*, *Lauriola*, *Lee*, *Lopes*, *Ly*, *López*, *Martinez-Lopez*, *Membrillo de Novales*, *Meo*, *Mikami*, *Million*, *Mitchell*, *Nachega*, *Núñez-Gil*, *Okour*, *Otea*, *Pinato*, *Pirnay*, *Sbidian*, *Serrano*, *Sheshah*, *Shoaibi*, *Sulaiman*, *Synolaki*, *Sánchez-Álvarez*, *Tehrani*, *Xia*, *Xue (B)*, *Yu*, *Yu (B)*, *Zhong*, *Zhong (B)*, *Ñamendys-Silva*], 30 present negative results (also of varying degrees and confidence) [*An*, *Barbosa*, *Borba*, *Cavalcanti*, *Chen (D)*, *Choi*, *Cravedi*, *Giacomelli*, *Gupta*, *Ip (B)*, *Kelly*, *Komissarov*, *Lecronier*, *Magagnoli*, *Mahévas*, *Molina*, *Peters*, *RECOVERY*, *Rentsch*, *Rivera*, *Roomi*, *Rosenberg*, *Saleemi*, *Self*, *Singh*, *Solh*, *SOLIDARITY*, *Soto-Becerra*, *Tang*, *Ulrich*], while the remainder are either inconclusive or were retracted. Table 1 shows a distribution of studies based on treatment time.

Study type	*In Vitro*	PrEP	PEP	Early treatment	Late treatment
Number of studies	12	22	3	26	106
Percentage positive	100%	91%	100%	100%	65%

Table 1. *Distribution of studies regarding HCQ for COVID-19. Note that some studies are inconclusive, and also that the degree of positive or negative effect, and confidence therein varies widely.*

Late treatment studies. Most studies focus on late treatment with hospitalized patients, and the results are very mixed. We found 55 of the studies reported positive effectiveness, while 29 reported negative effectiveness, both with varying degrees of effect and confidence. We do not consider the late treatment studies further here since we are concerned with early treatment, other than to note that these studies suggest HCQ may potentially be beneficial in a hospital setting if used very quickly and with patients that have not reached a more advanced stage of the disease; and it may be of limited or negative value with later stage disease. Three studies consider higher dosages than typically used [*Borba*, *RECOVERY*, *SOLIDARITY*], and the results suggest that these dosages in late stage patients may be harmful.

Pre-Exposure Prophylaxis (PrEP) studies. We found 22 PrEP studies [*Abella*, *Arleo*, *Bhattacharya*, *Chatterjee*, *de la Iglesia*, *Desbois*, *Ferreira*, *Ferri*, *Gendelman*, *Gentry*, *Goenka*, *Grau-Pujol*, *Huang*, *Huh*, *Khurana*, *Konig*, *Laplana*, *Macias*, *Mitchell*, *Rajasingham*, *Rentsch*, *Zhong*].

Several studies analyze HCQ usage by systemic autoimmune disease patients. SLE, RA, and other autoimmune conditions are associated with significantly increased susceptibility to and incidence of infections [*Bouza*, *Bultink*, *Herrinton*, *Iliopoulos*, *Kim (B)*, *Li*, *Listing*]. For COVID-19 specifically, research confirms that the risk for systemic autoimmune disease patients is much higher, [*Ferri*] show OR 4.42, $p<0.001$, which is the observed real-world risk, taking into account factors such as these patients potentially being more careful to avoid exposure.

*[**Arleo**]* perform a retrospective analysis of hospitalized rheumatic disease patients showing 50% lower mortality for patients on HCQ; *[**Goenka**]* study SARS-CoV-2-IgG antibodies in 1122 health care workers in India, finding 87% lower positives for adequate HCQ prophylaxis, 1.3% HCQ versus 12.3% for no HCQ prophylaxis; *[**Abella**]* report on a very small early-terminated underpowered PrEP RCT with 64/61 HCQ/control patients and only 8 infections, HCQ infection rate 6.3% versus control 6.6%, RR 0.95 [0.25 - 3.64]. There was no hospitalization or death, no significant difference in QTc, no severe adverse events, no cardiac events (e.g., syncope and arrhythmias) observed. Medication adherence was 81%. Therapeutic levels of HCQ may not have been reached by the time of the infection in the first week. 2 infections were reported to be after discontinuation of the medication, but the authors do not specify which arm these were in. Hypothetically, if these were both in the HCQ arm, the resulting RR for treatment would be much lower; *[**Gentry**]* perform a retrospective analysis of patients with rheumatologic conditions showing zero mortality with HCQ, odds ratio OR 0.0, p=0.10. 0 of 10,703 COVID-19 deaths for HCQ patients versus 7 of 21,406 for control patients. COVID-19 cases OR 0.79, p=0.27. There are several significant differences in the propensity matched patients that could affect results, e.g., 20.9% SLE versus 24.7%; *[**Rajasingham**]* show HCQ COVID-19 case HR 0.73, p = 0.12 with a PrEP RCT. This trial was halted after 47% enrollment, p < 0.05 will be reached at ~75% enrollment if similar results continue. HR 0.66/0.68 for full medication adherence (1x/2x dosing). Efficacy for first responders was higher, OR 0.32, p = 0.01. First responders had a much higher incidence, allowing greater power, and reducing the effect of confounders such as misdiagnosis of other conditions or survey issues. Performance is similar to placebo for the first 3 weeks. The effect may be greater with a dosage regimen that achieves therapeutic levels faster. ~40% of participants suspected they might have had COVID-19 before the trial, the effect in people without prior COVID-19 may be higher. Authors note that the trial was underpowered, investigation into more frequent dosing may be warranted, and there was insufficient dosing with no participants achieving more than the *in vitro* EC50; *[**Grau-Pujol**]* performed a small PrEP RCT showing that PrEP with HCQ is safe at the dosage used. No deaths, hospitalizations, or serious adverse events occurred. With only one case (in the placebo arm), efficacy was not evaluated; *[**Rentsch**]* perform an observational database study of RA/SLE patients in the UK, HCQ HR 1.03 [0.80-1.33] after adjustments. 70 patients with HCQ prescriptions died. One major problem is that there is no knowlege of medication adherence for these 70 - for example, it is possible that they were all part of the expected percentage of patients that did not take the medication as prescribed, invalidating the result. Both confirmed and suspected deaths were included. It is not clear why the authors did not report the result for only confirmed cases. Other limitations include confounding by use of bDMARDs, confounding by severity of rheumatological disease, and incorrectly classified deaths; *[**Laplana**]* survey 319 autoimmune disease patients taking CQ/HCQ finding 5.3% COVID-19 incidence, compared to a control group from the general population (matched on age, sex, and region, but not adjusted for autoimmune disease), with 3.4% incidence. It not clear why authors did not compare with autoimmune patients not on CQ/HCQ. If we adjust for the different baseline risk, the result would become RR 0.36, p<0.001, suggesting a substantial benefit for HCQ/CQ treatment; *[**de la Iglesia**]* analyze autoimmune disease patients on HCQ, compared to a control group from the general population (matched on age and sex, but not adjusted for autoimmune disease), showing non-significant differences between groups. If we adjust for the different baseline risk, the mortality result becomes RR 0.35, p=0.23, suggesting a substantial benefit for HCQ treatment; *[**Ferri**]* analyze 1641 autoimmune systemic disease (ASD) patients showing csDMARD (HCQ etc.) RR 0.37, p=0.015. csDMARDs include HCQ, CQ, and several other drugs, so the effect of HCQ/CQ alone could be higher. This study also confirms that the risk of COVID-19 for ASD patients in general is much higher, OR 4.42, p<0.001, which is the

real-world risk, accounting for factors such as ASD patients potentially being more careful to avoid exposure; *[**Khurana**]* presents a study of hospital health care workers showing HCQ prophylaxis reduces COVID-19 significantly, OR 0.30, p=0.02. 94 positive health care workers with a matched sample of 87 testing negative. The actual benefit of HCQ may be larger because the severity of symptoms are not considered; *[**Desbois**]* retrospectively analyze 199 sarcoidosis patients, showing HCQ RR 0.83, p=1.0; *[**Zhong**]* analyzed 6,228 patients with autoimmune rheumatic diseases with 55 COVID positive members of families exposed to COVID-19, showing that patients on HCQ had a lower risk of COVID-19 than those on other disease-modifying anti-rheumatic drugs with OR 0.09 (0.01–0.94), p=0.044; *[**Ferreira**]* analyze 26,815 patients showing that chronic HCQ treatment (77 patients) provides protection against COVID-19, odds ratio 0.51 (0.37-0.70); *[**Huang**]* analyze 1255 COVID-19 patients in Wuhan Tongji Hospital finding 0.61% with systemic autoimmune diseases, much lower than authors expected (3%–10%). Authors hypothesise that protective factors, such as CQ/HCQ use, reduce hospitalization; *[**Bhattacharya**]* shows PrEP HCQ reduced cases from 38% to 7% with 106 people; *[**Chatterjee**]* shows PrEP HCQ of 4+ doses was associated with a significant decline in the odds of getting infected, along with a dose-response relationship, based on 378 treatment and 373 control cases; *[**Konig**]* analyzed 80 SLE patients diagnosed with COVID-19, showing the frequency of hospitalisation did not differ significantly between individuals using an antimalarial versus non-users. Authors suggest that the dosage used may be too low to reach therapeutic levels; *[**Mitchell**]* analyze COVID-19 amongst 2.4B people, showing a wide counterintuitive disparity between well-developed and less-developed countries, with more affluent countries about one hundred times more likely to be infected and die due to COVID-19. They find the effect is most apparent when comparing to countries with the highest rates of endemic malaria. Since travelers to malaria-endemic countries are likely to be taking antimalarial prophylaxis, authors find the data highly probative for the hypothesis that prophylactic antimalarial use by incoming visitors markedly attenuates a country's COVID-19 fatality rate. While authors do not adjust for age differences, those adjustments can only account for a small fraction of the observed difference; *[**Huh**]* perform a database analysis of many drugs and COVID-19 cases, with 23 cases taking HCQ, and 251 control patients not taking HCQ, showing OR 1.07, p=0.77, and in multivariable analysis OR 1.48, p=0.086. Patients taking HCQ are most likely taking it for systemic autoimmune diseases where the risk of COVID-19 is much higher. Adjusting the multivariable analysis result for the difference in baseline risk of systemic autoimmune patients results in RR 0.34. Details of the multivarible analysis are not provided for assessment, but the analysis may be significantly affected by overfitting and/or multicollinearity. We note that many results in this study differ from other research, for example proton pump inhibitors show OR 0.47, p<0.001 whereas PPIs are classified as "no expected benefit" and other research suggests they increase risk; *[**Gendelman**]* presents a small study of rheumatic disease/autoimmune disorder patients showing no significant difference without adjusting for baseline risk. Adjusting for the difference in baseline risk using the result in Ferri et al. shows substantial benefit for HCQ, RR 0.211, but with only 3 HCQ cases the result is inconclusive; and *[**Macias**]* analyzes incidence among patients with rheumatic disease, however with only 3 confirmed cases, and not adjusting for significant differences between groups and the expected infection rates based on patient conditions, we consider this study inconclusive.

Post-Exposure Prophylaxis (PEP) studies. We found 3 PEP studies *[**Boulware**, **Lee**, **Mitjà**]*. *[**Lee**]* studies post exposure prophylaxis of 211 high-risk people in a long-term care hospital after a major exposure event, with no positive cases after 14 days.

*[**Boulware**]* reports a lack of efficacy due to statistical significance not being reached, however multiple secondary analyses show statistically significant and positive results. Due to this difference, we provide a detailed explanation. The paper shows a 17% reduction in cases, p=0.35 due to the small sample size - we can say this is inconclusive, but not negative (it is more likely to be positive than negative). Authors initially believed 3 days post exposure was the maximum enrollment delay of interest, however there was a mid-trial modification extending this to allow an addional day delay. With the original trial specification, they show a 30% reduction in cases for treatment, p=0.13. If the trial was not ended early, and if the observed trend continued, p=0.05 would have been reached at ~840 patients total (the original trial specification was 1,242 patients).

In the supplementary appendix, we can see that COVID-19 cases are reduced by [49%, 29%, 16%] respectively when taken within ~[70, 94, 118] hours of exposure (including shipping delay), as shown in Figure 6. *A priori* the most important cases to consider are the treatment delay-response relationship and the shortest delay to treatment (~70 hours on average in this case). The shortest delay to treatment is significant @94% versus all placebo. By simulation, assuming that cases occur randomly according to the observed frequency, we found the probability that the results follow the observed beneficial delay-reponse relationship is 0.2% *[**CovidAnalysis**]*. Since we have performed 2 tests, conservative Bonferroni adjustment *[**Jafari**]* gives us p = 0.004. The efficacy of treatment has also been shown in multiple other secondary analyses *[**Luco**, **Watanabe**, **Wiseman**]*.

A priori we expect an effective treatment here to be more effective when administered sooner *[**Cohen**]*. Extrapolating the treatment delay-response trend suggests 93% reduction in cases for immediate treatment, of course we have little confidence in this prediction, however it would be consistent with the data and can not be ruled out.

The effectiveness found is even more notable considering the limitations of the study. Treatment was relatively late, with enrollment up to 4 days after exposure, and an unspecified shipping delay. While the paper does not provide shipping details, the study protocol gives some information. While not clear, it indicates no shipping on the weekends and a possible 12pm cutoff for same day dispensing and mailing, from which we estimate the treatment delay as ~70 to 140 hours after exposure on average for the 1-4 days since enrollment specified in the paper (we will update this when authors respond to our request for details). There was only 75% medication adherence, including 16% who did not take the medication at all, so the actual effectiveness is likely to be higher. The study relies on Internet surveys, and false surveys were received (identified by 555 numbers), suggesting there could be additional unidentified false entries.

The accompanying editorial to this paper also notes that in a small-animal model of SARS-CoV-2 *[**Sheahan**]*, prevention of infection or more severe disease was observed only when the antiviral agent was given before or shortly after exposure *[**Cohen**]*. Research also shows that the placebo used in the US (folate) may be protective for COVID-19 *[**Acosta-Elias**]*. More details on this analysis can be found in *[**CovidAnalysis**]*.

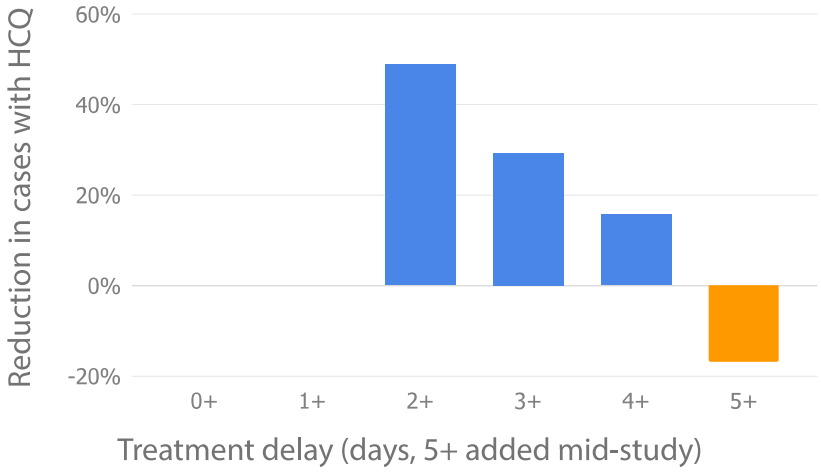


Figure 6. *Treatment delay-response relationship from [**Boulware**].*

*[**Mitjà**]* perform a highly delayed PEP treatment study which suggests efficacy but lacks statistical significance due to the small number of cases. Death rates reduced from 0.6% to 0.4%, RR 0.71, not statistically significant due to low incidence (8 control cases, 5 treatment cases).

Enrollment was up to 7 days after exposure and the treatment delay in this study is unclear, without details of the exposure event timing or medication dispensing. They appear to identify index cases based on the date of a positive test for a contact, which is likely to be much later than the actual exposure time. Due to quarantine at the time and likely cohabitation of a majority of the contacts, it is likely that the actual exposure time was significantly earlier. 13.1% of patients already tested positive at baseline, which is consistent with the actual exposure time being significantly earlier. Nasopharyngeal viral load analysis is subject to test unreliability and temporo-spatial differences in viral shedding *[**Wang (D)**]*. PCR testing has a very high false-negative rate in early stages (e.g., 100% on day 1, 67% on day 4, and 20% on day 8 *[**Kucirka**]*, hence it is likely that a much higher percentage were infected at an unknown time before enrollment.

Given the enrollment delay, PCR test delay, and PCR false negative rate at early stages, the treatment delay in general for this study was very long and could be over 2 weeks.

This study focuses on the existence of symptoms or PCR-positive results, however severity of symptoms is more important. Research has shown HCQ concentrations may be much higher in the lung compared to plasma *[**Browning**]*, which may help minimize the occurrence of severe cases and death. The outcome analyzed here may not be highly relevant to the goal of reducing mortality. For positive symptomatic cases, they find RR=0.89, favoring treatment but not statistically significant. The RR for non-PCR positive at baseline is 0.74, which is consistent with earlier treatment being more effective. A greater effect is seen for nursing home residents, RR=0.49, possibly because the exposure events are identified faster in this context, versus home exposure where testing of the source may be more delayed. There is a treatment-delay response relationship consistent with an effective treatment.

The paper does not mention zinc. Zinc deficiency in Spain has been reported at 83% *[**Olza**]*, this may significantly reduce effectiveness to the extent that zinc is important for the success of HCQ treatment.

The definition of COVID-19 symptoms is very broad - just existence of a headache alone or muscle pain alone was considered COVID-19. There was an overall very low incidence of confirmed COVID-19 (138 cases across both arms). There were no serious adverse events that were adjudicated as being treatment related. Authors exclude those with symptoms in the previous two weeks, however, those with symptoms up to several months before may still test PCR-positive even though there may be no viable virus. There appears to be inaccurate data in the paper. Table 2, secondary outcomes, control, hospital/vital records shows that 8 of 1042 is 9.7%.

In summary, this study appears positive in the context of very delayed treatment and the small number of cases.

Early treatment studies. We found 26 early treatment studies *[Ahmad, Ashraf, Chen (B), Derwand (B), Derwand (C), Elbazidi, Esper, Fonseca, Gautret, Gautret (B), Guérin, Heras, Hong, Huang (C), Ip, Izoulet, Kirenga, Lagier, Ly, Meo, Million, Mitjà (B), Otea, Pirnay, Skipper, Sulaiman]* which all show some degree of effectiveness. *[Fonseca]* show 64% lower hospitalization with HCQ. Retrospective 717 patients in Brazil with early treatment, adjusted OR 0.32, p=0.00081, for HCQ versus no medication, and OR 0.45, p=0.0065, for HCQ vs. anything else; *[Derwand (B)]* ; *[Derwand (C)]* performs a retrospective analysis of 518 patients (141 treated, 377 control) showing that early treatment with HCQ+AZ+Z results in 84% lower hospitalization and 80% lower death - hospitalization OR 0.16 (p<0.001), death OR 0.2 (p=0.16); *[Sulaiman]* perform a prospective analysis of 5,541 patients in Saudi Arabia showing adjusted HCQ mortality OR 0.36, p = 0.012, and adjusted HCQ hospitalization OR 0.57, p < 0.001; *[Kirenga]* retrospectively analyze 56 patients in Uganda, 29 HCQ and 27 control, showing 25.6% faster recovering with HCQ, 6.4 vs. 8.6 days (p = 0.20). There was no ICU admission, mechanical ventilation, or death; *[Heras]* perform a retrospective analysis of 100 confirmed COVID-19 elderly nursing home patients, median age 85, showing HCQ+AZ mortality 11.4% versus control 61.9%, RR 0.18, p<0.001. Details of differences between groups are not provided, and no adjustments are made. Authors indicate treatment was early but do not specify the treatment delay; *[Elbazidi]* analyze US states and countries. For countries they find a significant correlation between the dates of decisions to adopt/decline HCQ, and corresponding trend changes in CFR. For US states they find a significant correlation between CFR and the level of acceptance of HCQ; *[Ip]* perform a retrospective analysis of 1,274 outpatients, finding a 47% reduction in hospitalization with HCQ with propensity matching, HCQ OR 0.53 [0.29-0.95]. Sensitivity analyses revealed similar associations. Adverse events were not increased (2% QTc prolongation events, 0% arrhythmias); *[Ly]* perform a retrospective analysis of retirement homes with 1690 elderly residents (226 infected, 116 treated, mean age 83), showing HCQ+AZ >= 3 days resulted in 41% lower mortality (15.5% vs. 26.4%), OR = 0.37, p=0.02. Detection via mass screening also showed significant improvements (16.9% vs. 40.6%, OR = 0.20, p=0.001), suggesting that earlier detection and treatment is more successful; *[Hong]* showed that HCQ 1-4 days from diagnosis was the only protective factor against prolonged viral shedding found, OR 0.111, p=0.001. 57.1% viral clearance with 1-4 days delay vs. 22.9% for 5+ days delayed treatment. Authors report that early administration of HCQ significantly ameliorates inflammatory cytokine secretion and that COVID-19 patients should be administrated HCQ as soon as possible. 42 patients with HCQ 1-4 days from diagnosis, 48 with HCQ 5+ days from diagnosis; *[Lagier]* analyzed 3,737 patients showing that early treatment leads to significantly better clinical outcome and faster viral load reduction with matched sample mortality HR 0.41 p=0.048; *[Chen (B)]* showed significantly faster clinical recovery and shorter time to RNA negative (from 7.0 days to 2.0 days (HCQ), p=0.01 with 67 mild/moderate cases; *[Otea]* showed HCQ+AZ

appears to reduce serious complications and death with 80 patients; *[Pirnay]* analyze 68 very high risk nursing home residents, median age 86, using HCQ+AZ early treatment within 2.5 days onset, showing significantly less mortality than other nursing homes in France and the same as the median death for the same period in 2019/2018; *[Guérin]* performed a small retrospective study with 88 patients and found mean recovery time reduced from 26 days to 9 days with HCQ+AZ, p<0.0001 or to 13 days with AZ, including a case control analysis with matched patients; *[Ahmad]* treated 54 patients in long term care facilities with 6% death, compared to 22% using a naive indirect comparison; *[Million]* showed HCQ+AZ is safe and results in a low fatality rate with a retrospective analysis of 1,061 patients; *[Ashraf]* concluded that HCQ improved clinical outcome with a small limited trial of 100 patients in Iran; *[Izoulet]* compares the dynamics of daily deaths in the 10 days following the 3rd death in countries using and not using [H]CQ. They show dramatically lower death in [H]CQ countries, but do not attempt to account for other differences between the countries; *[Esper]* analyzed 636 patients showing HCQ+AZ reduced hospitalization 79% when used within 7 days (65% overall); *[Gautret (B)]* presented a pilot study suggesting improvement with HCQ+AZ and recommending further study; *[Huang (C)]* analyzed 22 patients with all CQ patients discharged by day 14 versus 50% of Lopinavir/Rotinavir patients, and all CQ patient's pneumonia improved, versus 75% of Lopinavir/Rotinavir patients.; and *[Gautret]* in an early and small trial with significant limitations, showed that HCQ was associated with viral load reduction and that this was enhanced with AZ. *[Gautret]* also performed an early and small trial, showing that HCQ was associated with viral load reduction and that this was enhanced with AZ, however this study has significant limitations *[Machiels, Rosendaal]*. In addition, *[Risch]* presents an updated meta analysis that includes several studies that are currently unpublished. 7 new studies of high-risk outpatients are reported, for a total of 12 studies, all showing significant benefit.

[Mitjà (B)] present a randomized trial of 293 low-risk patients with no deaths, no serious adverse events, and no statistically significant improvements. There was a 25% reduction in hospitalization and 16% reduction in the median time to symptom resolution for HCQ, without statistical significance due to small samples. However, this paper has inconsistent data - some of the values reported in Table 2 and the abstract correspond to 12 control hospitalizations, while others correspond to 11 control hospitalizations, hence we are unsure of other data reported here. This paper also does not specify the treatment delay, reporting only an enrollment delay of up to 120 hours post symptoms, plus an additional unspecified delay where medication was provided to patients at the first home visit. They do not break down results by treatment delay. Undetectable viral load was changed to 3 log10 copies/mL potentially partially masking effectiveness. For viral load with nasopharyngeal swabs, we note that viral activity in the lung may be especially important for COVID-19, and that HCQ concentration in the lung may be significantly higher (for example, about 30 times blood concentration in *[Chhonker]*). Nasopharyngeal viral load analysis is subject to test unreliability and temporo-spatial differences in viral shedding *[Wang (D)]*. Viral detection by PCR does not equate to viable virus *[Academy of Medicine]*. PCR testing does not distinguish between live virus and fragments of dead virus cells, which may take months to clear *[Bo-gyung]*.

[Skipper] present an RCT with Internet surveys of 423 patients. As with the companion PEP study, we find the results significantly more positive than typically reported. They show ~70 to 140 hour delayed treatment with HCQ reduced combined hospitalization/death by 50%, p=0.29 (5 HCQ cases, 10 control cases), and reduced hospitalization by 60%, p=0.17. There was one hospitalized control death and one non-hospitalized HCQ death. It is unclear why there was a non-hospitalized

death, external factors such as lack of standard care may be involved. Excluding that case results in one control death and zero HCQ deaths (not statistically significant but noted as reducing mortality is the most important outcome). Details for the hospitalizations and deaths such as medication adherence and treatment delay may be informative but are not provided.

The paper states the end point was changed from hospitalization/death to symptom severity because they would have required 6,000 participants. However, if the observed trend continued, they would hit 95% significance on the reduction in hospitalization at ~725 patients, and 95% on the reduction in combined hospitalization/death at ~1,145 patients, both of which are less than the original plan of 1,242 patients. We hope this trial can be continued for statistical significance.

As with the companion PEP trial, treatment in this trial was relatively late, with an unspecified shipping delay, which we estimate as ~70 to 140 hours after symptoms for enrollment days 1 to 4. We note there is no overlap with the more typical delays used such as 0 - 36 hours for oseltamivir.

The paper compares 0 - 36 hour delayed treatment with oseltamivir (influenza) and ~70 to 140 hour delayed treatment with HCQ (COVID-19), noting that oseltamivir seemed more effective. However, a more comparable study is *[McLean]* who showed that 48 - 119 hour delayed treatment with oseltamivir has no effect. This suggests that HCQ is more effective than oseltamivir, and that HCQ may still have significant effect for some amount of delay beyond the delay where oseltamivir is effective.

6 people were included that enrolled with >4d symptoms, although they do not match the study inclusion criteria. This reduces observed effectiveness. Patients in this study are relatively young and most of them recover without assistance. This reduces the room for a treatment to make improvements. The maximum improvement of an effective treatment would be expected before all patients approach recovery. For symptoms, authors focus on the end result where most have recovered, but it is more informative to examine the curve and the point of maximum effectiveness. Authors did not collect data for every day but they do have interim results for days 3, 5, 10. The results are consistent with an effective treatment and show a statistically significant improvement, $p = 0.05$, at day 10 (other unreported days might show increased effectiveness). Results also show a larger treatment effect for those >50, not statistically significant due to the small sample, but noted as COVID-19 risk dramatically increases with age.

As with the companion PEP trial, this study relies on Internet surveys. Known fake surveys were submitted to the PEP trial and there could be an unknown number of undetected fake surveys in both trials. Research shows the placebo used in the US may be protective for COVID-19 *[Acosta-Elias]* so the true effectiveness of HCQ could be higher than observed. Medication adherence was only 77% also making the true effect of treatment likely to be higher. Authors note that the results are not generalizable to the COVID high-risk population.

We originally used the term "country-randomized controlled trial" for this study - a medication is being trialled, there is a control group, and a person in the study has their group randomly assigned in advance, independent of their medical status. As distinct from a retrospective study, the control population is not related to the treatment decisions of the treatment population. People do not get to choose their group, and that is controlled by the countries (who are effectively running the trial), as opposed to occurring in a natural experiment. This is perhaps a unique time in history where the world bifurcated over a treatment for a disease, with countries choosing to accept or decline treatment based on the same information, resulting in random selection for patients. We also note one can make a comparison with cluster-randomized controlled trials, and that the bar for "RCT" is relatively low. For example, Internet survey studies with unknown survey bias, unknown pecentage of fake responses, and low adherence are accepted as RCTs. However, it is possible that some people misinterpreted the nature of this study as a clinical trial if they did not read the paper, hence we modified the name to avoid any confusion.

All studies have some limitations, for HCQ study limitations may include confounding factors; sample sizes that are too small; sub-optimal treatment regimens; dosing regimens that may be too low, too high, or insufficiently account for the long half-life of HCQ; excessive treatment delays; reliance on Internet surveys; inclusion/exclusion criteria; using tests that may be inaccurate or poor measures of disease severity; and patient characteristics that are very different from the most at-risk population.

There are distinct advantages and disadvantages to this trial, with several details discussed earlier. Benefits include the very large scale, lack of barriers to implementation, and lack of inclusion/exclusion criteria. The primary disdavantage is the coarse country-based randomization which requires us to address differences between countries, and the most significant limitation at present is likely to be the varying degrees of spread between countries. We have reviewed available seroprevalance data *[**BBC**, **CDC (B)**, **Eckerle**, **European University**, **Fontanet**, **Fontanet (B)**, **Havers**, **Ioannidis**, **Lewis**, **Public Health England**, **Salje**, **Skowronski**, **Slot**, **Swedish Public Health Agency**, **The Hindu**, **The Indian Express**, **The Irish Times**, **The Jerusalem Post**, **Valenti**]*, but the sparse nature, different time periods, and different geographic coverage prevents conclusions at this time. We expect that increased seroprevalence data will allow improved analysis over time.

While this is not a double-blind trial, this should not significantly affect the results. *[**Wood**]*, based on an analysis of 1,346 trials, show that allocation concealment and blinding are only important for subjective outcomes, and should not significantly effect the objective outcome here.

Imperfect medication adherence, imperfect co-administration of treatments, imperfect dosing regimens, and counterfeit HCQ may decrease the observed effectiveness of treatment.

In terms on early treatment, we consider this to be PrEP or PEP prophylaxis, and treatment within about 48 hours of symptoms. Details of the effectiveness based on treatment delay are not well known at this time. For comparison, oseltamivir is generally considered to only be effective within about 48 hours, and within that time period earlier is considered to be better. *[**Nicholson**, **Treanor**]* for example, find effectiveness for oseltamivir based on 0-36 hour delayed treatment, while *[**McLean**]* finds no effect for 48 - 119 hour delayed treatment.

The results here are consistent with the positive results of other early treatment trials as discussed in the previous section. There are many other examples that are consistent with effectiveness, some of these in Brazil and Switzerland are discussed by *[Rafaeli, Risch (B)]*. We provide a few more examples.

[Mitchell (B)] provide an extensive discussion of the differences between the death rates of New York City and Lagos, Nigeria, which both received infected travelers around the same time. NYC's high rate has been linked to population density, poverty, overcrowding, and ethnicity. Lagos is a crowded urban center of about 22 million people with 30 families often in a single building sharing the same bathroom, and none of the factors mentioned favor reduced death rates in Lagos. Lagos further has lower quality of medical care. Yet NYC had a death rate 600 times higher. The younger population can only account for a small part of this difference. Mitchell concludes that there is a crossover prophylactic effect of antimalarial agents against COVID-19.

In France, early treatment with HCQ has not been widely used, but one exception is in Marseille. Table 2 shows the death statistics until the end of May for these two locations for 2020 and compared with the previous two years. Paris shows a large increase, while Marseille does not *[Covid19Crusher (B)]*.

				Change from previous years	
	2018	2019	2020	2020/2018	2020/2019
Paris	6,055	5,927	7,972	+32%	+35%
Marseille	1,321	1,509	1,304	-1%	-14%

Table 2. *Deaths as of the end of May each year for Marseille (using early treatment with HCQ) vs. Paris (generally not using early treatment with HCQ) [Covid19Crusher (B)].*

For countries that started and/or stopped early HCQ treatment it is possible to examine the resulting change in statistics. Many examples can be found from *[Covid19Crusher (C)]*.

We welcome feedback and will improve and update this study over time.

Revisions

This study is updated regularly. The paper is entirely data-driven - all graphs and numbers are dynamically generated based on the latest data. As discussed previously, the limitation from varying degrees of spread should reduce over time, allowing a continually improving analysis. Numbers may change as new statistics are released each day. OWID also periodically updates statistics for earlier days, sometimes these changes are significant. The prediction for future spread will change based on the latest trend.

11/14: We added *[Núñez-Gil, Sheshah, Simova, Simova (B), Águila-Gordo]*. Vaccines and a more effective treatment option are starting to be used around the world, so this is the final data update. We will continue to make updates for any errors.

11/10: We added *[Dhibar, Mathai, Self]*.

11/4: We added *[Behera, Cadegiani]*.

11/1: We added *[Desbois, Trullàs]*.

10/31: We added *[Arleo, Choi, Coll, Fonseca, Frontera, Tehrani]*.

10/24: We added *[Barnabas, Goenka]*.

10/23: We added references *[Dubee, Lano, Solh, Ñamendys-Silva]*.

10/16: We added references *[Annie, Aparisi, DISCOVERY, Guisado-Vasco, Nachega, Sili, SOLIDARITY, Soto-Becerra]*.

10/6: We added analysis of BCG vaccine usage and references *[Abella, Almazrou, Ayerbe, Dabbous, de Freitas e Silva, Escobar, Hegarty, Lammers, Luco, Sharquie, Wiseman]*.

9/25: We added references *[Ashinyo, Axfors, Gentry, Grau-Pujol, Karatza, Rajasingham, Shoaibi]*.

9/15: We added reference *[Lauriola]*.

9/13: We added references *[Alamdari, Sulaiman]*.

9/9: We added references *[Kirenga, Laplana, Rentsch]*.

9/8: We added reference *[Synolaki]*.

9/7: We added references *[BaŞaran, Elbazidi]*.

9/6: Since the previously minor correlation for the intervention stringency index has disappeared as the data evolves, we no longer test removing stringency outliers. We added references *[Burrows, Elbazidi, Furtado, Huang, Sánchez-Álvarez]*.

8/31: We added references *[de la Iglesia, Fried, Heras, Huh]*.

8/28: We added reference *[Ferri]*.

8/27: We added a comparison of results without the country exclusions.

8/26: We added reference *[Ip]*.

8/25: We added reference *[Di Castelnuovo]*.

8/24: We added references *[Catteau, Grassin-Delyle]*.

8/21: We added a reference *[Gonzalez]*.

8/20: We removed Israel because multiple reports indicated usage has not been as widespread as believed. Reference *[Dubernet]* was added. We changed "/million" to "per million" to avoid any confusion.

8/19: Corrected a typo in the responses - "widespread" should have been "not widespread". Historical data for the United Kingdom was updated in the OWID data, allowing removal of the special case for the change in their counting method.

8/18: We added references *[Abd-Elsalam, Ly, Peters, Saleemi]*.

8/17: Some countries identified by Leffler were missing in Appendix 12. Notably, Leffler identified Indonesia, which should therefore be excluded but which we had previously included. This error has been corrected.

8/15: We noted that the United Kingdom modified their counting method around August 13.

8/13: We added references *[Machiels, Mitchell, Rosendaal]* and details on the definition of early treatment.

8/12: We updated the title and corresponding discussion. We added analysis of the probability of random allocation resulting in the observed difference or better. We clarified the exclusion of countries that widely and quickly adopted masks, which is focused on excluding those countries that have taken an aggresive intervention and isolation approach and have very little spread of the virus.

8/10: We added a section to respond to common questions. This will be expanded over time. An appendix numbering error was fixed for urbanization.

8/9: We clarified the p-value for the entire treatment and control groups. We updated the medication cost reference to link directly to the relevant data.

8/8: We clarified the mask based exclusions at the earlier mention because feedback indicated many people did not read the confounding factors section and misinterpreted this. Feedback also indicated that many people missed the discussion of case statistics, so we moved that into a separate named section.

8/7: We updated and clarified terminology related to the trial. We believe it was clear originally from the title on, with clear explanation of how the trial came about, however some people reported misunderstanding. We didn't think that anyone would misinterpret the wording to think that 2.4B enrolled in a clinical trial, that's impossible. It seems self-evident that the countries are trialling this treatment (and we explain this in the first sentence of the abstract). It's not clear how much people really misinterpreted this due to the combination with other baseless accusations. One for example claims this must be fake because it looks too professional. We appreciate the feedback on our basic design skills (hopefully clean and easy to navigate), but we don't follow the logic. In any case, we want to be as clear as possible.

Responses

Why is country x not included? Our goal is to identify countries that have taken a strong decision on treatment. Countries without clear decisions are much harder to analyze - to create any meaningful results we need to know the proportion of usage to some reasonable degree. One possibility for further research would be to analyze prescription data if available.

Countries like Italy or Brazil have extremely mixed usage, with differences during major time periods of their outbreak and/or major geographic differences. Analyzing these countries would be much more complex. Data broken done by intra-country geography is typically unavailable, and analysis before/after treatment decision changes is complicated by different rates of spread over time.

Analysis of countries that have avoided significant spread of the virus is difficult because we have very little ability to predict the final death rate when the virus is not widespread, and the virus may never become widespread in these countries, for example if they maintain isolation long enough and a very effective vaccine becomes available. These countries also tend not to have made a strong decision for or against treatment.

Israel should not be in the widespread use category. We received some reports that usage in Israel is not as high as believed. We would like to receive confirmation of usage. Removing Israel would not significantly change the observed effect (it would benefit the treatment group slightly).

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Appendix 1. Country Statistics

Country	Age 0-9	Age 10-19	Age 20-29	Age 30-39	Age 40-49	Age 50-59	Age 60-69	Age 70-79	Age 80+	Age factor
Algeria	22.1%	15.3%	15.0%	16.6%	12.4%	8.7%	5.8%	2.8%	1.3%	3.14
Canada	10.5%	10.5%	13.5%	14.0%	12.8%	13.7%	12.5%	8.0%	4.4%	1.28
Costa Rica	13.9%	14.1%	16.2%	16.2%	12.8%	11.8%	8.3%	4.5%	2.2%	2.10
Cuba	10.6%	11.0%	12.5%	13.4%	13.8%	17.4%	10.4%	7.1%	3.8%	1.42
France	11.5%	12.1%	11.3%	12.3%	12.8%	13.2%	11.9%	8.8%	6.2%	1.12
Greece	8.5%	10.3%	10.1%	12.8%	15.1%	14.4%	12.1%	9.2%	7.5%	1.00
India	17.0%	18.3%	17.4%	15.6%	12.3%	9.3%	6.3%	2.8%	1.0%	3.24
Ireland	13.6%	13.5%	11.5%	14.1%	15.5%	12.2%	9.7%	6.7%	3.2%	1.60
Mexico	17.2%	17.3%	16.9%	14.6%	12.8%	9.9%	6.4%	3.2%	1.6%	2.77
Morocco	18.3%	16.5%	15.9%	15.2%	12.1%	10.1%	7.4%	3.2%	1.2%	2.83
Netherlands	10.2%	11.4%	12.2%	12.2%	12.6%	14.7%	12.4%	9.3%	4.9%	1.17
Russia	12.8%	10.5%	10.7%	16.8%	14.0%	12.9%	12.7%	5.9%	3.9%	1.46
Sweden	11.8%	11.2%	12.6%	13.1%	12.5%	12.8%	10.8%	9.8%	5.3%	1.16
Turkey	15.9%	16.1%	15.6%	15.1%	13.6%	10.6%	7.3%	4.0%	1.7%	2.43
U.K.	11.8%	11.3%	12.6%	13.7%	12.7%	13.5%	10.7%	8.6%	5.1%	1.23
USA	12.0%	12.8%	13.9%	13.5%	12.2%	12.7%	11.6%	7.3%	4.0%	1.40
Ukraine	10.5%	10.0%	11.2%	16.5%	14.6%	13.5%	12.7%	6.8%	4.2%	1.36

Table 3. *Country age distributions [**United Nations**] and the computed age factor.*

Country	Population	Urban percentage	Average intervention stringency index	Population density	Males per 100 females	BCG vaccine usage	Gender factor
Algeria	44M	73.2	0.32	17	102.1	94	1.00
Canada	38M	81.5	0.28	4	98.5	0	1.00
Costa Rica	5M	80.1	0.28	96	99.8	86	1.00
Cuba	11M	77.1	0.32	110	98.6	98	1.00
France	65M	80.7	0.27	123	93.8	80	1.01
Greece	10M	79.4	0.25	83	96.4	72	1.01
India	1.4B	34.5	0.34	450	108.2	76	0.99
Ireland	5M	63.4	0.29	70	98.6	79	1.00
Mexico	129M	80.4	0.30	66	95.8	85	1.01
Morocco	37M	63.0	0.32	80	98.5	91	1.00
Netherlands	17M	91.9	0.25	509	99.3	0	1.00
Russia	146M	74.6	0.27	9	86.4	94	1.02
Sweden	10M	87.7	0.22	25	100.4	17	1.00
Turkey	84M	75.6	0.26	105	97.5	73	1.00
U.K.	68M	83.7	0.29	273	97.7	37	1.00
USA	331M	82.5	0.29	36	97.9	0	1.00
Ukraine	44M	69.5	0.26	77	86.3	92	1.02

Table 4. *Country statistics [Escobar, Our World in Data (D), Our World in Data (F), United Nations (B), University of Oxford, World Bank] and the computed gender factor.*

Country	Life expectancy	Diabetes prevalence	Obesity prevalence	Hypertension prevalence	Tests per thousand
Algeria	76.9	6.7	27.4	32.1	N/A
Canada	82.4	7.6	29.4	23.3	269.2
Costa Rica	80.3	9.1	25.7	24.0	47.6
Cuba	78.8	9.6	24.6	38.8	83.3
France	82.7	4.8	21.6	38.2	352.5
Greece	82.2	4.7	24.9	37.8	194.6
India	69.7	10.4	3.9	27.5	89.2
Ireland	82.3	3.2	25.3	39.1	358.4
Mexico	75.0	13.5	28.9	28.9	16.9
Morocco	76.7	7.0	26.1	33.2	96.9
Netherlands	82.3	5.4	20.4	36.5	171.4
Russia	72.6	6.1	23.1	40.7	461.5
Sweden	82.8	4.8	20.6	39.4	197.5
Turkey	77.7	11.1	32.1	36.7	186.3
U.K.	81.3	3.9	27.8	30.8	476.8
USA	78.9	10.8	36.2	31.5	485.4
Ukraine	72.1	6.1	24.1	49.2	86.5

Table 5. *Country statistics [CIA, International Diabetes Federation, Mills, Our World in Data (B), Our World in Data (C)].*

Country	Diabetes factor	Obesity factor	Hypertension factor
Algeria	1.04	1.11	1.36
Canada	1.05	1.12	1.26
Costa Rica	1.06	1.10	1.27
Cuba	1.06	1.10	1.44
France	1.03	1.09	1.43
Greece	1.03	1.10	1.42
India	1.07	1.02	1.31
Ireland	1.02	1.10	1.44
Mexico	1.09	1.12	1.32
Morocco	1.04	1.10	1.37
Netherlands	1.03	1.08	1.41
Russia	1.04	1.09	1.46
Sweden	1.03	1.08	1.44
Turkey	1.07	1.13	1.41
U.K.	1.02	1.11	1.34
USA	1.07	1.14	1.35
Ukraine	1.04	1.10	1.55

Table 6. *Health adjustment factors.*

Appendix 2. Diabetes

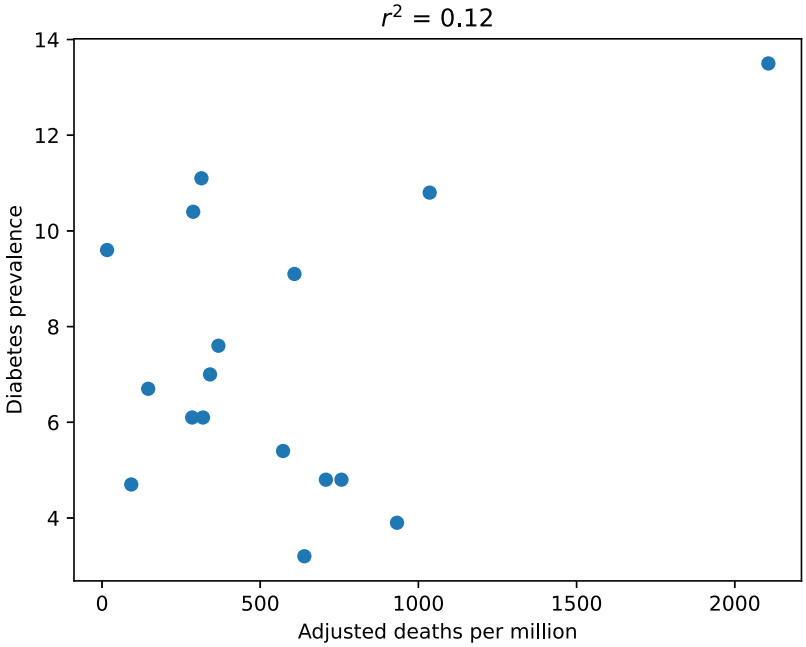

Figure 7. *Diabetes prevalence [**International Diabetes Federation**] versus adjusted deaths per million, r^2 = 0.12.*

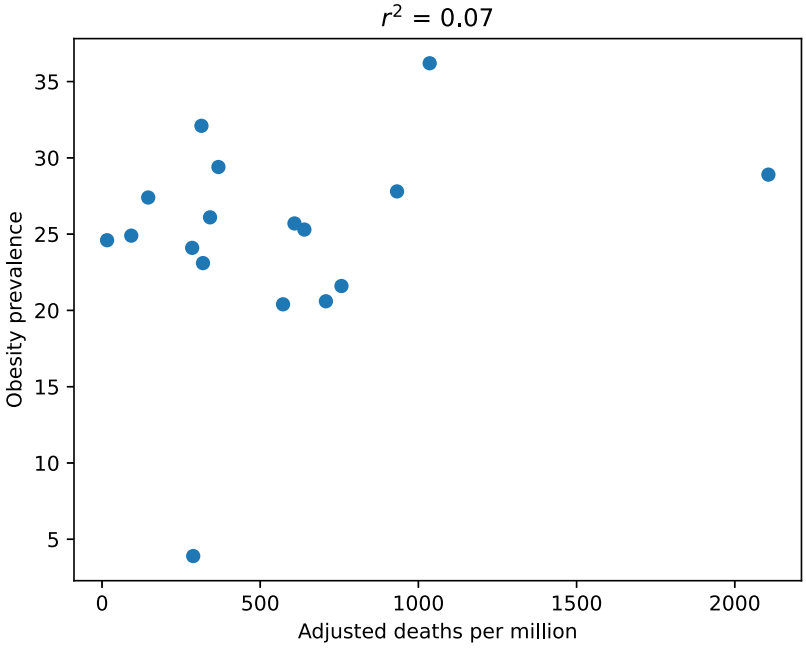

Figure 8. *Obesity prevalence [**CIA**] versus adjusted deaths per million, r^2 = 0.07.*

Appendix 4. Hypertension

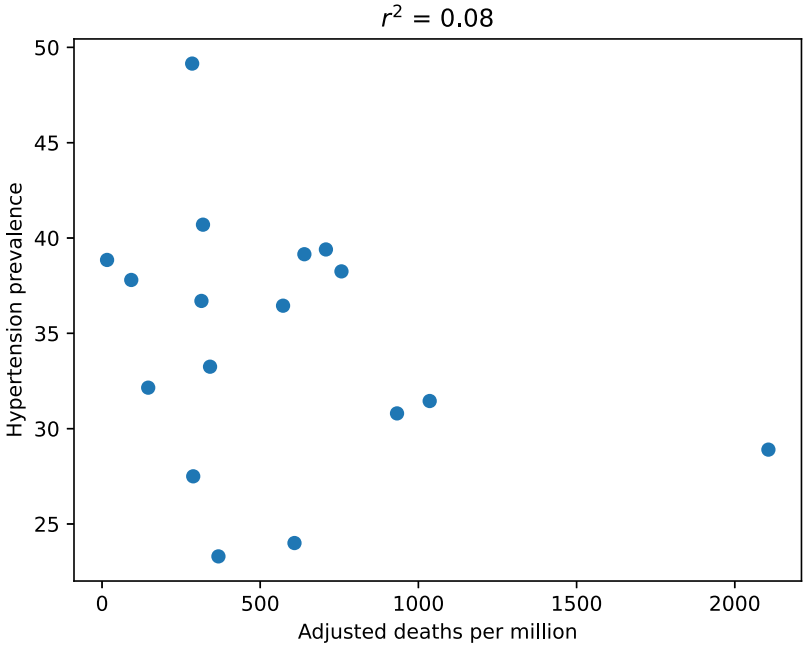

Figure 9. *Hypertension prevalence [**Mills**] versus adjusted deaths per million, r^2 = 0.08.*

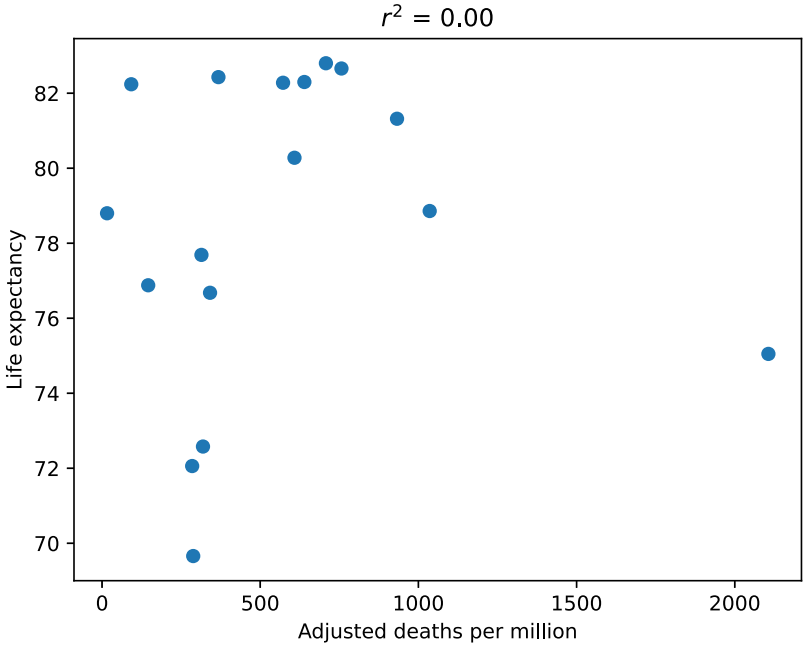

Figure 10. *Life expectancy [**Our World in Data (B)**] versus adjusted deaths per million, r^2 = 0.00.*

Appendix 6. Urbanization

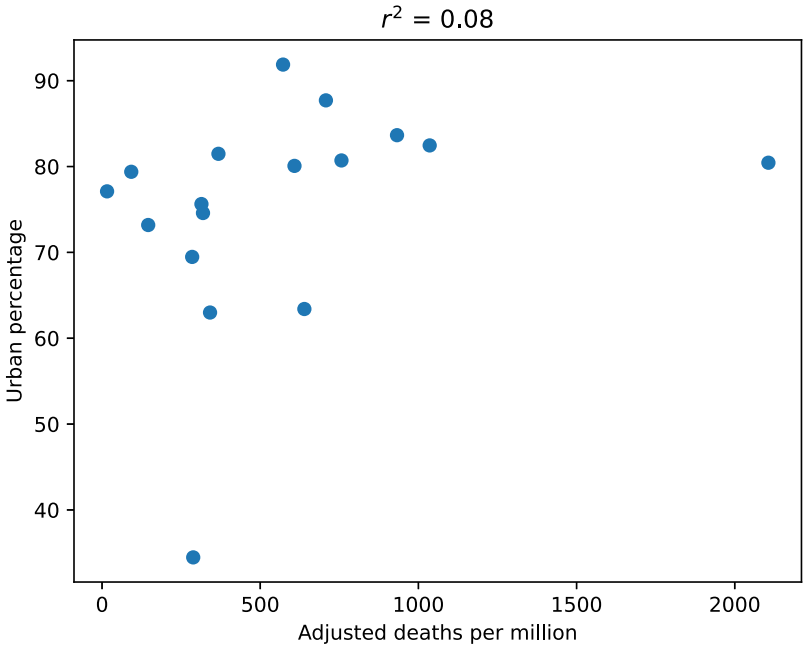

Figure 11. *Urban percentage [**World Bank**] versus adjusted deaths per million, r^2 = 0.08.*

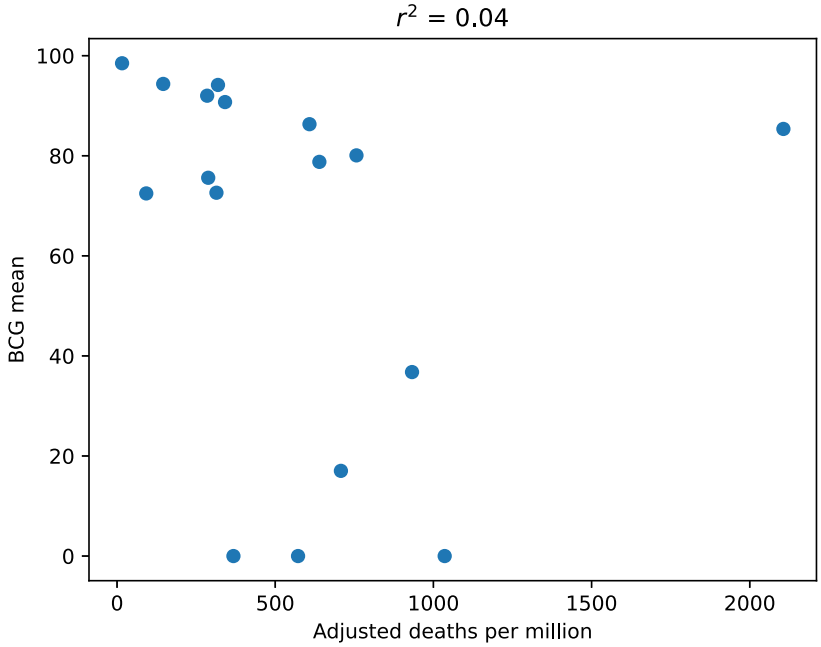

Figure 12. *BCG vaccine usage [**Escobar**] versus adjusted deaths per million, r^2 = 0.04.*

Appendix 8. Gender

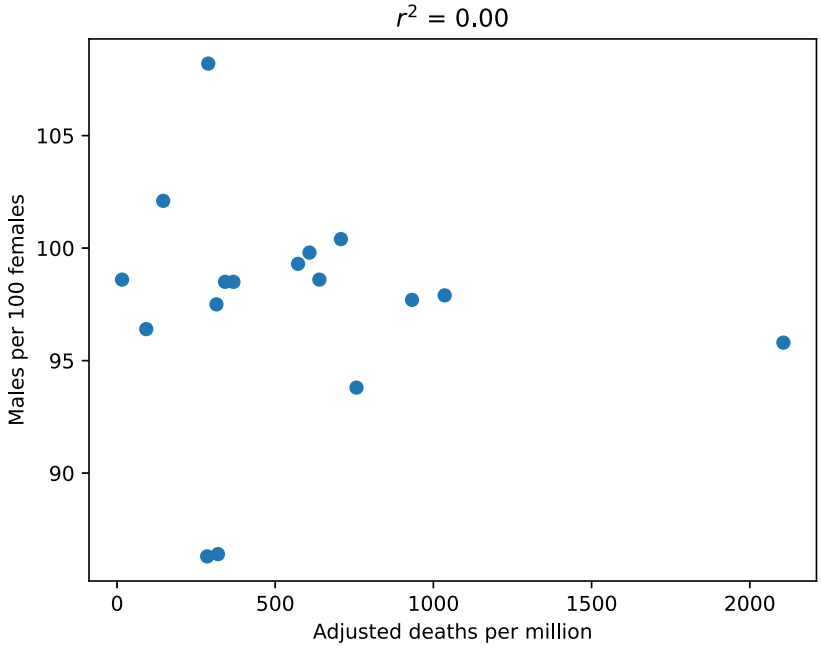

Figure 13. *Males per 100 females [**United Nations (B)**] versus adjusted deaths per million, r^2 = 0.00.*

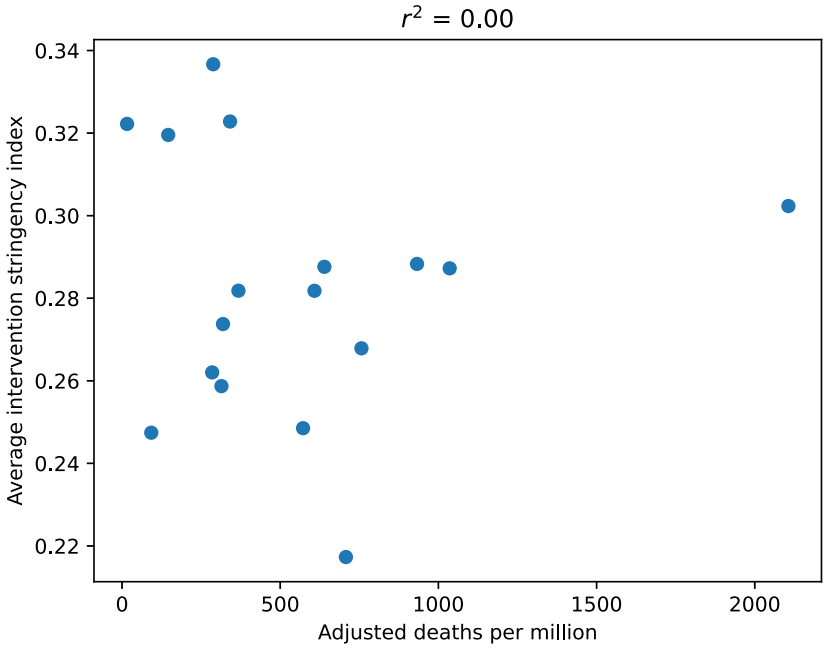

Figure 14. *Average intervention stringency index [**Our World in Data (F)**, **University of Oxford**] versus adjusted deaths per million, r^2 = 0.00.*

Appendix 10. Population Density

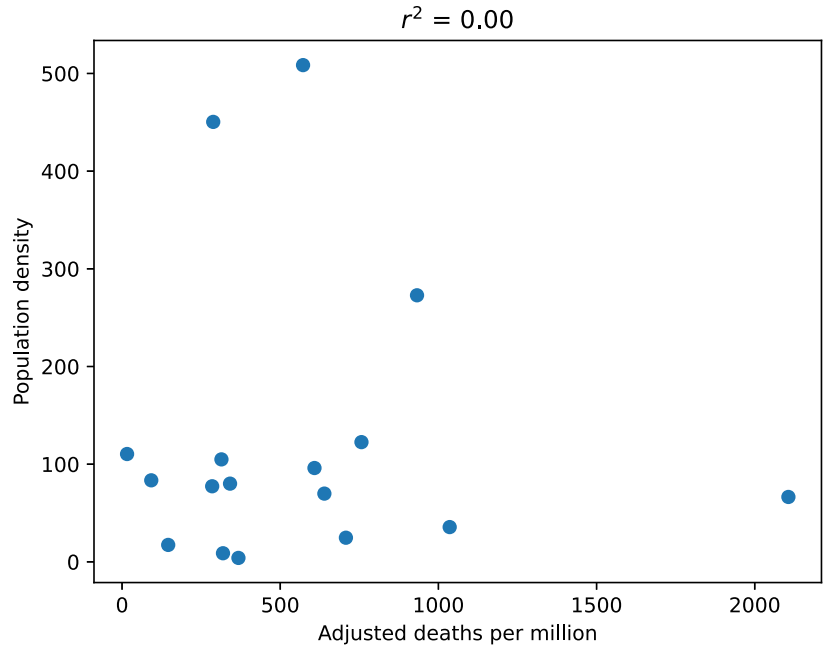

Figure 15. *Population density [**Our World in Data (D)**] versus adjusted deaths per million, r^2 = 0.00.*

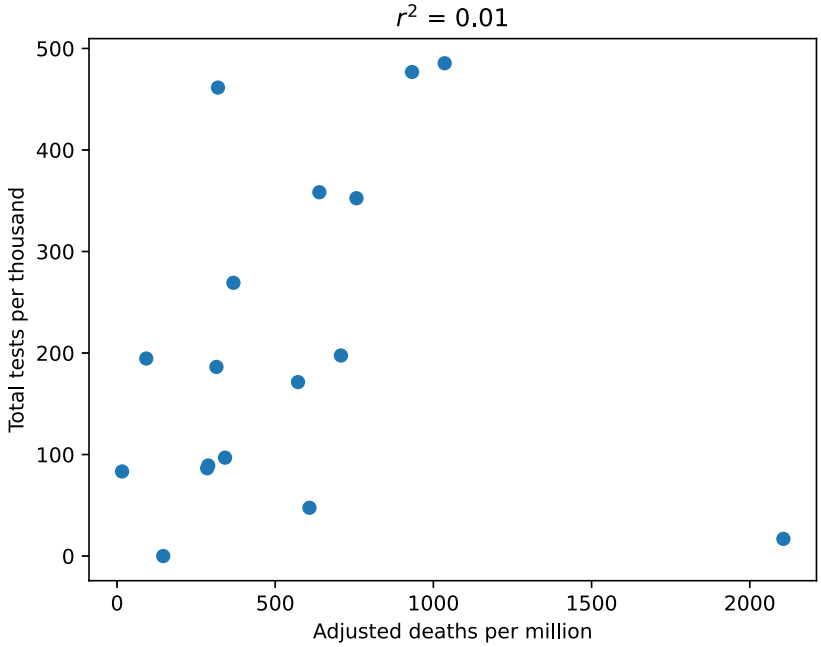

Figure 16. *Tests per thousand [**Our World in Data (C)**] versus adjusted deaths per million, r^2 = 0.01.*

Appendix 12. Early Mask Adoption

Country	Days adopted within	Comments
Antigua and Barbuda	28	Masks were required in all public spaces on April 5.
Bangladesh	24	The first death occurred on March 18. From March 11-19, 2020, when students age 17 to 28 were asked if they were wearing a surgical face mask in public, 53.8% responded “yes” and an additional 6.6% responded “occasionally”. A survey from March 29 to April 29 found that 98.7% reported wearing a face mask in crowded places.
Benin	26	Masks were recommended in public on April 6, mandated on April 7, and enforced by police beginning April 8.
Bhutan	10	On Mar. 11, the Ministry of Health advised wearing of masks in “a crowded place”.
Bosnia and Herzegovina	29	Masks were required in public by March 29.
Brunei	18	On March 22, Sultan Hassanal Bolkiah advised the people to wear masks in public.
Cambodia	6	Masks were widely used by the public by January 28.
Chad	24	On April 13, the office of the president announced that a mask or suitable alternative (e.g. turban, veil) would be mandatory in public on April 14. On April 14, the government had to backtrack on enforcement due to lack of supplies. Specific penalties for failing to wear a mask in public were announced on May 7.
Czechia	23	Masks were required in public on March 19.
Côte d'Ivoire	29	On April 4, senior health officials recommended masks when in public.
Dominica	23	Prime Minister Skerrit and Health Minister McIntyre wore masks during an interview on March 30. When Dr. Adis King demonstrated mask-wearing to the legislative assembly on April 7, all in attendance wore masks. S76 President Savarin recommended the wearing of masks in public on April 9. Others, including the state epidemiologist, repeated this recommendation in coming days. On April 21, physician Sam King estimated that 95% of the population was wearing masks in public. Masks were mandated on public transport on April 25.
El Salvador	31	The first death was reported March 31. Masks were mandated in public on April 8.
Grenada	18	On April 3, the Ministry of Health recommended all wear a mask, which could be purchased at a pharmacy, to “prevent asymptomatic people from transmitting the disease unknowingly”. Masks were mandated outside the home on April 6.
Hong Kong	6	Surgical masks were traditionally used, and also were recommended on public transport and in crowded places, on January 24, 2020. Surveys indicated that masks were worn by about 73% in the week of Jan. 21, and by 98% of the public by mid-February, which persisted into May. In February 2020, 94.8% of pedestrians were observed to wear masks, and 94.1% believed mass masking reduces the chance of community outbreak. A poll consistently found that 85% or more wore masks in public between Feb. 25 and Apr. 21, 2020.

Country	Days adopted within	Comments
Indonesia	15	The first death occurred on March 3. The public scrambled to buy face masks in early February. The proportion of Indonesian adults wearing a mask in public was 54% on Feb. 24, 2020, 47% on March 9, 59% on March 23, 71% on March 30, 79% on April 13, 81% on April 20, and from 82%-84% from May 4 to June 9. During March and April, 76% of students indicated that they wore a mask outside the home. Masks were mandated in public on April 5.
Japan	5	Public use of masks is traditional. Surveys indicate that 64% of adults habitually wore a mask in Winter. Public masking was manifest by Jan. 16 when the first domestic case was announced. The government initially recommended masks when in “confined, badly ventilated spaces”. One survey documented mask wear prevalence over 60% by March 14, increasing to over 75% by April 12 In another poll, 62% indicated wearing a mask in public by March 17, and 76% by April 13, 2020
Kenya	30	The March 12 case had arrived from the U.S. on March 5. The first death was on March 26, of a man who arrived in Kenya on March 13. Masks were mandated in Kenya on public transport on April 2, and more broadly in public on April 4. A survey in Nairobi published on May 5, 2020 found that 89% had worn a face mask in the previous week, and 73% said they always did so outside the home.
Laos	0	Health officials in Laos advised mask-wearing by March 6 and the public began wearing masks even before any cases were reported in the country
Macau	6	Mask use is traditional. By Jan. 23, the government had implemented a mask distribution program for the public.
Malawi	20	The first death was on April 7. The public was required to wear masks on April 4. A survey in Karonga from April 25 to May 23 found that 22% of urban residents and 5% of rural residents wore a mask.
Malaysia	10	Masks were used by the public by January 30. A poll reported 55% wore a mask in public on Feb. 24, 69% on Mar. 23, and 82% on Apr 6.
Mongolia	0	Mongolians began wearing masks in January.
Mozambique	18	Masks were recommended by health authorities on April 4, and were required on public transport or in gatherings on April 8.
Myanmar	28	In Myanmar, the first death occurred on March 31. A study from March 3-20, 2020 found that 72% of adults were confident they would wear a surgical mask whenever visiting a crowded area.68 On April 5, the Ministry of Health recommended masks in crowded places, and cited the US CDC recommendation for the use of cloth masks by the public. On April 7, State Counsellor Daw Aung San Suu Kyi announced that she would make a mask for herself. By April 16, some regions mandated masks in public. A survey from May 7-23, 2020 conducted by the Ministry of Health found that 80% of the public wore a mask each time they went out.
Philippines	5	Masks were used extensively as early as Jan. 30. In a poll, 60% indicated wearing a mask in public on Feb. 24, and 82% by March 30. Masks were mandated on April 2.
Sierra Leone	6	Masks were recommended in public on April 1. Compliance has been incomplete.
Slovakia	13	Masks were mandated in shops and transit on March 15, and more broadly in public on March 25.

Country	Days adopted within	Comments
South Korea	15	Use of masks is traditional. The alert level was raised from yellow to orange on Jan. 27. Children were advised to wear masks at school by January 30. By Feb. 2, mask sales increased 373 times year-over-year. Stores were selling out of masks by February 3. A superspreader event in mid-February was associated with a religious group which did not use masks at their gatherings. South Korea initially had trouble obtaining enough masks, but at the end of February the government began to control the distribution of masks to the public. On Feb. 22, the government instructed the wearing of masks in the epidemic area.
South Sudan	29	On April 29, the High Level Task Force approved the use of locally-manufactured cloth masks to be worn in public.
St. Kitts and Nevis	14	On April 2, Chief Medical Officer Dr. Hazel Laws recommended wearing a mask in public on the grounds that masks could block droplets, and viral particles could remain suspended for 3 hours. The requirement to wear masks in public became mandatory on April 7. (S225)
Sudan	27	The first death occurred on March 12. Masks were dispensed by pharmacists for free in Sudan by March 16. A survey from March 25 to April 4 of 2336 adults found that 703 (30.1%) had been to a crowded area, and 1153 (49.4%) had worn a mask outside the home in the previous few days.
São Tomé and Príncipe	21	On April 22, it was announced that masks would be mandatory in public beginning April 24.
Taiwan	11	Use of masks is traditional. By January 24, Taiwan banned the export of surgical masks. By January 27, the government had to limit mask exports and limit sales from pharmacies to those needed for personal use. On January 28, the government began releasing 6 million masks daily, with each resident able to purchase 3 masks weekly at a set price. A poll consistently found over 80% wore a mask from Feb. 25 to Apr 21, 2020.
Thailand	20	Masks, including N95 masks, were already worn outdoors in early January to combat smog. The Thai government was handing out masks and advising wearing of masks in public to prevent coronavirus by January 28, 2020. The recommendation of cloth masks for the public was reaffirmed by the Ministry of Public Health on March 3, 2020. Enforcement of a mask mandate on public transport began on March 26.102 One survey reported high mask-wearing: 73% by Feb. 24, 80% by March 23, and 89% by March 30. During March 2020, another survey found masks were worn “all the time” by 14% of COVID19 cases and 24% of controls, and “some of the time” by 38% of cases and 15% of controls.
Timor-Leste	7	Masks were required in stores and other venues as part of a state of emergency beginning March 28.
Uzbekistan	19	The first coronavirus death was on March 29. Masks were mandated on March 25.
Venezuela	5	President Maduro demonstrated wearing of masks on live television on March 13 (the day the first case was confirmed), and required masks on public transport. Masks were required in any public space by March 20.
Vietnam	9	Masks were widely used by the public by January 27 and were mandated by the government on March 16. One survey found the prevalence of mask wear consistently from 85-90% from March 12 to April 14. A poll reported 59% wore a mask on March 23, and over 80% from March 30 to Apr. 20. From March 31 to April 6, 2020, 99.5% of respondents reported using a mask when outside.
Zambia	24	The first death was recorded on April 2. On April 4, masks were recommended for the public “at all times” by the Zambian Minister of Health. This spurred the manufacture of cloth masks. On April 16, masks were mandated for the public.

Table 7. *Countries that adopted masks early, and the number of days from the estimated start of their outbreak, from [**Leffler**].*

Andorra, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Brunei, Brunei Darussalam, Cayman Islands, Curacao, Curaçao, Dominica, French Polynesia, Gibraltar, Greenland, Grenada, Guam, Iceland, Isle of Man, Liechtenstein, Malta, Marshall Islands, Monaco, Montserrat, New Caledonia, Northern Mariana Islands, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Sao Tome and Principe, Seychelles, Sint Maarten (Dutch part), Turks and Caicos Islands, United States Virgin Islands, Vanuatu

These countries were excluded because their population is <1M.

Afghanistan, Angola, Bahrain, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Congo, Democratic Republic of the, Cote d'Ivoire, Côte d'Ivoire, DR Congo, Democratic Republic of Congo, Democratic Republic of the Congo, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Iraq, Kenya, Kuwait, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Oman, Palestine, Palestine, State of, Papua New Guinea, Qatar, Republic of Congo, Rwanda, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, State of Palestine, Sudan, Tajikistan, Tanzania, Togo, Uganda, United Arab Emirates, United Republic of Tanzania, Vanuatu, Western Sahara, Yemen, Zambia, Zimbabwe

These countries were excluded because <0.5% of the population is >80.

Mongolia, Laos, Japan, Philippines, Macau, Hong Kong, Sierra Leone, Cambodia, Timor-Leste, Vietnam, Malaysia, Bhutan, Venezuela, Taiwan, Slovakia, St. Kitts and Nevis, South Korea, Indonesia, Brunei, Grenada, Mozambique, Uzbekistan, Thailand, Malawi, São Tomé and Príncipe, Czechia, Dominica, Bangladesh, Zambia, Chad, Benin, Sudan, El Salvador, Antigua and Barbuda, Myanmar, Bosnia and Herzegovina, Côte d'Ivoire, South Sudan, Kenya

These countries were excluded because they quickly adopted widespread mask use.

Australia, New Zealand, North Korea, Turkmenistan, Solomon Islands, Vanuata, Samoa, Kiribati, Federated States of Micronesia, Tonga, Marshall Islands, Palua, Tuvalu, Nauru

These countries were excluded because they have no or very little spread to date. They may be included in the future if they experience significant spread.

Algeria - widespread early treatment for high-risk patients for most of the outbreak

Adopted HCQ in early April and continued to use after WHO warning.

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Belarus - mixed use of early treatment with HCQ

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Late and very mixed use, increasing over time.

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Burkina Faso - widespread early treatment (excluded due to young population)

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Cameroon - widespread early treatment (excluded due to young population)

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Canada - limited early treatment with HCQ

Physicians not allowed to use. New Brunswick used briefly until stopped by Health Canada.

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Greece - widespread early treatment for high-risk patients for most of the outbreak

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Ireland - limited early treatment with HCQ

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Morocco - widespread early treatment for high-risk patients for most of the outbreak

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Netherlands - limited early treatment with HCQ

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Pakistan - mixed use of early treatment with HCQ

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Peru - early HCQ treatment was adopted relatively late

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Ukraine - widespread early treatment for high-risk patients for most of the outbreak

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doi: 10.7326/M20-6817. Epub 2020 Nov 18.

Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers : A Randomized Controlled Trial

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Abstract

Background: Observational evidence suggests that mask wearing mitigates transmission of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). It is uncertain if this observed association arises through protection of uninfected wearers (protective effect), via reduced transmission from infected mask wearers (source control), or both.

Objective: To assess whether recommending surgical mask use outside the home reduces wearers' risk for SARS-CoV-2 infection in a setting where masks were uncommon and not among recommended public health measures.

Design: Randomized controlled trial (DANMASK-19 [Danish Study to Assess Face Masks for the Protection Against COVID-19 Infection]). (ClinicalTrials.gov: NCT04337541).

Setting: Denmark, April and May 2020.

Participants: Adults spending more than 3 hours per day outside the home without occupational mask use.

Intervention: Encouragement to follow social distancing measures for coronavirus disease 2019, plus either no mask recommendation or a recommendation to wear a mask when outside the home among other persons together with a supply of 50 surgical masks and instructions for proper use.

Measurements: The primary outcome was SARS-CoV-2 infection in the mask wearer at 1 month by antibody testing, polymerase chain reaction (PCR), or hospital diagnosis. The secondary outcome was PCR positivity for other respiratory viruses.

Results: A total of 3030 participants were randomly assigned to the recommendation to wear masks, and 2994 were assigned to control; 4862 completed the study. Infection with SARS-CoV-2

occurred in 42 participants recommended masks (1.8%) and 53 control participants (2.1%). The between-group difference was -0.3 percentage point (95% CI, -1.2 to 0.4 percentage point; *P* = 0.38) (odds ratio, 0.82 [CI, 0.54 to 1.23]; *P* = 0.33). Multiple imputation accounting for loss to follow-up yielded similar results. Although the difference observed was not statistically significant, the 95% CIs are compatible with a 46% reduction to a 23% increase in infection.

Limitation: Inconclusive results, missing data, variable adherence, patient-reported findings on home tests, no blinding, and no assessment of whether masks could decrease disease transmission from mask wearers to others.

Conclusion: The recommendation to wear surgical masks to supplement other public health measures did not reduce the SARS-CoV-2 infection rate among wearers by more than 50% in a community with modest infection rates, some degree of social distancing, and uncommon general mask use. The data were compatible with lesser degrees of self-protection.

Primary funding source: The Salling Foundations.

Figures

Visual Abstract.. Effectiveness of Mask Recommendation for...

Figure.. Study flow diagram. Inclusion and exclusion...

Comment in

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ANTI-EMPIRE

Here Is a Video of Fauci Explaining in January 2020 That Asymptomatic Transmission Is NEVER the Driver of Outbreaks

"In all the history of respiratory viruses of any type"

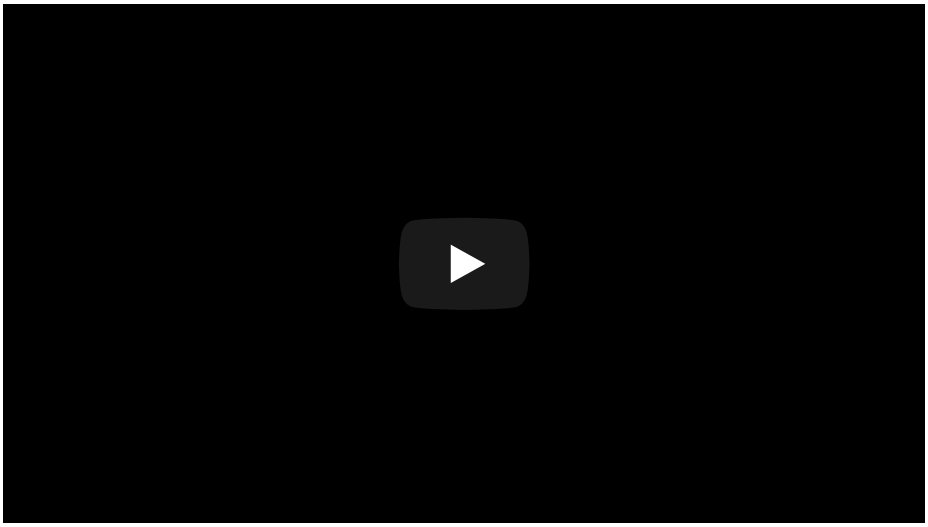
The Covid Rouge

Marko Marjanović 4 Oct 20 1944 6

The January Anthony Fauci was adamant that “in all the history of respiratory viruses of any type” asymptomatics have never been a major disease vector.

> "But **the one thing historically that people need to realize is** that even if there is some asymptomatic transmission, in all the history of respiratory viruses of any type asymptomatic transmission has never been the driver of outbreaks. The driver of outbreaks is always a symptomatic person. **Even if there is a rare symptomatic transmission that may transmit, an epidemic is not driven by asymptomatic carriers.**

He wasn't even asked about this, it was something he felt he needed to put out there.



So then what does that mean? It means **we are being asked to believe that SARS-CoV-2 is unlike any other respiratory virus in history.** And that despite being closely related to a number of them (chiefly SARS, MERS, and to a lesser extent the common cold coronaviruses).

How likely is that? How likely is it that just as you are alive a respiratory virus that is unlike any other in the history of respiratory viruses has developed?

Pretty darn unlikely. Much more likely is that a human, with all the human failings, like Dr. Fauci, who at one point knew better, nonetheless eventually got swept up in the hysteria. All the more so since getting “swept up” entailed power, fame, and adulation, while sticking to what he knew in January would have entailed getting trampled by the hysteria lemmings.

> Why is EVERYBODY wearing masks?
>
> “Because it MAY prevent spread from #Asymptomatic carriers.” – Dr. Fauci.
>
> “In the history of respiratory disease, asymptomatic spread has NEVER been the DRIVER OF TRANSMISSION, symptomatic people are.” – Dr. Fauci.
>
> What? 🤨🤨🤨 pic.twitter.com/u63qOrUtqy
>
> — Mr. Grey (@Ch4rl13Tango) September 9, 2020

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Ivermectin Effective Against Covid 19 Infection, Find Scientists

By Dr. Kamal Kant Kohli — Published On 4 April 2020 1:30 AM | Updated On 4 April 2020 3:29 AM

Scientists from Monash University have shown that an anti-parasitic drug already available around the world can kill the virus within 48.

They have found that a single dose of the drug, Ivermectin, could stop the SARS-CoV-2 virus growing in cell culture - effectively eradicating all genetic material of the virus within 48 hours.

Ivermectinis is an FDA-approved anti-parasitic drug that has also been shown to be effective in vitro against a broad range of viruses including HIV, Dengue, Influenza and Zika virus.

The next steps are to determine the correct human dosage - ensuring the doses shown to effectively treat the virus in the test tube are safe levels for humans.

The Monash Biomedicine Discovery Institute's Dr Kylie Wagstaff, who led the study, said the scientists showed that the drug, Ivermectin, stopped the SARS-CoV-2 virus growing in cell culture within 48 hours.

"We found that even a single dose could essentially remove all viral RNA by 48 hours and that even at 24 hours there was a really significant reduction in it," Dr Wagstaff said.

Dr Wagstaff cautioned that the tests conducted in the study were in vitro and that trials needed to be carried out in people.

"Ivermectin is very widely used and seen as a safe drug. We need to figure out now whether the dosage you can use it at in humans will be effective - that's the next step," Dr Wagstaff said.

"In times when we're having a global pandemic and there isn't an approved treatment, if we had a compound that was already available around the world then that might help people sooner. Realistically it's going to be a while before a vaccine is broadly available.

Although the mechanism by which Ivermectin works on the virus is not known, it is likely, based on its action in other viruses, that it works to stop the virus 'dampening down' the host cells' ability to clear it, Dr Wagstaff said.

Royal Melbourne Hospital's Dr Leon Caly, a Senior Medical Scientist at the Victorian Infectious Diseases Reference Laboratory (VIDRL) at the Doherty Institute where the experiments with live coronavirus were conducted, is the study's first author.

"As the virologist who was part of the team who were first to isolate and share SARS-COV2 outside of China in January 2020, I am excited about the prospect of Ivermectin being used as a potential drug against COVID-19," Dr Caly said.

Dr Wagstaff made a previous breakthrough finding on Ivermectin in 2012 when she identified the drug and its antiviral activity with Monash Biomedicine Discovery Institute's Professor David Jans, also an author on this paper. Professor Jans and his team have been researching Ivermectin for more than 10 years with different viruses.

Dr Wagstaff and Professor Jans started investigating whether it worked on the SARS-CoV-2 virus as soon as the pandemic was known to have started.

The use of Ivermectin to combat COVID-19 would depend on the results of further pre-clinical testing and ultimately clinical trials, with funding urgently required to keep progressing the work, Dr Wagstaff said.

For further reference log on to:

The FDA-approved Drug Ivermectin inhibits the replication of SARS-CoV-2 in vitro: https://www.sciencedirect.com/science/article/pii/S0166354220302011

coronavirus COVID 19 drug Ivermectin

Dr. Kamal Kant Kohli

Dr Kamal Kant Kohli-MBBS, DTCD- a chest specialist with more than 30 years of practice and a flair for writing clinical articles, Dr Kamal Kant Kohli joined Medical Dialogues as an Editor-in-Chief for the Speciality Medical Dialogues section. Besides writing articles, as an editor, he proofreads and verifies all the medical content published on Medical Dialogues including those coming from journals, studies,medical conferences,guidelines etc. Before Joining Medical Dialogues, he has served at important positions in the medical industry in India including as the Hony. Secretary of the Delhi Medical Association as well as the chairman of Anti-Quackery Committee in Delhi and worked with other Medical Councils in India. Email: editorial@medicaldialogues.in. Contact no. 011-43720751

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11 Jun 2020

Masks Don't Work: A Review of Science Relevant to COVID-19 Social Policy (/commentary/masks-dont-work-covid-a-review-of-science-relevant-to-covide-19-social-policy)

By Denis G. Rancourt, PhD (/authors/Denis-G.-Rancourt,-PhD)

Masks and respirators do not work.

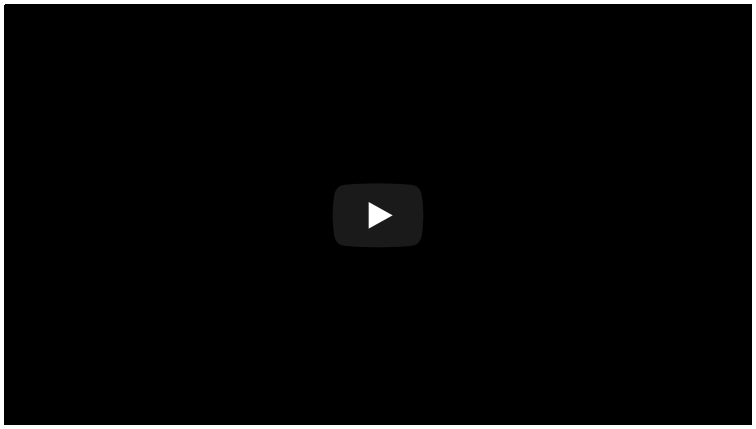
There have been extensive randomized controlled trial (RCT) studies, and meta-analysis reviews of RCT studies, which all show that masks and respirators do not work to prevent respiratory influenza-like illnesses, or respiratory illnesses believed to be transmitted by droplets and aerosol particles.

Furthermore, the relevant known physics and biology, which I review, are such that masks and respirators should not work. It would be a paradox if masks and respirators worked, given what we know about viral respiratory diseases: The main transmission path is long-residence-time aerosol particles (< 2.5 μm), which are too fine to be blocked, and the minimum-infective dose is smaller than one aerosol particle.

The present paper about masks illustrates the degree to which governments, the mainstream media, and institutional propagandists can decide to operate in a science vacuum, or select only incomplete science that serves their interests. Such recklessness is also certainly the case with the current global lockdown of over 1 billion people, an unprecedented experiment in medical and political history.

(From Words from the Publisher (https://www.rcreader.com/commentary/lockdowns-an-unprecedented-experiment-sometimes-you-gotta-wear-the-stupid); "We pledge to publish all letters, guest commentaries, or studies

refuting [Rancourt's] general premise that this mask-wearing culture and shaming could be more harmful than helpful. Please send your feedback to info@rcreader.com (http://mailto:info@rcreader.com).") **[UPDATE: August 12, 2020 Still No Evidence Justifying Mandatory Masks (https://www.rcreader.com/commentary/still-no-conclusive-evidence-justifying-mandatory-masks)]**



Review of the Medical Literature

Here are key anchor points to the extensive scientific literature that establishes that wearing surgical masks and respirators (e.g., "N95") does not reduce the risk of contracting a verified illness:

Jacobs, J. L. et al. (2009) "Use of surgical face masks to reduce the incidence of the common cold among health care workers in Japan: A randomized controlled trial," *American Journal of Infection Control*, Volume 37, Issue 5, 417 – 419. https://www.ncbi.nlm.nih.gov/pubmed/19216002 (https://www.ncbi.nlm.nih.gov/pubmed/19216002)

N95-masked health-care workers (HCW) were significantly more likely to experience headaches. Face mask use in HCW was not demonstrated to provide benefit in terms of cold symptoms or getting colds.

Cowling, B. et al. (2010) "Face masks to prevent transmission of influenza virus: A systematic review," *Epidemiology and Infection*, 138(4), 449-456. https://www.cambridge.org/core/journals/epidemiology-and-infection/article/face-masks-to-prevent-transmission-of-influenza-virus-a-systematic- review/64D368496EBDE0AFCC6639CCC9D8BC05 (https://www.cambridge.org/core/journals/epidemiology-and-infection/article/face-masks-to-prevent-transmission-of-influenza-virus-a-systematic- review/64D368496EBDE0AFCC6639CCC9D8BC05)

None of the studies reviewed showed a benefit from wearing a mask, in either HCW or community members in households (H). See summary Tables 1 and 2 therein.

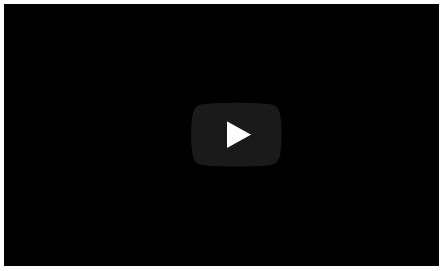
bin-Reza et al. (2012) "The use of masks and respirators to prevent transmission of influenza: a systematic review of the scientific evidence," *Influenza and Other Respiratory Viruses* 6(4), 257–267. https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1750-2659.2011.00307.x (https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1750-2659.2011.00307.x)

"There were 17 eligible studies. ... None of the studies established a conclusive relationship between mask/respirator use and protection against influenza infection."

Smith, J.D. et al. (2016) "Effectiveness of N95 respirators versus surgical masks in protecting health care workers from acute respiratory infection: a systematic review and meta-analysis," *CMAJ* Mar 2016 https://www.cmaj.ca/content/188/8/567 (https://www.cmaj.ca/content/188/8/567)

"We identified six clinical studies ... . In the meta-analysis of the clinical studies, we found no significant difference between N95 respirators and surgical masks in associated risk of (a) laboratory-confirmed respiratory infection, (b) influenza-like illness, or (c) reported work-place absenteeism."

Offeddu, V. et al. (2017) "Effectiveness of Masks and Respirators Against Respiratory Infections in Healthcare Workers: A Systematic Review and Meta-Analysis," *Clinical Infectious Diseases*, Volume 65, Issue 11, 1 December 2017, Pages 1934–1942, https://academic.oup.com/cid/article/65/11/1934/4068747 (https://academic.oup.com/cid/article/65/11/1934/4068747)



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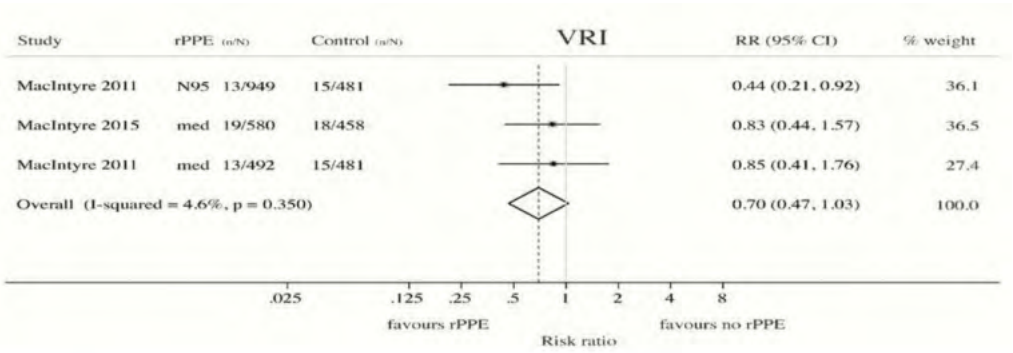
"Self-reported assessment of clinical outcomes was prone to bias. Evidence of a protective effect of masks or respirators against verified respiratory infection (VRI) was not statistically significant"; as per Fig. 2c therein:



Radonovich, L.J. et al. (2019) "N95 Respirators vs Medical Masks for Preventing Influenza Among Health Care Personnel: A Randomized Clinical Trial," *JAMA.* 2019; 322(9): 824–833. https://jamanetwork.com/journals/jama/fullarticle/2749214 (https://jamanetwork.com/journals/jama/fullarticle/2749214)

"Among 2862 randomized participants, 2371 completed the study and accounted for 5180 HCW-seasons. ... Among outpatient health care personnel, N95 respirators vs medical masks as worn by participants in this trial resulted in no significant difference in the incidence of laboratory-confirmed influenza."

Long, Y. et al. (2020) "Effectiveness of N95 respirators versus surgical masks against influenza: A systematic review and meta-analysis," *J Evid Based Med.* 2020; 1- 9. https://onlinelibrary.wiley.com/doi/epdf/10.1111/jebm.12381 (https://onlinelibrary.wiley.com/doi/epdf/10.1111/jebm.12381)

"A total of six RCTs involving 9,171 participants were included. There were no statistically significant differences in preventing laboratory-confirmed influenza, laboratory-confirmed respiratory viral infections, laboratory-confirmed respiratory infection, and influenza-like illness using N95 respirators and surgical masks. Meta-analysis indicated a protective effect of N95 respirators against laboratory-confirmed bacterial colonization (RR = 0.58, 95% CI 0.43-0.78). The use of N95 respirators compared with surgical masks is not associated with a lower risk of laboratory-confirmed influenza."

Conclusion Regarding That Masks Do Not Work

No RCT study with verified outcome shows a benefit for HCW or community members in households to wearing a mask or respirator. There is no such study. There are no exceptions.

Likewise, no study exists that shows a benefit from a broad policy to wear masks in public (more on this below).

Furthermore, if there were any benefit to wearing a mask, because of the blocking power against droplets and aerosol particles, then there should be more benefit from wearing a respirator (N95) compared to a surgical mask, yet several large meta-analyses, and all the RCT, prove that there is no such relative benefit.

Masks and respirators do not work.

Precautionary Principle Turned on Its Head with Masks

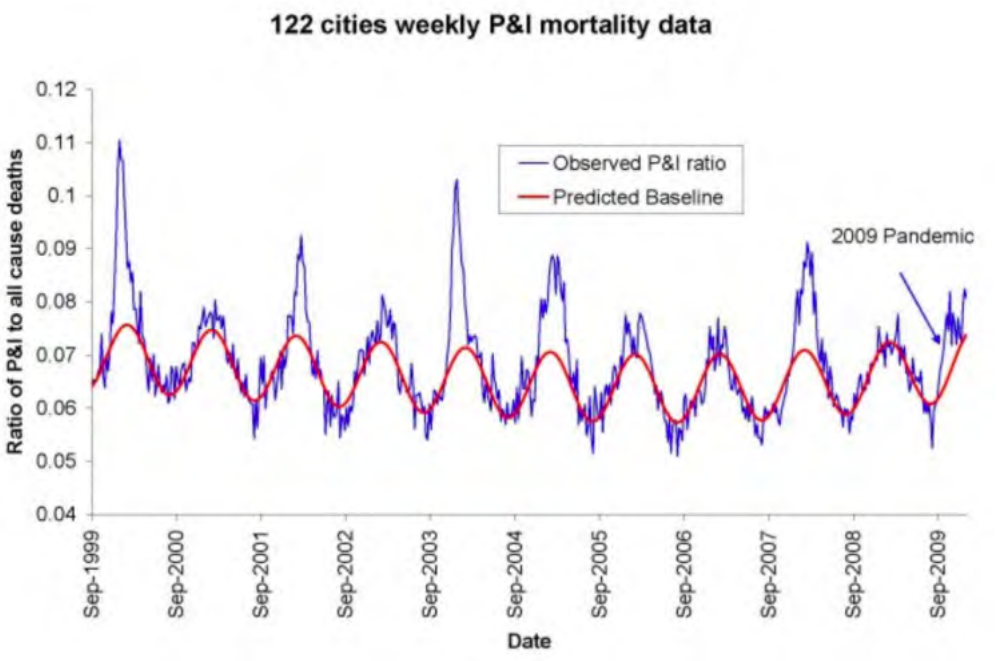
In light of the medical research, therefore, it is difficult to understand why public-health authorities are not consistently adamant about this established scientific result, since the distributed psychological, economic, and environmental harm from a broad recommendation to wear masks is significant, not to mention the unknown potential harm from concentration and distribution of pathogens on and from used masks. In this case, public authorities would be turning the precautionary principle on its head (see below).

Physics and Biology of Viral Respiratory Disease and of Why Masks Do Not Work

In order to understand why masks cannot possibly work, we must review established knowledge about viral respiratory diseases, the mechanism of seasonal variation of excess deaths from pneumonia and influenza, the aerosol mechanism of infectious disease transmission, the physics and chemistry of aerosols, and the mechanism of the so-called minimum-infective-dose.

In addition to pandemics that can occur anytime, in the temperate latitudes there is an extra burden of respiratory-disease mortality that is seasonal, and that is caused by viruses. For example, see the review of influenza by Paules and Subbarao (2017). This has been known for a long time, and the seasonal pattern is exceedingly regular. *(Publisher's note: All links to source references to studies here forward are found at the end of this article.)*

For example, see Figure 1 of Viboud (2010), which has "Weekly time series of the ratio of deaths from pneumonia and influenza to all deaths, based on the 122 cities surveillance in the US (blue line). The red line represents the expected baseline ratio in the absence of influenza activity," here:



The seasonality of the phenomenon was largely not understood until a decade ago. Until recently, it was debated whether the pattern arose primarily because of seasonal change in virulence of the pathogens, or because of seasonal change in susceptibility of the host (such as from dry air causing tissue irritation, or diminished daylight causing vitamin deficiency or hormonal stress). For example, see Dowell (2001).

In a landmark study, Shaman et al. (2010) showed that the seasonal pattern of extra respiratory-disease mortality can be explained quantitatively on the sole basis of absolute humidity, and its direct controlling impact on transmission of airborne pathogens.

Lowen et al. (2007) demonstrated the phenomenon of humidity-dependent airborne-virus virulence in actual disease transmission between guinea pigs, and discussed potential underlying mechanisms for the measured controlling effect of humidity.

The underlying mechanism is that the pathogen-laden aerosol particles or droplets are neutralized within a half-life that monotonically and significantly decreases with increasing ambient humidity. This is based on the seminal work of Harper (1961). Harper experimentally showed that viral-pathogen-carrying droplets were inactivated within shorter and shorter times, as ambient humidity was increased.

Harper argued that the viruses themselves were made inoperative by the humidity ("viable decay"), however, he admitted that the effect could be from humidity-enhanced physical removal or sedimentation of the droplets ("physical loss"): "Aerosol viabilities reported in this paper are based on the ratio of virus titre to radioactive count in suspension and cloud samples, and can be criticized on the ground that test and tracer materials were not physically identical."

The latter ("physical loss") seems more plausible to me, since humidity would have a universal physical effect of causing particle/droplet growth and sedimentation, and all tested viral pathogens have essentially the same humidity-driven "decay." Furthermore, it is difficult to understand how a virion (of all virus types) in a droplet would be molecularly or structurally attacked or damaged by an increase in ambient humidity. A "virion" is the complete, infective form of a virus outside a host cell, with a core of RNA or DNA and a capsid. The actual mechanism of such humidity-driven intra-droplet "viable decay" of a virion has not been explained or studied.

In any case, the explanation and model of Shaman et al. (2010) is not dependent on the particular mechanism of the humidity-driven decay of virions in aerosol/droplets. Shaman's quantitatively demonstrated model of seasonal regional viral epidemiology is valid for either mechanism (or combination of mechanisms), whether "viable decay" or "physical loss."

The breakthrough achieved by Shaman et al. is not merely some academic point. Rather, it has profound health-policy implications, which have been entirely ignored or overlooked in the current coronavirus pandemic.

In particular, Shaman's work necessarily implies that, rather than being a fixed number (dependent solely on the spatial-temporal structure of social interactions in a completely susceptible population, and on the viral strain), the epidemic's **basic reproduction number** (R0) is highly or predominantly dependent on ambient absolute humidity.

For a definition of R0, see HealthKnowlege-UK (2020): R0 is "the average number of secondary infections produced by a typical case of an infection in a population where everyone is susceptible." The average R0 for influenza is said to be 1.28 (1.19–1.37); see the comprehensive review by Biggerstaff et al. (2014).

In fact, Shaman et al. showed that R0 must be understood to seasonally vary between humid-summer values of just larger than "1" and dry-winter values typically as large as "4" (for example, see their Table 2). In other words, the seasonal infectious viral respiratory diseases that plague temperate latitudes every year go from being intrinsically mildly contagious to virulently contagious, due simply to the bio-physical mode of transmission controlled by atmospheric humidity, irrespective of any other consideration.

Therefore, all the epidemiological mathematical modeling of the benefits of mediating policies (such as social distancing), which assumes humidity-independent R0 values, has a large likelihood of being of little value, on this basis alone. For studies about modeling and regarding mediation effects on the effective reproduction number, see Coburn (2009) and Tracht (2010).

To put it simply, the "second wave" of an epidemic is not a consequence of human sin regarding mask wearing and hand shaking. Rather, the "second wave" is an inescapable consequence of an air-dryness-driven many-fold increase in disease contagiousness, in a population that has not yet attained immunity.

If my view of the mechanism is correct (i.e., "physical loss"), then Shaman's work further necessarily implies that the dryness-driven high transmissibility (large R0) arises from small aerosol particles fluidly suspended in the air; as opposed to large droplets that are quickly gravitationally removed from the air.

Such small aerosol particles fluidly suspended in air, of biological origin, are of every variety and are everywhere, including down to virion-sizes (Despres, 2012). It is not entirely unlikely that viruses can thereby be physically transported over inter-continental distances (e.g., Hammond, 1989).

More to the point, indoor airborne virus concentrations have been shown to exist (in day-care facilities, health centers, and on-board airplanes) primarily as aerosol particles of diameters smaller than 2.5 μm, such as in the work of Yang et al. (2011):

"Half of the 16 samples were positive, and their total virus −3 concentrations ranged from 5800 to 37 000 genome copies m . On average, 64 per cent of the viral genome copies were associated with fine particles smaller than 2.5 μm, which can remain suspended for hours. Modeling of virus concentrations indoors suggested a source strength of 1.6 ± 1.2 × 105 genome copies m−3 air h−1 and a deposition flux onto surfaces of 13 ± 7 genome copies m−2 h−1 by Brownian motion. Over one hour, the inhalation dose was estimated to be 30 ± 18 median tissue culture infectious dose (TCID50), adequate to induce infection. These results provide quantitative support for the idea that the aerosol route could be an important mode of influenza transmission."

Such small particles (< 2.5 μm) are part of air fluidity, are not subject to gravitational sedimentation, and would not be stopped by long-range inertial impact. This means that the slightest (even momentary) facial misfit of a mask or respirator renders the design filtration norm of the mask or respirator entirely irrelevant. In any case, the filtration material itself of N95 (average pore size ~0.3−0.5 μm) does not block virion penetration, not to mention surgical masks. For example, see Balazy et al. (2006).

Mask stoppage efficiency and host inhalation are only half of the equation, however, because the minimal infective dose (MID) must also be considered. For example, if a large number of pathogen-laden particles must be delivered to the lung within a certain time for the illness to take hold, then partial blocking by any mask or cloth can be enough to make a significant difference.

On the other hand, if the MID is amply surpassed by the virions carried in a single aerosol particle able to evade mask-capture, then the mask is of no practical utility, which is the case.

Yezli and Otter (2011), in their review of the MID, point out relevant features:

1. Most respiratory viruses are as infective in humans as in tissue culture having optimal laboratory susceptibility
2. It is believed that a single virion can be enough to induce illness in the host
3. The 50-percent probability MID ("TCID50") has variably been found to be in the range 100−1000 virions
4. There are typically 10 to 3rd power − 10 to 7th power virions per aerolized influenza droplet with diameter 1 μm − 10 μm
5. The 50-percent probability MID easily fits into a single (one) aerolized droplet
6. For further background:
7. A classic description of dose-response assessment is provided by Haas (1993).
8. Zwart et al. (2009) provided the first laboratory proof, in a virus-insect system, that the action of a single virion can be sufficient to cause disease.
9. Baccam et al. (2006) calculated from empirical data that, with influenza A in humans,"we estimate that after a delay of ~6 h, infected cells begin producing influenza virus and continue to do so for ~5 h. The average lifetime of infected cells is ~11 h, and the half-life of free infectious virus is ~3 h. We calculated the [in-body] basic reproductive number, R0, which indicated that a single infected cell could produce ~22 new productive infections."
10. Brooke et al. (2013) showed that, contrary to prior modeling assumptions, although not all influenza-A-infected cells in the human body produce infectious progeny (virions), nonetheless, 90 percent of infected cell are significantly impacted, rather than simply surviving unharmed.

All of this to say that: if anything gets through (and it always does, irrespective of the mask), then you are going to be infected. Masks cannot possibly work. It is not surprising, therefore, that no bias-free study has ever found a benefit from wearing a mask or respirator in this application.

Therefore, the studies that show partial stopping power of masks, or that show that masks can capture many large droplets produced by a sneezing or coughing mask-wearer, in light of the above-described features of the problem, are irrelevant. For example, such studies as these: Leung (2020), Davies (2013), Lai (2012), and Sande (2008).

Why There Can Never Be an Empirical Test of a Nation-Wide Mask-Wearing Policy

As mentioned above, no study exists that shows a benefit from a broad policy to wear masks in public. There is good reason for this. It would be impossible to obtain unambiguous and bias-free results [because]:

1. Any benefit from mask-wearing would have to be a small effect, since undetected in controlled experiments, which would be swamped by the larger effects, notably the large effect from changing atmospheric humidity.
2. Mask compliance and mask adjustment habits would be unknown.
3. Mask-wearing is associated (correlated) with several other health behaviors; see Wada (2012).
4. The results would not be transferable, because of differing cultural habits.
5. Compliance is achieved by fear, and individuals can habituate to fear-based propaganda, and can have disparate basic responses.
6. Monitoring and compliance measurement are near-impossible, and subject to large errors.
7. Self-reporting (such as in surveys) is notoriously biased, because individuals have the self-interested belief that their efforts are useful.
8. Progression of the epidemic is not verified with reliable tests on large population samples, and generally relies on non-representative hospital visits or admissions.
9. Several different pathogens (viruses and strains of viruses) causing respiratory illness generally act together, in the same population and/or in individuals, and are not resolved, while having different epidemiological characteristics.

Unknown Aspects of Mask Wearing

Many potential harms may arise from broad public policies to wear masks, and the following unanswered questions arise:

1. Do used and loaded masks become sources of enhanced transmission, for the wearer and others?
2. Do masks become collectors and retainers of pathogens that the mask wearer would otherwise avoid when breathing without a mask?
3. Are large droplets captured by a mask atomized or aerolized into breathable components? Can virions escape an evaporating droplet stuck to a mask fiber?
4. What are the dangers of bacterial growth on a used and loaded mask?
5. How do pathogen-laden droplets interact with environmental dust and aerosols captured on the mask?
6. What are long-term health effects on HCW, such as headaches, arising from impeded breathing?
7. Are there negative social consequences to a masked society?

8. Are there negative psychological consequences to wearing a mask, as a fear-based behavioral modification?
9. What are the environmental consequences of mask manufacturing and disposal?
10. Do the masks shed fibers or substances that are harmful when inhaled?

Conclusion

By making mask-wearing recommendations and policies for the general public, or by expressly condoning the practice, governments have both ignored the scientific evidence and done the opposite of following the precautionary principle.

In an absence of knowledge, governments should not make policies that have a hypothetical potential to cause harm. The government has an onus barrier before it instigates a broad social-engineering intervention, or allows corporations to exploit fear-based sentiments.

Furthermore, individuals should know that there is no known benefit arising from wearing a mask in a viral respiratory illness epidemic, and that scientific studies have shown that any benefit must be residually small, compared to other and determinative factors.

Otherwise, what is the point of publicly funded science?

The present paper about masks illustrates the degree to which governments, the mainstream media, and institutional propagandists can decide to operate in a science vacuum, or select only incomplete science that serves their interests. Such recklessness is also certainly the case with the current global lockdown of over 1 billion people, an unprecedented experiment in medical and political history.

Denis G. Rancourt is a researcher at the Ontario Civil Liberties Association (OCLA.ca) and is formerly a tenured professor at the University of Ottawa, Canada. This paper was originally published at Rancourt's account on ResearchGate.net. As of June 5, 2020, this paper was removed from his profile by its administrators at Rese (http://Researchgate.net/profile/D_Rancourt)archgate.net/profile/D_Rancourt (http://Researchgate.net/profile/D_Rancourt). At Rancourt's blog ActivistTeacher (http://activistteacher.blogspot.com/2020/06/covid-censorship-at-researchgate-things.html), (http://activistteacher.blogspot.com/2020/06/covid-censorship-at-researchgate-things.html)blogspot.com (http://activistteacher.blogspot.com/2020/06/covid-censorship-at-researchgate-things.html), he recounts the notification and responses he received from ResearchGate.net and states, "This is censorship of my scientific work like I have never experienced before."

The original April 2020 white paper in .pdf format is available here (https://www.rcreader.com/y/mask8), complete with charts that have not been reprinted in the Reader print or web versions.

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Endnotes:

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Science News

from research organizations

Possible coronavirus drug identified

Ivermectin stops SARS-CoV-2 virus growing in cell culture

Date: April 3, 2020

Source: Monash University

Summary: A new study has shown that an anti-parasitic drug already available around the world can kill the virus within 48 hours. Scientists found that a single dose of the drug, Ivermectin, could stop the SARS-CoV-2 virus growing in cell culture. The next steps are to determine the correct human dosage -- ensuring the doses shown to effectively treat the virus in vitro are safe for humans.

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- Epstein-Barr virus
- Virus
- West Nile virus
- H5N1
- Chickenpox
- Severe acute respiratory syndrome
- HIV

FULL STORY

A collaborative study led by the Monash Biomedicine Discovery Institute (BDI) with the Peter Doherty Institute of Infection and Immunity (Doherty Institute), a joint venture of the University of Melbourne and Royal Melbourne Hospital, has shown that an anti-parasitic drug already available around the world kills the virus within 48 hours.

The Monash Biomedicine Discovery Institute's Dr Kylie Wagstaff, who led the study, said the scientists showed that the drug, Ivermectin, stopped the SARS-CoV-2 virus growing in cell culture within 48 hours.

"We found that even a single dose could essentially remove all viral RNA by 48 hours and that even at 24 hours there was a really significant reduction in it," Dr Wagstaff said.

Ivermectin is an FDA-approved anti-parasitic drug that has also been shown to be effective *in vitro* against a broad range of viruses including HIV, Dengue, Influenza and Zika virus.

Dr Wagstaff cautioned that the tests conducted in the study were *in vitro* and that trials needed to be carried out in people.

"Ivermectin is very widely used and seen as a safe drug. We need to figure out now whether the dosage you can use it at in humans will be effective -- that's the next step," Dr Wagstaff said.

"In times when we're having a global pandemic and there isn't an approved treatment, if we had a compound that was already available around the world then that might help people sooner.

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Realistically it's going to be a while before a vaccine is broadly available.

Although the mechanism by which Ivermectin works on the virus is not known, it is likely, based on its action in other viruses, that it works to stop the virus 'dampening down' the host cells' ability to clear it, Dr Wagstaff said.

Royal Melbourne Hospital's Dr Leon Caly, a Senior Medical Scientist at the Victorian Infectious Diseases Reference Laboratory (VIDRL) at the Doherty Institute where the experiments with live coronavirus were conducted, is the study's first author.

"As the virologist who was part of the team who were first to isolate and share SARS-COV2 outside of China in January 2020, I am excited about the prospect of Ivermectin being used as a potential drug against COVID-19," Dr Caly said.

Dr Wagstaff made a previous breakthrough finding on Ivermectin in 2012 when she identified the drug and its antiviral activity with Monash Biomedicine Discovery Institute's Professor David Jans, also an author on this paper. Professor Jans and his team have been researching Ivermectin for more than 10 years with different viruses.

Dr Wagstaff and Professor Jans started investigating whether it worked on the SARS-CoV-2 virus as soon as the pandemic was known to have started.

The use of Ivermectin to combat COVID-19 would depend on the results of further pre-clinical testing and ultimately clinical trials, with funding urgently required to keep progressing the work, Dr Wagstaff said.

Story Source:

Materials provided by **Monash University**. *Note: Content may be edited for style and length.*

Journal Reference:

1. Leon Caly, Julian D. Druce, Mike G. Catton, David A. Jans, Kylie M. Wagstaff. **The FDA-approved Drug Ivermectin inhibits the replication of SARS-CoV-2 in vitro**. *Antiviral Research*, 2020; 104787 DOI: 10.1016/j.antiviral.2020.104787

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Monash University. "Possible coronavirus drug identified: Ivermectin stops SARS-CoV-2 virus growing in cell culture." ScienceDaily. ScienceDaily, 3 April 2020. <www.sciencedaily.com/releases/2020/04/200403115115.htm>.

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Exhibit "R"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

adamsonbarbecue Enough is enough- we're opening.

Starting Tuesday, November 24th, the Adamson Barbecue Etobicoke location will be open for dine-in service.

19w

alibertymaniac
http://commonlawcourt.com

12w Reply

averyfuckingveber I live in Oshawa. They keep getting fined and keep paying it off. No lines. Packed stores. No sanitization. This covid lockdown restrictions are absolute bullshit. It is an all

709,244 views

NOVEMBER 23, 2020

Exhibit "S"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

TORONTO

Dr. Eileen de Villa
Medical Officer of Health

Public Health
277 Victoria Street
5th Floor
Toronto, Ontario M5B 1W2

toronto.ca/health

Date: November 24, 2020

ORDER

Made pursuant to Section 22 of the
Health Protection and Promotion Act, R.S.O. 1990, Chapter H.7

TO: Adamson Barbecue Limited O/A Adamson Barbecue
William Adamson Skelly
176 Wicksteed Avenue,
Toronto, Ontario
M4G 2B6

I, Eileen de Villa, Medical Officer of Health for the City of Toronto Health Unit, order you to take the following action:

1. **Immediately** close the premises carrying on business operating as Adamson BBQ and located at 7 Queen Elizabeth Blvd., Toronto, Ontario, M8Z 1L8 (the "Premises") and keep it closed until you are authorized in writing to reopen by Toronto Public Health.
2. **Immediately** post the red "closure" placard provided to you by Toronto Public Health in a conspicuous location at the entrance to the Premises until you are authorized in writing to re-open the Premises by Toronto Public Health.
3. Ensure the following public health measures are implemented in order to decrease or eliminate the risk to health presented by COVID-19 in the context of your operations:
    a) Compliance with all applicable legal requirements including but not limited to Ontario Regulation 82/20 issued under the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020.
    b) Compliance with all applicable Toronto Public Health guidance pertaining to COVID-19
4. Comply with any further instructions from Toronto Public Health pertaining to this order.

THE REASONS for this ORDER are that:

1. COVID-19 is a disease of public health significance and a disease that is communicable from person to person by the COVID-19 virus. It is now present in the City of Toronto and therefore poses a risk to the health of the residents of the City of Toronto. COVID-19 been declared a pandemic by the World Health Organization.

2. The COVID-19 virus is spread from an infected person to a close contact by direct contact or when respiratory secretions from the infected person enter the eyes, nose or mouth of another person. COVID-19 may be transmitted from one person to another during an asymptomatic and pre-symptomatic state.

3. On November 24, 2020, a Public Health Inspector from Toronto Public Health conducted an inspection and observed the following:
   a) Patrons dining indoors; and
   b) Patrons were not physically distanced with a minimum distance of two metres from other persons; and
   c) Persons working in the establishment not wearing personal protective equipment while coming into contact within two metres of other persons not wearing masks; and
   d) Capacity of the establishment such that persons were not able to physically distance by at least two metres; and
   e) Music played at a decibel level that exceeds the level at which normal conversation is possible.

I am of the opinion, on reasonable and probable grounds that:

a. a communicable disease exists or may exist or there is an immediate risk of an outbreak of a communicable disease in the health unit served by me;

b. the communicable disease presents a risk to the health of persons in the health unit served by me; and

c. the requirements specified in this order are necessary in order to decrease or eliminate the risk to health presented by the communicable disease.

NOTICE

TAKE NOTICE THAT you are entitled to a hearing by the Health Services Appeal and Review Board if you have delivered to me and to the Health Services Appeal and Review Board, 151 Bloor Street West, 9th Floor, Toronto, Ontario, M5S 1S4*, notice in writing, requesting a hearing within 15 days after service of this Order.

*At the time of this Order, all requests for appeals and reviews, submissions, materials, and inquiries must be sent to the Health Services Appeal and Review Board by e-mail to hsarb@ontario.ca or faxed at 416-327-8524. See: http://www.hsarb.on.ca/ for current information.

AND TAKE FURTHER NOTICE THAT although a hearing may be requested this Order takes effect when it is served upon you.

FAILURE to comply with this Order is an offence for which you may be liable, on conviction, to a fine of not more than $5,000 (for a person) or $25,000 (for a corporation) for every day or part of each day on which the offence occurs or continues.

Bille

Eileen de Villa
Medical Officer of Health
City of Toronto Health Unit
277 Victoria Street, 5th Floor
Toronto, Ontario
M5B 1W2

Email: medicalofficerofhealth@toronto.ca

SERVED UPON: WILLIAM ADAMSON SKELLY

DATE/TIME: NOVEMBER 2nd / 2020 / 15:55

HAND DELIVERED BY: John Foti

Exhibit "T"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

TORONTO

Dr. Eileen de Villa
Medical Officer of Health

Public Health
277 Victoria Street
5th Floor
Toronto, Ontario M5B 1W2
toronto.ca/health

VIA EMAIL

November 25, 2020

TO: Municipal Licensing and Standards and Toronto Public Health staff including By-law Enforcement Officers and Public Health Inspectors, the Chief of Police of the Toronto Police Services and members of the Toronto Police Services, and third parties engaged to provide locksmith and other services specified below

RE: Directions to take actions in respect of section 22 order regarding closure of Adamson Barbecue

On November 24, 2020, I issued the attached Order under section 22 of the Health Protection and Promotion Act, R.S.O. 1990, c.H.7. to require the closure of the premises operating as Adamson Barbecue and located at 7 Queen Elizabeth Blvd., Toronto, Ontario, M8Z 1L8 (the "Premises").

Further to that Order, and pursuant to section 24 of the Health Protection and Promotion Act, I am directing you to take actions necessary to ensure that the Premises is and remains closed, and that access to the Premises is restricted until such time as the Order has been lifted. These actions include the engagement of third party services to remove existing locks and secure a magnetic lock, padlock, or other similar mechanism on all doors to the Premises, the installation of cinder blocks or other blockades to prevent entry, and the posting of notices to notify members of the public about the Order.

The above actions should not prohibit entry to the Premises for health and safety purposes, including inspections under the Building Code and Fire Code.

Thank you for your support in undertaking these actions in order to decrease the risk to health presented by COVID-19.

Yours truly,

Dr. Eileen de Villa
Medical Officer of Health
Toronto Public Health, City of Toronto

c. Sylvanus Thompson, Associate Director, Healthy Environments
Melissa Simone, Manager, Healthy Environments
Paul Di Salvo, Manager, Healthy Environments
Carleton Grant, Executive Director Municipal Licensing & Standards

Exhibit "U"

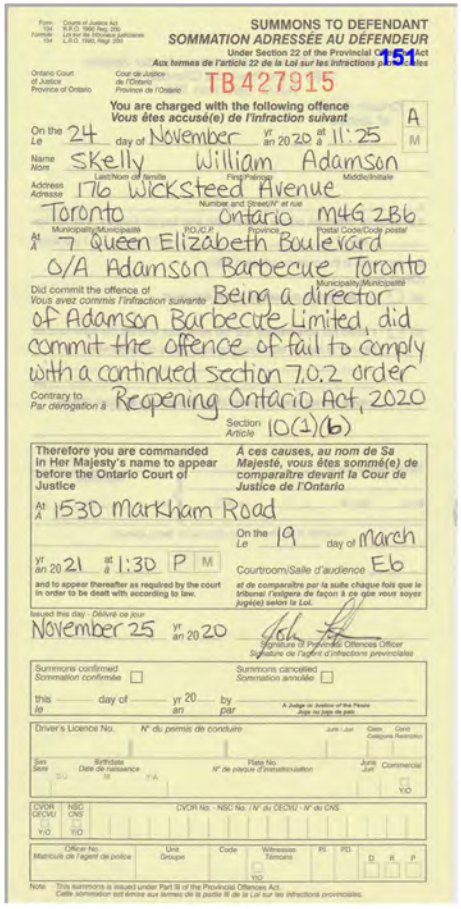
This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

151

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427915

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant

On the 24 day of November yr an 2020 at 11:25 — A

Name: Skelly William Adamson (Last/Nom de famille, First/Prénom, Middle/Initiale)

Address: 176 Wicksteed Avenue (Number and Street/N° et rue)
Toronto (Municipality) Ontario (Province) M4G 2B6 (Postal Code)

At: 7 Queen Elizabeth Boulevard (Municipality)
O/A Adamson Barbecue Toronto

Did commit the offence of / Vous avez commis l'infraction suivante: Being a director of Adamson Barbecue Limited, did commit the offence of fail to comply with a continued section 7.0.2 order

Contrary to / Par dérogation à: Reopening Ontario Act, 2020 Section / Article 10(1)(b)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At: 1530 Markham Road

On the 19 day of March

yr an 2021 at 1:30 P M — Courtroom/Salle d'audience E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: November 25 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this ___ day of ___ yr 20__ / le ___ jour de ___ an 20__ by / par ___ A Judge or Justice of the Peace / Juge ou juge de paix

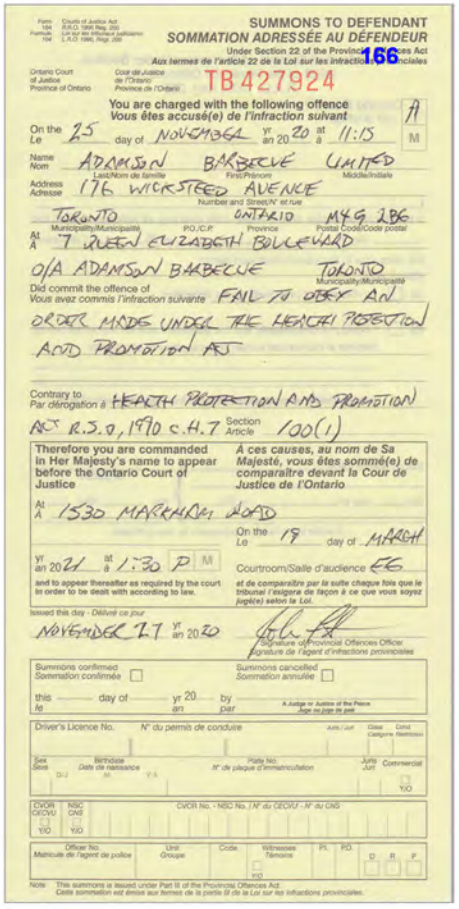
Driver's Licence No. / N° du permis de conduire — Juris. / Jur. — Class / Categ. — Cond. / Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris. / Jur. — Commercial

CVOR / CEVU — NSC / CNS — CVOR No. - NSC No. / N° du CEVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — Pl. — P.D. — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

166

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427924

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant

On the 25 day of NOVEMBER yr an 2020 at 11:15 — A

Name: ADAMSON BARBECUE LIMITED (Last/Nom de famille, First/Prénom, Middle/Initiale)

Address: 176 WICKSTEED AVENUE (Number and Street/N° et rue)
TORONTO (Municipality) ONTARIO (Province) M4G 2B6 (Postal Code)

At: 7 QUEEN ELIZABETH BOULEVARD (Municipality)
O/A ADAMSON BARBECUE TORONTO

Did commit the offence of / Vous avez commis l'infraction suivante: FAIL TO OBEY AN ORDER MADE UNDER THE HEALTH PROTECTION AND PROMOTION ACT

Contrary to / Par dérogation à: HEALTH PROTECTION AND PROMOTION ACT R.S.O. 1990 c.H.7 Section / Article 100(1)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At: 1530 MARKHAM ROAD

On the 18 day of MARCH

yr an 2021 at 1:30 P M — Courtroom/Salle d'audience E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: NOVEMBER 27 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this ___ day of ___ yr 20__ / le ___ jour de ___ an 20__ by / par ___ A Judge or Justice of the Peace / Juge ou juge de paix

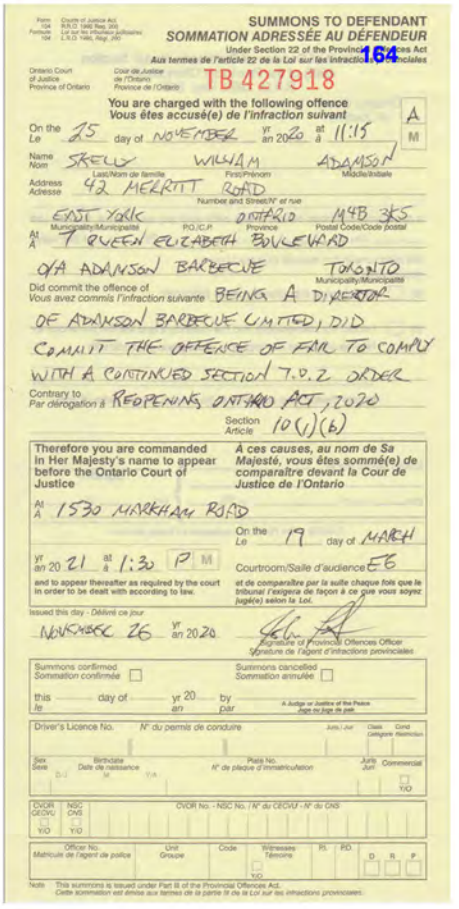
Driver's Licence No. / N° du permis de conduire — Juris. / Jur. — Class / Categ. — Cond. / Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris. / Jur. — Commercial

CVOR / CEVU — NSC / CNS — CVOR No. - NSC No. / N° du CEVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — Pl. — P.D. — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

164

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427918

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant

On the 25 day of NOVEMBER yr an 2020 at 11:15 — A

Name: SKELLY WILLIAM ADAMSON (Last/Nom de famille, First/Prénom, Middle/Initiale)

Address: 42 MERRITT ROAD (Number and Street/N° et rue)
EAST YORK (Municipality) ONTARIO (Province) M4B 3K5 (Postal Code)

At: 7 QUEEN ELIZABETH BOULEVARD (Municipality)
O/A ADAMSON BARBECUE TORONTO

Did commit the offence of / Vous avez commis l'infraction suivante: BEING A DIRECTOR OF ADAMSON BARBECUE LIMITED, DID COMMIT THE OFFENCE OF FAIL TO COMPLY WITH A CONTINUED SECTION 7.0.2 ORDER

Contrary to / Par dérogation à: REOPENING ONTARIO ACT, 2020 Section / Article 10(1)(b)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At: 1530 MARKHAM ROAD

On the 19 day of MARCH

yr an 2021 at 1:30 P M — Courtroom/Salle d'audience E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: NOVEMBER 26 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this ___ day of ___ yr 20__ / le ___ jour de ___ an 20__ by / par ___ A Judge or Justice of the Peace / Juge ou juge de paix

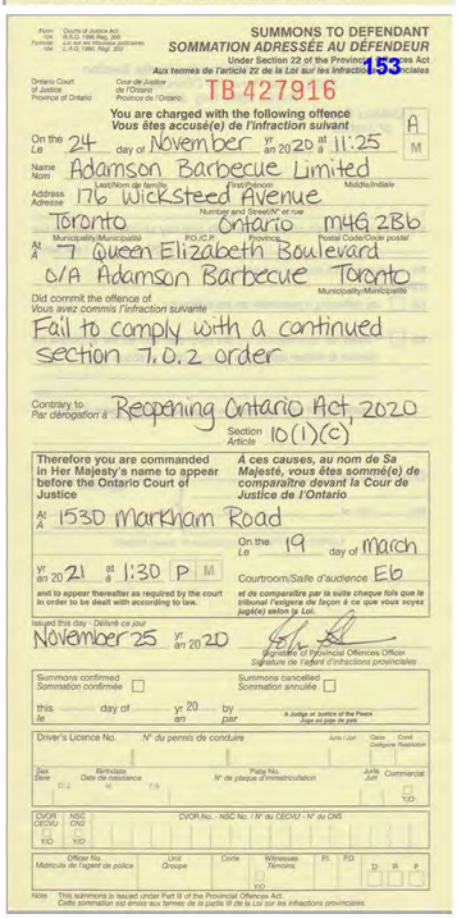
Driver's Licence No. / N° du permis de conduire — Juris. / Jur. — Class / Categ. — Cond. / Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris. / Jur. — Commercial

CVOR / CEVU — NSC / CNS — CVOR No. - NSC No. / N° du CEVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — Pl. — P.D. — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

153

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427916

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant

On the 24 day of November yr an 2020 at 11:25 — A

Name: Adamson Barbecue Limited (Last/Nom de famille, First/Prénom, Middle/Initiale)

Address: 176 Wicksteed Avenue (Number and Street/N° et rue)
Toronto (Municipality) Ontario (Province) M4G 2B6 (Postal Code)

At: 7 Queen Elizabeth Boulevard (Municipality)
O/A Adamson Barbecue Toronto

Did commit the offence of / Vous avez commis l'infraction suivante: Fail to comply with a continued section 7.0.2 order

Contrary to / Par dérogation à: Reopening Ontario Act, 2020 Section / Article 10(1)(c)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At: 1530 Markham Road

On the 19 day of March

yr an 2021 at 1:30 P M — Courtroom/Salle d'audience E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: November 25 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this ___ day of ___ yr 20__ / le ___ jour de ___ an 20__ by / par ___ A Judge or Justice of the Peace / Juge ou juge de paix

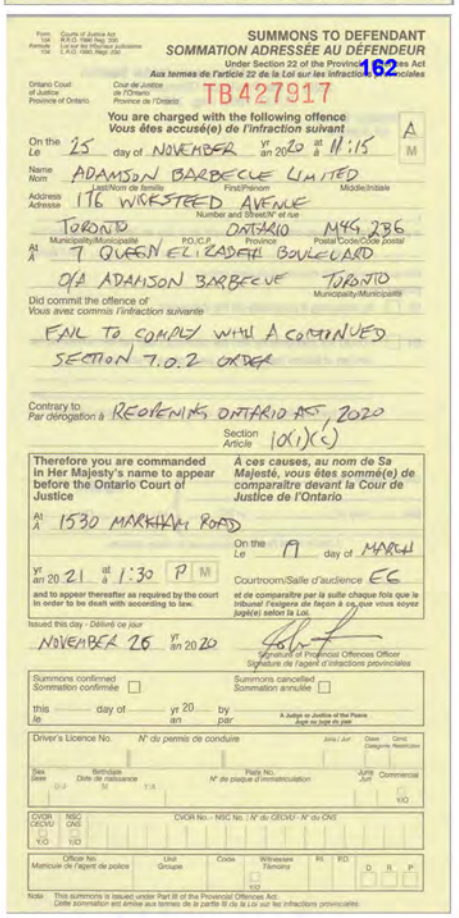
Driver's Licence No. / N° du permis de conduire — Juris. / Jur. — Class / Categ. — Cond. / Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris. / Jur. — Commercial

CVOR / CEVU — NSC / CNS — CVOR No. - NSC No. / N° du CEVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — Pl. — P.D. — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

162

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427917

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant

On the 25 day of NOVEMBER yr an 2020 at 11:15 — A

Name: ADAMSON BARBECUE LIMITED (Last/Nom de famille, First/Prénom, Middle/Initiale)

Address: 176 WICKSTEED AVENUE (Number and Street/N° et rue)
TORONTO (Municipality) ONTARIO (Province) M4G 2B6 (Postal Code)

At: 7 QUEEN ELIZABETH BOULEVARD (Municipality)
O/A ADAMSON BARBECUE TORONTO

Did commit the offence of / Vous avez commis l'infraction suivante: FAIL TO COMPLY WITH A CONTINUED SECTION 7.0.2 ORDER

Contrary to / Par dérogation à: REOPENING ONTARIO ACT, 2020 Section / Article 10(1)(c)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At: 1530 MARKHAM ROAD

On the 19 day of MARCH

yr an 2021 at 1:30 P M — Courtroom/Salle d'audience E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: NOVEMBER 26 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this ___ day of ___ yr 20__ / le ___ jour de ___ an 20__ by / par ___ A Judge or Justice of the Peace / Juge ou juge de paix

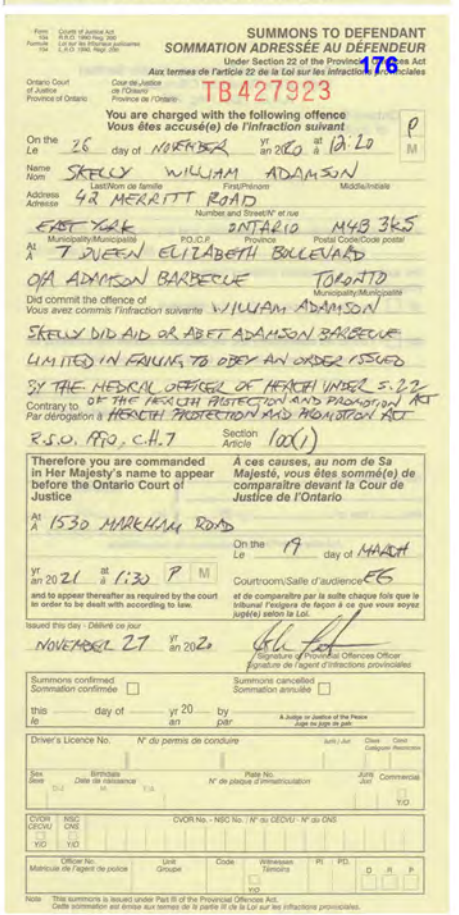
Driver's Licence No. / N° du permis de conduire — Juris. / Jur. — Class / Categ. — Cond. / Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris. / Jur. — Commercial

CVOR / CEVU — NSC / CNS — CVOR No. - NSC No. / N° du CEVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — Pl. — P.D. — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

176

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427923

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant

On the 26 day of NOVEMBER yr an 2020 at 10:20 — P

Name: SKELLY WILLIAM ADAMSON (Last/Nom de famille, First/Prénom, Middle/Initiale)

Address: 42 MERRITT ROAD (Number and Street/N° et rue)
EAST YORK (Municipality) ONTARIO (Province) M4B 3K5 (Postal Code)

At: 7 QUEEN ELIZABETH BOULEVARD (Municipality)
O/A ADAMSON BARBECUE TORONTO

Did commit the offence of / Vous avez commis l'infraction suivante: WILLIAM ADAMSON SKELLY DID AID OR ABET ADAMSON BARBECUE LIMITED IN FAILING TO OBEY AN ORDER ISSUED BY THE MEDICAL OFFICER OF HEALTH UNDER S. 22 OF THE HEALTH PROTECTION AND PROMOTION ACT

Contrary to / Par dérogation à: HEALTH PROTECTION AND PROMOTION ACT R.S.O. 1990, c.H.7 Section / Article 100(1)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At: 1530 MARKHAM ROAD

On the 19 day of MARCH

yr an 2021 at 1:30 P M — Courtroom/Salle d'audience E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: NOVEMBER 27 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this ___ day of ___ yr 20__ / le ___ jour de ___ an 20__ by / par ___ A Judge or Justice of the Peace / Juge ou juge de paix

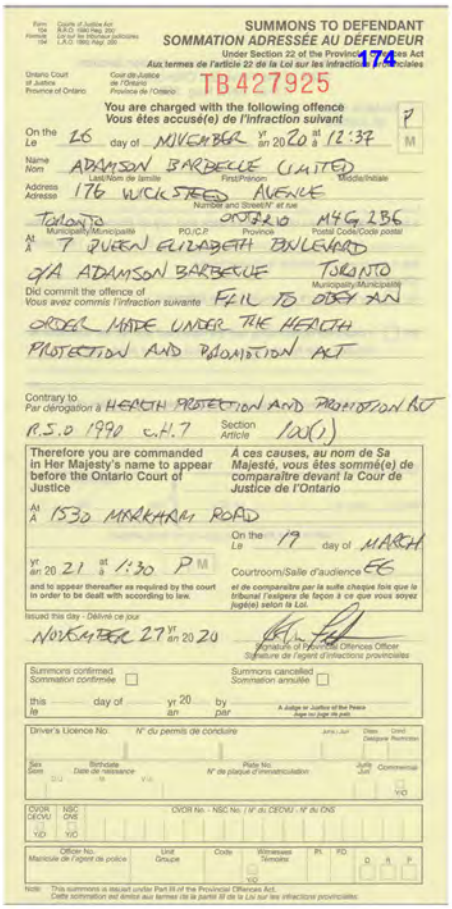
Driver's Licence No. / N° du permis de conduire — Juris. / Jur. — Class / Categ. — Cond. / Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris. / Jur. — Commercial

CVOR / CEVU — NSC / CNS — CVOR No. - NSC No. / N° du CEVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — Pl. — P.D. — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

174

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427925

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant: P

On the 26 day of NOVEMBER yr an 2020 at 12:37

Name: ADAMSON BARBECUE LIMITED (Last/Nom de famille — First/Prénom — Middle/Initiale)

Address: 176 WICKSTEED AVENUE (Number and Street/N° et rue)

TORONTO (Municipality/Municipalité) ONTARIO (Province) M4G 2B6 (Postal Code/Code postal)

At A: 7 QUEEN ELIZABETH BOULEVARD

O/A ADAMSON BARBECUE TORONTO (Municipality/Municipalité)

Did commit the offence of / Vous avez commis l'infraction suivante: FAIL TO OBEY AN ORDER MADE UNDER THE HEALTH PROTECTION AND PROMOTION ACT

Contrary to / Par dérogation à: HEALTH PROTECTION AND PROMOTION ACT R.S.O 1990 c.H.7 — Section / Article: 100(1)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At A: 1530 MARKHAM ROAD

On the Le: 19 day of MARCH

yr an 2021 at à 1:30 P M

Courtroom/Salle d'audience: E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: NOVEMBER 27 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this — day of — yr 20 — by — A Judge or Justice of the Peace / Juge ou juge de paix

Driver's Licence No. / N° du permis de conduire — Juris / Jur — Class / Catégorie — Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris / Jur — Commercial

CVOR / CECVU — NSC / CNS — CVOR No. - NSC No. / N° du CECVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — PI — PD — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.

SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

172

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427921

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant: P

On the 26 day of NOVEMBER yr an 2020 at 12:37

Name: SKELLY WILLIAM ADAMSON (Last/Nom de famille — First/Prénom — Middle/Initiale)

Address: 92 MERRITT ROAD (Number and Street/N° et rue)

EAST YORK (Municipality/Municipalité) ONTARIO (Province) M4B 3K5 (Postal Code/Code postal)

At A: 7 QUEEN ELIZABETH BOULEVARD

O/A ADAMSON BARBECUE TORONTO (Municipality/Municipalité)

Did commit the offence of / Vous avez commis l'infraction suivante: BEING A DIRECTOR OF ADAMSON BARBECUE LIMITED, DID COMMIT THE OFFENCE OF FAIL TO COMPLY WITH A CONTINUED SECTION 7.0.2 ORDER

Contrary to / Par dérogation à: REOPENING ONTARIO ACT, 2020 — Section / Article: 10(1)(b)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At A: 1530 MARKHAM RD

On the Le: A day of MARCH

yr an 2021 at à 1:30 P M

Courtroom/Salle d'audience: E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: NOVEMBER 27 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this — day of — yr 20 — by — A Judge or Justice of the Peace / Juge ou juge de paix

Driver's Licence No. / N° du permis de conduire — Juris / Jur — Class / Catégorie — Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris / Jur — Commercial

CVOR / CECVU — NSC / CNS — CVOR No. - NSC No. / N° du CECVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — PI — PD — D R P

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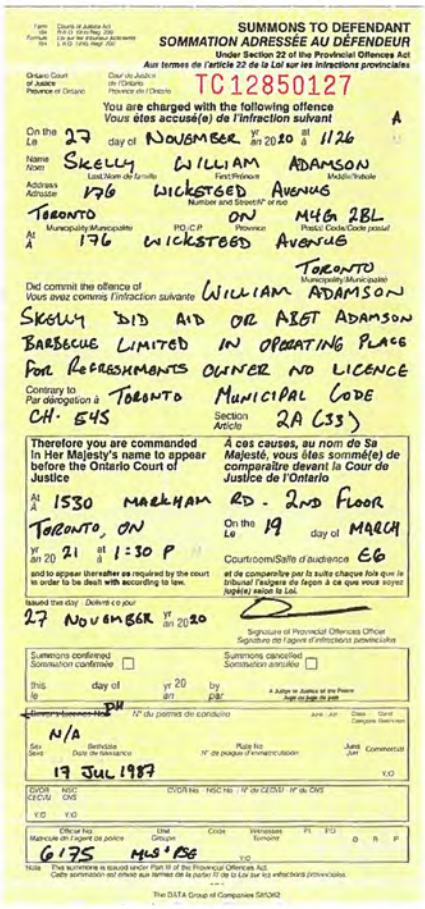


SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TC 12850127

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant: A

On the 27 day of NOVEMBER yr an 2020 at 1126

Name: SKELLY WILLIAM ADAMSON (Last/Nom de famille — First/Prénom — Middle/Initiale)

Address: 176 WICKSTEED AVENUE (Number and Street/N° et rue)

TORONTO (Municipality/Municipalité) ON (Province) M4G 2BL (Postal Code/Code postal)

At A: 176 WICKSTEED AVENUE

TORONTO (Municipality/Municipalité)

Did commit the offence of / Vous avez commis l'infraction suivante: WILLIAM ADAMSON SKELLY DID AID OR ABET ADAMSON BARBECUE LIMITED IN OPERATING PLACE FOR REFRESHMENTS OWNER NO LICENCE

Contrary to / Par dérogation à: TORONTO MUNICIPAL CODE CH. 545 — Section / Article: 2A (33)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At A: 1530 MARKHAM RD. 2ND FLOOR

TORONTO, ON

On the Le: 19 day of MARCH

yr an 20 21 at à 1:30 P

Courtroom/Salle d'audience: E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: 27 NOVEMBER yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this — day of — yr 20 — by — A Judge or Justice of the Peace / Juge ou juge de paix

Driver's Licence No. / N° du permis de conduire: DH — N/A — Juris / Jur — Class / Catégorie — Restriction

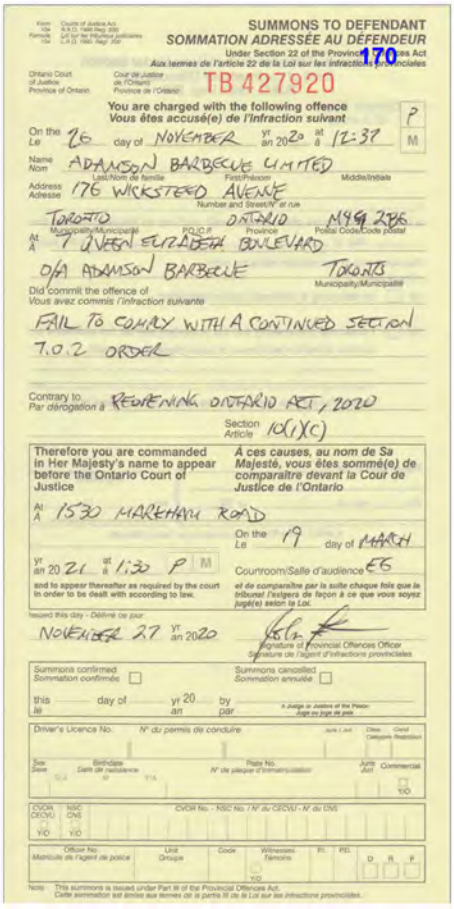
Sex / Sexe — Birthdate / Date de naissance: 17 JUL 1987 — Plate No. / N° de plaque d'immatriculation — Juris / Jur — Commercial

CVOR / CECVU — NSC / CNS — CVOR No. - NSC No. / N° du CECVU - N° du CNS

Officer No. / Matricule de l'agent de police: 6175 — Unit / Groupe: MLS — Code: PSE — Witnesses / Témoins — PI — PD — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.

The DATA Group of Companies 58042



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

170

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 427920

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant: P

On the 26 day of NOVEMBER yr an 2020 at 12:37

Name: ADAMSON BARBECUE LIMITED (Last/Nom de famille — First/Prénom — Middle/Initiale)

Address: 176 WICKSTEED AVENUE (Number and Street/N° et rue)

TORONTO (Municipality/Municipalité) ONTARIO (Province) M4G 2B6 (Postal Code/Code postal)

At A: 7 QUEEN ELIZABETH BOULEVARD

O/A ADAMSON BARBECUE TORONTO (Municipality/Municipalité)

Did commit the offence of / Vous avez commis l'infraction suivante: FAIL TO COMPLY WITH A CONTINUED SECTION 7.0.2 ORDER

Contrary to / Par dérogation à: REOPENING ONTARIO ACT, 2020 — Section / Article: 10(1)(c)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At A: 1530 MARKHAM ROAD

On the Le: 19 day of MARCH

yr an 2021 at à 1:30 P M

Courtroom/Salle d'audience: E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: NOVEMBER 27 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this — day of — yr 20 — by — A Judge or Justice of the Peace / Juge ou juge de paix

Driver's Licence No. / N° du permis de conduire — Juris / Jur — Class / Catégorie — Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris / Jur — Commercial

CVOR / CECVU — NSC / CNS — CVOR No. - NSC No. / N° du CECVU - N° du CNS

Officer No. / Matricule de l'agent de police — Unit / Groupe — Code — Witnesses / Témoins — PI — PD — D R P

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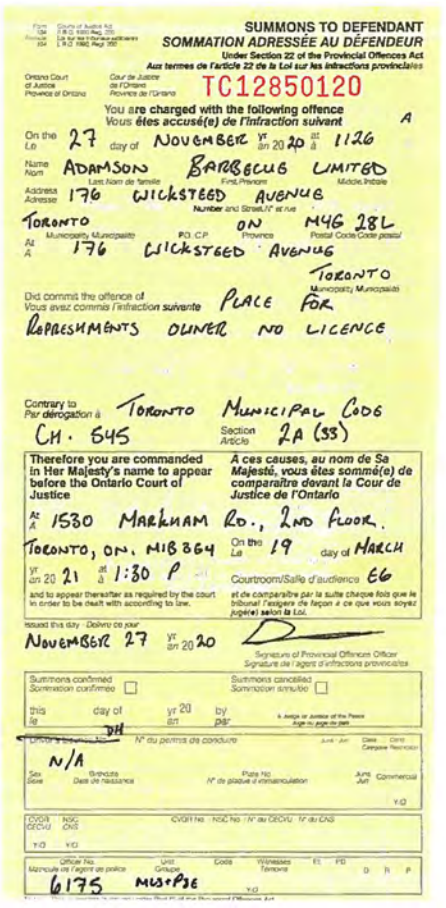


SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TC12850120

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant: A

On the 27 day of NOVEMBER yr an 2020 at 1126

Name: ADAMSON BARBECUE LIMITED (Last/Nom de famille — First/Prénom — Middle/Initiale)

Address: 176 WICKSTEED AVENUE (Number and Street/N° et rue)

TORONTO (Municipality/Municipalité) ON (Province) M4G 2BL (Postal Code/Code postal)

At A: 176 LICKSTEED AVENUE

TORONTO (Municipality/Municipalité)

Did commit the offence of / Vous avez commis l'infraction suivante: PLACE FOR REFRESHMENTS OWNER NO LICENCE

Contrary to / Par dérogation à: TORONTO MUNICIPAL CODE CH. 545 — Section / Article: 2A (33)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At A: 1530 MARKHAM RD., 2ND FLOOR.

TORONTO, ON. M1B 3G4

On the Le: 19 day of MARCH

yr an 20 21 at à 1:30 P

Courtroom/Salle d'audience: E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: NOVEMBER 27 yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

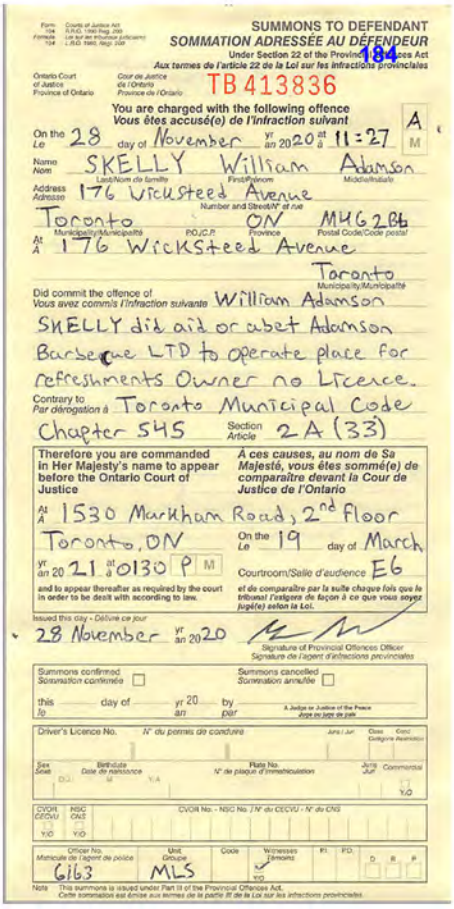
this — day of — yr 20 — by — A Judge or Justice of the Peace / Juge ou juge de paix

Driver's Licence No. / N° du permis de conduire: DH — N/A — Juris / Jur — Class / Catégorie — Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris / Jur — Commercial

CVOR / CECVU — NSC / CNS — CVOR No. - NSC No. / N° du CECVU - N° du CNS

Officer No. / Matricule de l'agent de police: 6175 — Unit / Groupe: MLS — Code: PSE — Witnesses / Témoins — PI — PD — D R P



SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

184

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario: TB 413836

You are charged with the following offence / Vous êtes accusé(e) de l'infraction suivant: A

On the 28 day of November yr an 2020 at 11:27

Name: SKELLY William Adamson (Last/Nom de famille — First/Prénom — Middle/Initiale)

Address: 176 Wicksteed Avenue (Number and Street/N° et rue)

Toronto (Municipality/Municipalité) ON (Province) M4G 2B6 (Postal Code/Code postal)

At A: 176 Wicksteed Avenue

Toronto (Municipality/Municipalité)

Did commit the offence of / Vous avez commis l'infraction suivante: William Adamson SKELLY did aid or abet Adamson Barbecue LTD to operate place for refreshments Owner no Licence.

Contrary to / Par dérogation à: Toronto Municipal Code Chapter 545 — Section / Article: 2A (33)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice / À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At A: 1530 Markham Road, 2nd floor

Toronto, ON

On the Le: 19 day of March

yr an 20 21 at à 0130 P M

Courtroom/Salle d'audience: E6

and to appear thereafter as required by the court in order to be dealt with according to law. / et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day - Délivré ce jour: 28 November yr an 2020

Signature of Provincial Offences Officer / Signature de l'agent d'infractions provinciales

Summons confirmed / Sommation confirmée ☐ — Summons cancelled / Sommation annulée ☐

this — day of — yr 20 — by — A Judge or Justice of the Peace / Juge ou juge de paix

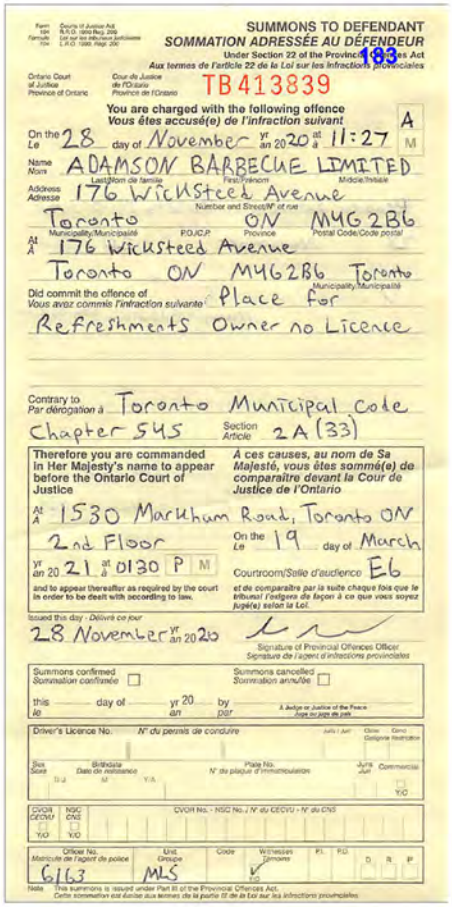
Driver's Licence No. / N° du permis de conduire — Juris / Jur — Class / Catégorie — Restriction

Sex / Sexe — Birthdate / Date de naissance — Plate No. / N° de plaque d'immatriculation — Juris / Jur — Commercial

CVOR / CECVU — NSC / CNS — CVOR No. - NSC No. / N° du CECVU - N° du CNS

Officer No. / Matricule de l'agent de police: 6163 — Unit / Groupe: MLS — Code — Witnesses / Témoins — PI — PD — D R P

Note: This summons is issued under Part III of the Provincial Offences Act. / Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.



Form 104 Courts of Justice Act R.R.O. 1990 Reg. 200 Loi sur les tribunaux judiciaires L.R.O. 1990, règl. 200

SUMMONS TO DEFENDANT
SOMMATION ADRESSÉE AU DÉFENDEUR
Under Section 22 of the Provincial Offences Act
Aux termes de l'article 22 de la Loi sur les infractions provinciales

183

Ontario Court of Justice / Province of Ontario — Cour de Justice de l'Ontario / Province de l'Ontario

TB413839

You are charged with the following offence
Vous êtes accusé(e) de l'infraction suivant

A / M

On the / *Le* 28 day of / November yr / an 2020 at / à 11:27

Name / Nom: ADAMSON BARBECUE LIMITED
(Last/Nom de famille — First/Prénom — Middle/Initials)

Address / Adresse: 176 Wicksteed Avenue
(Number and Street/N° et rue)

Toronto (Municipality/Municipalité) — P.O./C.P. — ON (Province) — M4G 2B6 (Postal Code/Code postal)

At / *À*: 176 Wicksteed Avenue
Toronto ON M4G 2B6 Toronto (Municipality/Municipalité)

Did commit the offence of / *Vous avez commis l'infraction suivante*: Place for Refreshments Owner no Licence

Contrary to / *Par dérogation à*: Toronto Municipal Code
Chapter 545 — Section / *Article*: 2A (33)

Therefore you are commanded in Her Majesty's name to appear before the Ontario Court of Justice

À ces causes, au nom de Sa Majesté, vous êtes sommé(e) de comparaître devant la Cour de Justice de l'Ontario

At / *À*: 1530 Markham Road, Toronto ON
2nd Floor

On the / *Le* 19 day of / March

yr / *an* 20 21 at / *à* 0130 P M

Courtroom/*Salle d'audience*: E6

and to appear thereafter as required by the court in order to be dealt with according to law.

et de comparaître par la suite chaque fois que le tribunal l'exigera de façon à ce que vous soyez jugé(e) selon la Loi.

Issued this day / *Délivré ce jour*
28 November yr / an 2020

Signature of Provincial Offences Officer
Signature de l'agent d'infractions provinciales

Summons confirmed / *Sommation confirmée* ☐ — Summons cancelled / *Sommation annulée* ☐

this / *le* ____ day of / ____ yr / *an* 20__ by / *par* ____
(A Judge or Justice of the Peace / *Juge ou juge de paix*)

Driver's Licence No. / *N° du permis de conduire* — Juris / Juri — Class / Catégorie — Cond.

Sex / Sexe — Birthdate / Date de naissance (D-J / M / Y-A) — Plate No. / *N° de plaque d'immatriculation* — Jur's / Juri — Commercial Y/O

CVOR / DECVU Y/O — NSC / CNS Y/O — CVOR No. - NSC No. / *N° du CEDVU - N° du CNS*

Officer No. / *Matricule de l'agent de police*: 6163 — Unit / Groupe: MLS — Code — Witnesses / Témoins Y/O ✓ — P.I. — R.D. — D — R — P

Note: This summons is issued under Part III of the Provincial Offences Act. / *Cette sommation est émise aux termes de la partie III de la Loi sur les infractions provinciales.*

Exhibit "V"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths
Katherine Kowalchuk
Barrister and Solicitor

TORONTO

Dr. Eileen de Villa
Medical Officer of Health

Public Health
277 Victoria Street, 5th Floor
Toronto, Ontario M5B 1W2
toronto.ca/health
416-338-7600

NOTICE UNDER THE TRESPASS TO PROPERTY ACT

November 26, 2020

To: All persons

Re: Adamson Barbecue, located at 7 Queen Elizabeth Boulevard, Toronto, Ontario, M8Z 1L8

On November 24, 2020, I issued an order under section 22 of the *Health Protection and Promotion Act* R.S.O. 1990, c.H.7. (the "Order") requiring the closure of Adamson Barbecue Limited, operating as Adamson Barbecue, located at 7 Queen Elizabeth Boulevard, Toronto, Ontario, M8Z 1L8 (the "Premises"). This legally enforceable Order establishes that I have the authority to determine which persons will be allowed to enter the Premise at any time or for any purpose. Accordingly, and pursuant to the *Trespass to Property Act*, R.S.O. 1990, C.T21, I am an occupier of the Premises.

As an occupier, I have issued this Notice of Trespass under the authority of the *Trespass to Property Act* to all persons who do not follow my lawful Order. This Notice confirms that you are not permitted to access, enter in or be on the Premises.

Please be advised that this Notice of Trespass may be enforced in accordance with the provisions of the *Trespass to Property Act*, or by any other legal means available to the City of Toronto.

In the event that you do not adhere to the terms and conditions of this Notice of Trespass, the Toronto Police Service may charge you under the *Trespass to Property Act*.

Please be further advised that under the *Trespass to Property Act*, every person who engages in an activity on premises when the activity has been prohibited under the Act is guilty of an offence and is liable, on conviction, to a fine of not more than $10,000.

Please contact the above number if you have any questions or concerns regarding this Notice.

This Notice of Trespass will remain in effect for the duration of the Order unless you are notified in writing that it has been withdrawn.

Dated in the City of Toronto this 26 day of November, 2020.

Sincerely,

Dr. Eileen de Villa
Medical Officer of Health
Toronto Public Health
City of Toronto

SUPERIOR COURT OF JUSTICE
(Toronto Region)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

-and-

WILLIAM SKELLY

Applicant

CROWN'S NOTICE OF RESPONSE
Application for Bail Review
s.520 *Criminal Code of Canada*

Michael Townsend
Assistant Crown Attorney
Ministry of the Attorney General
2201 Finch Avenue West, Unit 29
Toronto, Ontario
M9M 2Y9

Tel: 416-314-3936
Fax: 416-314-3949

Facts:

1. The allegations that were read out to the presiding Justice of the Peace can be summarized as follows:

a. **Monday, November 24, 2020** - The provincial government issued an order for stricter measures to be taken for businesses in the face of a growing number of infections caused by the global COVID-19 pandemic. As a result of these lockdown measures, restaurants were prohibited from offering indoor or outdoor dining, but were permitted to offer takeout, drive-thru or delivery.[1]

b. **Tuesday, November 25, 2020** – Police received information that the Applicant, the owner of Adamson Barbeque, took to social media to publicly defy provincial health orders by opening his business. Members of the Toronto Police Service, the Toronto Municipal Licencing and Standards By-Law officers, and Toronto Public Health officials attended the property and observed the Applicant failing to comply with a Section 7.0.2 order, contrary to the Re-opening of Ontario Act and an order to close the establishment which was issued by the Toronto Public Health authorities.[2]

c. **Wednesday, November 26, 2020** - Members of the Toronto Police Service received further information that the Applicant disregarded that order and was continuing to operate his business, failing again to comply with Section 7.0.2 order. As officers attended the location and witnessed a large crowd, approximately a hundred to a hundred fifty people, outside protesting and approximately 50 plus people inside. There was dining indoors and the restaurant was open for business. Officers witnessed staff serving customers, preparing food and continuing to disregard the Reopening Ontario Act. Customers at that time were allowed to eat inside the restaurant and had been seated at tables with total disregard for social – social distancing. Members of the Toronto Public Health Unit were on scene and laid charges against the Applicant. Police at that time continued to simply make efforts to support the Toronto Public Health authorities and keep the peace.[3]

d. **Thursday, November 27, 2020** – As a result of the recent violations, Toronto Public Health Officials took possession of the premises where Adamson Barbeque is located, placed a padlock on the front door, and gave the Applicant notice under the Trespass Act. Toronto Police Services were on scene at the restaurant where a large crowd had gathered.[4]

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[1] Transcript Dated 27 November 2020, p.12
[2] Transcript Dated 27 November 2020, p.13
[3] Transcript dated 27 November 2020, p 13
[4] Transcript dated 27 November 2020, p 14-15.

Trespass Charge: The Applicant arrived and approached the officers. Police advised the Applicant of the actions taken by police and public health officials. The Applicant then entered an adjacent unit and was soon observed inside the Adamson Barbeque restaurant. While police stood at the main doors of the restaurant, a large group of people rushed into the adjacent premise. When police were able to gain access to the adjacent premises, they observed that a hole had been cut in the drywall between the adjacent premises and the restaurant. The Applicant was observed serving food inside the restaurant.[5]

Mischief Charge: Police gained control of the adjacent unit entry point, and the Applicant was observed kicking the padlock that Toronto Public Health authority had placed on the restaurant's main doors. This kicking motion damaged the padlock mechanism.[6]

Obstruct Police Charge: Once the front doors were open, the Applicant exited. Officers refused to allow the Applicant to re-enter the premises. The Applicant then made his way to the adjacent unit and attempted to enter the restaurant through the opening in the drywall. At that point a police officer stopped the accused. The accused was advised that he could no longer enter the premises. The accused was given several warnings. He pushed forward in an attempt to gain entry into the residence and for that he was arrested and charged with obstructing police.[7]

2. Following his arrest, the Applicant was transported to 11 Division where he was held pending a show cause hearing.

3. Counsel for the Applicant attended court that afternoon to address the Applicant's matter. However, the Court Clerk advised counsel that the Court did not yet have an information for the Applicant's matter and that the Applicant would be appearing the next morning.[8]

4. On November 27, 2020, the day after the Applicant's arrest, the Applicant appeared before Justice of the Peace Scarfe and joined the Crown in a joint position on release. Justice of the Peace Scarfe accepted the joint position and signed a Release Order.

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[5] Transcript of Proceedings, November 27, 2020 at p. 14-16.
[6] Transcript of Proceedings, November 27, 2020 at p. 16.
[7] Transcript of Proceedings, November 27, 2020 at p. 16-17.
[8] Transcript of Proceedings, November 26, 2020 at p. 2-3.

5. The Applicant now claims that the Justice of the Peace committed an error in law by compelling the Applicant to inappropriate conditions and allowing the Crown to deprive the Court of its ability to impose fit conditions.

Standard of Review

6. In *R. v. St Cloud*, the Supreme Court of Canada held:

> Since a decision whether to order the pre-trial release of an accused involves a delicate balancing of all the relevant circumstances, the power of a judge hearing an application under s. 520 or 521 Cr.C. to review such a decision is not open-ended. I conclude that exercising this power will be appropriate in only three situations: (1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate. In the last of these situations, a reviewing judge cannot simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision. It is only if the justice gave excessive weight to one relevant factor or insufficient weight to another that the reviewing judge can intervene.[9]

7. Pursuant to s 520(7)(e) of the Criminal Code, the onus is on the Applicant to "show cause" why the original order should be vacated.

The Applicant was not deprived of his opportunity to be released on reasonable conditions

8. The Applicant claims that the Crown improperly labelled the Applicant's matter a "special bail" and thereby forced the Applicant to choose between accepting the Crown's proposed conditions of release or spending multiple days in jail pending a special bail hearing. The Respondent respectfully disagrees.

9. In September 2020, Local Administrative Justice K.E. Erlick and Local Administrative Justice of the Peace Moniz released a notice entitled "Scheduling of Special Bail Hearing Conferences and Special Bail Hearings – 2201 Finch Avenue West".[10]

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[9] *R. v. St Cloud*, [2015] 2 S.C.R. 328 at para 6.

[10] Scheduling of Special Bail Hearing Conferences and Special Bail Hearings – 2201 Finch Avenue West – attached at Appendix 'A'

Pursuant to the notice, during the COVID-19 pandemic, a bail hearing is classified as "special" if it is anticipated to be more than two hours or more in length.[11]

10. The notice further states that special bail hearings require a case conference to determine whether a special bail hearing is required. If it is determined that a special bail hearing is required, the parties then contact the trial coordinator's office to schedule a hearing date.

11. In this case, the Applicant's matter clearly qualified as a special bail hearing. As Mr. Chorney indicated on behalf of the Crown, "The Crown is of the view that [the Crown's] evidence would take more than two hours and that if this became a show cause hearing, that a special bail hearing would be required and a case conference would be required, which I would carry out with [defence counsel] as – as soon as – as he would want, including today.[12]

12. The Applicant argues that having to choose between same-day release on disagreeable terms and waiting the weekend for a special bail hearing, placed him in an "untenable" position tantamount to an error of law. This was a choice made by the Applicant and his counsel, not an imposition by the Court or the Crown. The Applicant's argument rests on the false notion that an accused is entitled to an instantaneous bail hearing.

13. Section 516(1) of the *Criminal Code* expressly contemplates that an accused may be remanded before their show cause hearing by providing that:

> A justice may, before or at any time during the course of any proceedings under section 515, on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused.

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[11] See also *R. v. Arsenault-Lewis*, [2020] O.J. No. 1879 at para 7.
[12] *Transcript of Proceedings*, November 27, 2020 at p. 7

14. It would be untenable to interpret an accused's right to address bail as providing an unequivocal right to have a show cause hearing at the first appearance. As Justice Nordheimer (as he was then) observed in *Donnelly*, "First appearances cannot routinely turn into contested hearings or the system will collapse."[13]

15. The Ontario Court of Justice's implementation of a separate system for bail hearings that are estimated to exceed 2 hours is a reasonable response pressures caused by limited court availability during the COVID-19 pandemic. Requiring the Applicant to comply with the procedure for special bail hearings did not "vitiate" his right to address bail.

16. With respect, the Applicant's argument overlooks the fact that the Applicant's case is not the only one with a legitimate demand on the court's limited resources. As the Ontario Court of Appeal set out in *R. v. Allen*:

> No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.[14]

17. On Friday November 27, 2020 (the Applicant's first appearance at bail), the Crown was prepared to offer the Applicant a same-day case conference to schedule a date for the special bail hearing in accordance with the Court's special bail system.

18. The Applicant declined to attend the case conference or canvass available dates to address bail, preferring to accept the fastest procedural option available to him – a consent release. The Applicant made this choice with the full benefit of legal advice and full awareness that he was giving up his right to a bail hearing.

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[13] *R v Donnelly*, [2013] O.J. No. 5819 at para 41; reversed on a separate issue 2016 ONCA 988.
[14] *R. v. Allen*, [1996] O.J. No. 3175 (CA) at para 27, 110 C.C.C. (3d) 331; *R. v. Brissett*, [2017] O.J. No. 298 at paras. 29-30, affirmed: *R. v. Benjamin*, 2019 ONCA 10; *R. v. K.G.K.*, [2020] S.C.J. No. 7 at para. 61.

19. If counsel for the Applicant was "precluded from assisting the Court with the terms", it was because of his client's instructions or a tactical decision made by counsel, not the from Crown action.

20. The Crown respectfully submits that the Applicant's decision to enter into a joint submission on release at no time fettered the Justice of the Peace's discretion. It is trite law that the Court is not bound by joint submissions, either at plea or upon release at bail. While the Court is obliged to give a proposed consent release careful consideration, the Courts is not a "rubber stamp".[15] There is nothing on the record to indicate that the learned Justice of the Peace failed to give the joint submission independent consideration.

21. As set out in *Zora*, "it is not uncommon for counsel to agree to a condition that may seem somewhat onerous but does not warrant turning the matter into a contested bail hearing, which could result in the accused having to stay in custody for a few more days. In such cases, counsel can also seek a review of the condition after a reasonable length of time and ask that it be altered."[16] This does not mean that the presiding justice at the consent release hearing committed an error in law.

The Terms of Release Are Not "Clearly Inappropriate"

22. A judicial review is not a *de novo* hearing. The onus is on the Applicant to demonstrate that the impugned terms constitute an error in law or are clearly inappropriate in the sense that the presiding justice gave excessive weight to one factor or too little weight to another.[17]

23. The Applicant challenges the following terms of his consent release order:

> […]
>
> 2) Not to operate any business except in accordance with:

[15] *R. v. Singh*, [2018] O.J. No. 4757 at paras 23-27 per Justice Hill; see also *R. v. Antic*, 2017 SCC 27 at para 68.
[16] *R. v. Zora*, [2020] S.C.J. No. 14 at para 101.
[17] *R. v. St Cloud*, [2015] 2 S.C.R. 328 at paras 6, 121.

A) Reopening Ontario Act and any regulations or orders made thereunder

B) Health Protection and Promotion Act and any regulations or orders made

C) Any lawful orders issued by the Chief Public Health Officer of Ontario; and any Public Officer of the city or region in which your business operates.

[…]

4) Do not be within 200 meters of 15195 Yonge St, Aurora

5) Do not be within 200 meters of 176 Wicksteed Ave, Toronto

6) Not to post or communicate on any Internet social media platform, including but not limited to Twitter, Facebook, Instagram and Tiktok

Term #2: Not to Operate Any Business Except in Accordance with COVID-19 Health Restrictions

24. The necessity of this term is demonstrated by the Applicant's repeated and flagrant disregard for mandatory COVID-19 health measures regardless of the associated penalties. More specifically:

a. On November 25, 2020, the Applicant took to social media and brazenly advertised his non-compliance with the recently enacted Provincial Order restricting indoor dining.

b. On November 26, 2020, the Applicant continued to operate his restaurant and offer indoor dining in flagrant disregard for both the Provincial Order restricting indoor dining and Toronto Public Health's order to close his business.

c. On November 27, 2020, the Applicant continued to operate his restaurant and offer indoor dining in flagrant disregard for:

    i. The Provincial Order restricting indoor dining;

    ii. Toronto Public Health's order to close his business;

    iii. The Trespass to Property Notice from Toronto Public Health;

    iv. Multiple verbal warnings from police officers on scene.

25. A less onerous form of bail would not have sufficed. The Applicant has shown utter contempt for the order issued by Toronto Public Health and the requirements of the Reopening Ontario Act. Absent the threat of criminal sanction, the Applicant poses a "substantial likelihood" of committing an offence that endangers public protection and safety.[18]

26. As will be discussed below, the Applicant has consistently shown his commitment to defiance of any Court or Provincial Order imposed to restrict the operation of his businesses. The below clip from Instagram Account @6ixnewzz was posted on Instagram on November 27, 2020. This clip appears to show the extent to which the Applicant will go to defy Provincial Orders.

https://www.picuki.com/media/2451862267585903658

Terms #4 & #5: Do Not Be Within 200 Metres of the Other Adamson Barbeque Locations

27. The Crown respectfully submits that the appropriateness of term's #4 and #5 align with the appropriateness with term #2. While the Applicant was only arrested and charges specifically with offences related to the Adamson BBQ location at 7 Queen Elizabeth Boulevard, the Applicant has made it abundantly clear that he wishes to continue operation of all his businesses *regardless* of his bail conditions, or legislative orders listed in term #2 a-c of his release order.

28. The Applicant has made clear his intention to defy those orders in the following clip, posted to the Twitter account of @LeighStewy on November 28, 2020 – just one day after the Applicant was released from custody. In this video the Applicant is clearly encouraging individuals to open their businesses in defiance of provincial orders, and that the are "well within (your) rights" to do so.

https://mobile.twitter.com/leighstewy/status/1332760507040870401

[18] *R. v. Zora*, [2020] S.C.J. No. 14 at para 84.

29. Considering the Applicant's encouragement of other business owners to open up in the face of provincial orders, the Crown respectfully submits the term that the Applicant not attend the location of his other businesses is entirely an appropriate term.

Term #6: Not to post or communicate on any Internet social media platform, including but not limited to Twitter, Facebook, Instagram and Tiktok

30. The use of social media platforms like Twitter, Instagram and Facebook has replaced the megaphone and sandwich board as the modern platform for private citizens to "get the word out" to the masses.

31. As this Honourable Court can see from the transcript of proceedings at bail, and in other documents provided on this Application, "taking to social media" is precisely how the Applicant got the word out about his defiance of provincial orders. The use of social media is how the Applicant encouraged people to come to his restaurant to support his defiance of those provincial orders.

32. The Crown respectfully submits that individuals often have an unfettered ability to use social media platforms like those listed in the Applicant's bail conditions, it is absolutely a reasonable limit to place restrictions on the use of such media when that use serves to incite or encourage others to break the law, engage in unpeaceful protest, or defy public health orders in the face of a global pandemic. One only has to look south of the border for a much larger scale justification to the limitation of one's use of social media.

33. In an internet post on www.narcity.com, an urban news and travel website located in Toronto, an article headlined "Adamson BBQ Owner Just Told His Side Of The Story & He's Not Done Fighting"[19] the Applicant seems to suggest that the Applicant will continue to defy provincial public health orders – simply because he doesn't believe

[19] https://www.narcity.com/en-ca/news/toronto/adamson-bbq-owner-just-told-his-side-of-the-story-hes-not-done-fighting – posted December 11, 2020

there is a need for such orders.

34. That article contains a link to an “email blast” purportedly sent out by the Applicant. That email blast is signed “Adam” and speaks specifically to the personal circumstances of the Applicant. While the impugned term of the Applicant’s bail does not refer to “email blasts” it is clear that the Applicant is using other means of electronic communications to reach a large number of people, and to spread his message of defiance.

35. In that letter, attached at Appendix “B”[20], the Applicant even goes so far as to suggest that he got himself arrested on purpose. In the third paragraph of this “email blast” the Applicant states: “Despite not being a smart business move, I opened up so I could receive the charges under the Reopening Ontario Act and challenge them in the courts.” The Crown respectfully submits that in releasing this “email blast” the Applicant continues to proclaim his intent to defy Court orders.

36. At the end of this “email blast” the Applicant states the following: “I'll send another message tomorrow to address some of the claims made by the media, and some updates on what's happening with the authorities.”

Conclusion

37. It is the Crown’s respectful submission that the decision to enter into a joint position with the Crown before the learned Justice of the Peace for a release order on agreed upon terms was a decision freely and voluntarily made by the Applicant and his counsel.

38. The terms imposed by the learned Justice of the Peace, and agreed to by the Applicant are all reasonable terms to place upon the Applicant given the specific

[20] Electronic version located at: What happened at Adamson Barbecue, and why? (forward-to-friend.com)

facts and circumstances of this case.

39. The Crown respectfully submits that the learned Justice of the Peace at no time made an error of law, and the form and terms of the Applicant's release order ought to remain in place.

THE RELIEF SOUGHT IS:

1. An order dismissing this Application and upholding the Applicant's existing form and terms of release.

IN SUPPORT OF THIS RESPONSE THE RESPONDENT INTENDS TO RELY UPON THE FOLLOWING:

1. Crown's Notice of Response;
2. Transcript of Proceedings, November 26, 2020 and November 27, 2020;
3. Scheduling of Special Bail Hearing Conferences and Special Bail Hearings – 2201 Finch Avenue West – attached at Appendix 'A';
4. "Email Blast" purported to have been authored by the Applicant – Attached at Appendix 'B';
5. Media links as cited in this Notice of Response;
6. Case Law as cited;
7. Submissions of counsel; and
8. Such further and other material as counsel may advise and this Honourable Court may permit.

THE RESPONDENT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION:

By service in accordance with Rule No.5, through Michael Townsend, Assistant Crown Attorney, 2201 Finch Ave. West, Toronto, Ontario, M9M 2Y9. Telephone: (416) 314-3479, Email: Michael.Townsend@Ontario.ca

ALL OF WHICH is respectfully submitted this 16th day of January, 2021.

Michael Townsend
Assistant Crown Attorney

Ministry of the Attorney General
2201 Finch Ave. West
Unit 29
Toronto, ON
M9M 2Y9

Tel: (416) 314-3936
Email: Michael.Townsend@Ontario.ca

TO:
Cal Rosemond, Counsel for the Applicant
Edward H. Royle & Partners,
439 University Avenue, Suite #1200,
Toronto, Ontario;
Tele: (416)309-1970;
Fax: (416) 340-1672.

AND TO:
Registrar, Superior Court of Justice, 361 University Ave., Toronto, Ontario

SUPERIOR COURT OF JUSTICE
(Toronto Region)

B E T W E E N:

HER MAJESTY THE QUEEN
Respondent

-and-

WILLIAM SKELLY
Applicant

CROWN'S NOTICE OF RESPONSE
Application for Bail Review
s.520 Criminal Code of Canada

Michael Townsend
Assistant Crown Attorney

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2201 Finch Avenue West, Unit 29
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Tel: 416-314-3936
Fax: 416-314-3949
Email: Michael.Townsend@Ontario.ca

AUTHORITIES TO BE CITED

1. *R. v. St-Cloud*, [2015] 2 S.C.R. 328
2. *R. v. K.G.K.,* [2020] S.C.J. No. 7
3. *R. v. Zora*, [2020] S.C.J. No. 14
4. *R. v. Arsenault-Lewis*, [2020] O.J. No. 1879
5. *R. v. Singh*, [2018] O.J. No. 4757
6. *R. v. Brissett*, [2017] O.J. No. 298
7. *R. v. Donnelly*, [2013] O.J. No. 5819
8. *R. v. Allen*, [1996] O.J. No. 3175

APPENDIX

‘A’

Scheduling of Special Bail Hearing Conferences and Special Bail Hearings
2201 Finch Avenue West

During COVID, a bail hearing is classified as a special if it is anticipated to be two hours or more in length. However, there is always room for flexibility; for example, a matter that may be only slightly longer than two hours that can be accommodated in the regular bail court should stay within the regular bail stream, particularly if the court's docket is permissive.

1. To schedule a case conference, Crown and/or Defence counsel should email the Regional Senior Justice of the Peace (RSJP) office at OCH-RSJP-Office@ontario.ca to advise a case conference is required. A copy of the synopsis (and criminal record, if applicable) shall be included in the email.

2. A case conference can be done same day or on a later date if that is preferred by the parties. The RSJP office will contact the LAJP/Designate to arrange a time for the parties to call in for the case conference. Case conferences will be done by audio.

3. If it is determined that a special bail hearing is required, the parties will contact the 2201 Finch trial co-ordinator's office at: TorontoWest.OCJ.Criminal.TrialCoordinator@ontario.ca

4. The 2201 Finch trial co-ordinator's office will confirm with the RSJP office that a justice of the peace is available on the date suggested.

5. Once a hearing date is determined, the 2201 Finch trial co-ordinator's office will send an email to the following to confirm the date, time and contact details (zoom, JVN, etc.) for the hearing:
   - Crown and defence counsel (cc. case conference justice of the peace and RSJP office); and
   - courthouse justice participants (i.e. SCO, clerks office, interpreter's office, etc.)

6. Crown and Defence counsel shall forward all materials they will be relying on (as discussed at the case conference) to the RSJP office at: OCH-RSJP-Office@ontario.ca no later than noon the day before the hearing.

Case Conference Number:

Courthouse	Phone Number	Conference Code
2201 Finch	(416) 212-8013 1-866-633-1033	6276163

RSJP Office: OCH-RSJP-Office@ontario.ca
2201 Finch Trial Co-ordinators: TorontoWest.OCJ.Criminal.TrialCoordinator@ontario.ca

LAJ Erlick
LAJP Moniz
Effective September 21, 2020

APPENDIX

‘B’

Share Tweet Forward

Hey Adamson Barbecue fans! I'm writing you today to share my side of the story from the last few weeks. My intention is not to diminish the effects that COVID may have had on you or your loved ones, but to shine some light on the unjust laws, disproportionate restrictions on small business, and excessive force used against anyone who challenges the the authoritarian measures put in place by the provincial government.

For those of you who have had my back the last few weeks, thank you for the support. There's a long road ahead and I'm fortunate to have you behind me. If you could place a pre-order during this particularly challenging time, it would help me continue the fight!

Why I opened up against provincial orders

I was well aware of the position I'd be putting myself in by taking this stand. Receiving hundreds of scorning emails, angry social media messages, threats against my family, harassment by the police, and having my name dragged through the mud by the media is not something I look forward to. Despite not being a smart business move, I opened up so I could receive the charges under the Reopening Ontario Act and challenge them in the courts. Our lawyers agree that the government actions have impacted small businesses disproportionately, and violate our charter rights. I am hopeful that we win this fight, and the sacrifice will be for the benefit of other small businesses across the province and country.

Despite having a strong take-out business, my restaurants will not survive extended lockdowns through the Spring (like thousands of others across the country who have already closed for good). All of the Adamson Barbecue locations have thousands of square feet of dining room space, and large parking lots to support those tables. This comes at a price. Despite the pivot to home delivery across the GTA, sales are down over 60%. I cannot maintain the current level of service and overhead costs with these sales numbers.

As a direct result of the lockdowns, I went from employing 55 people in February between two locations, to 26 people between three locations today. I am grateful to have had the opportunity to provide well paid kitchen work and entrepreneurial opportunities for so many people over the years. I feel this opportunity disappearing, with no light at the end of the tunnel.

Tens of thousands of small businesses in Canada have already closed permanently since March, and the CFIB estimates 200,000 more may fail by Spring. Canada now has the highest unemployment in the G7, and Canadians have raked up 400B in credit card debt (8X the highest annual spike in history). Overdose deaths, suicides and domestic violence are on the rise. These consequences of the lockdowns have been accepted by the general public in the name of "safety" and "science".

What "science" are we trusting?

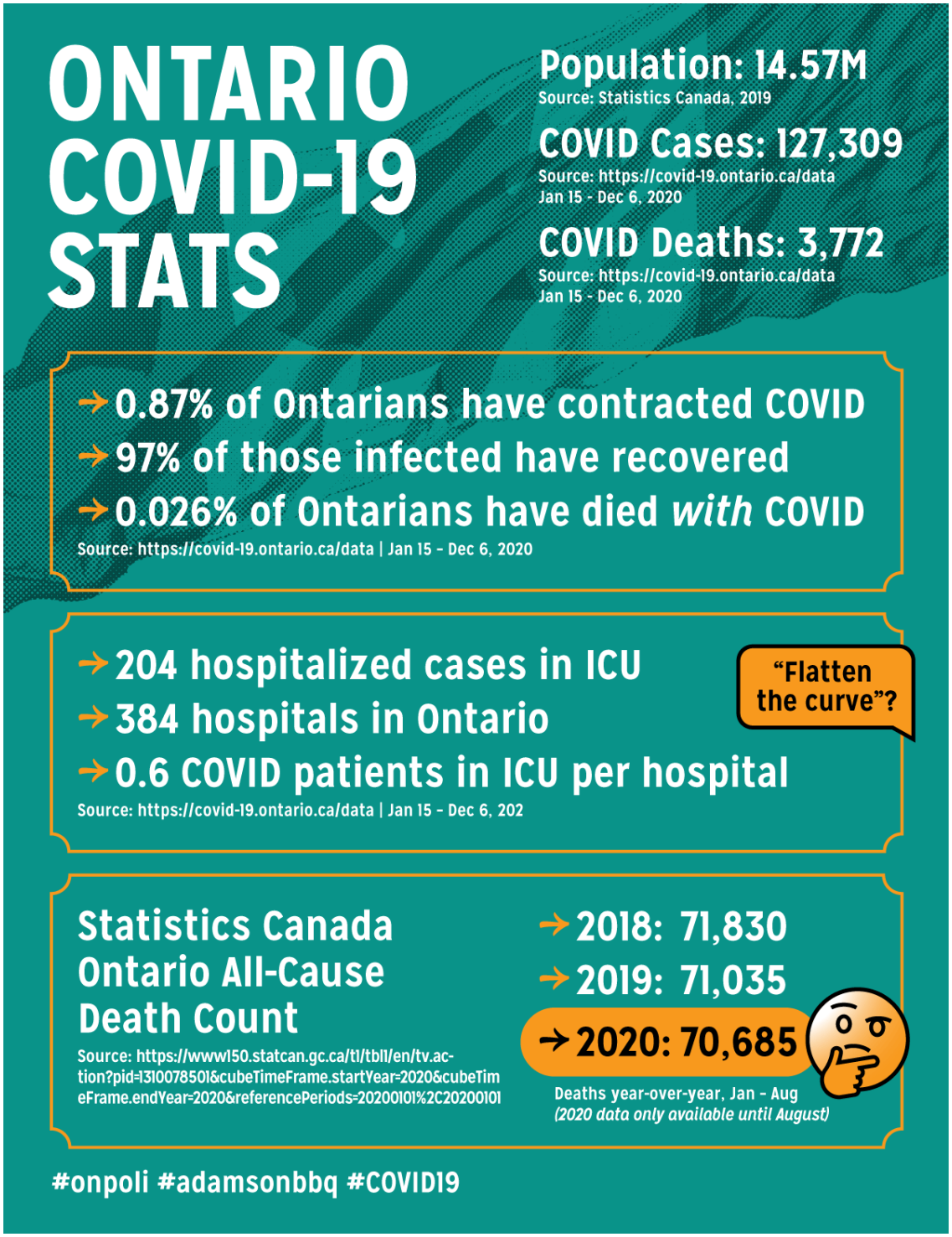
- 80%+ of Canada's COVID deaths have occurred in long term care facilities. The director of long term care said "from 2017 into 2018 — the numbers are comparable". Where's the excess deaths to justify all these other impacts?

- This video (banned from YouTube) features Dr. Roger Hodkinson. He calls the events of 2020 "the greatest hoax ever perpetuated on an unsuspecting public". He is the a board certified pathologist, CEO of a private medical laboratory, and Chairman of a biotech company that sells COVID-19 tests.

- This letter by Michael Silvestri outlines the glaring issues with the PCR test (determined to create 97% false positives at 33cT+ by the highest courts in Portugal). Why are we worried about these "positive cases"?

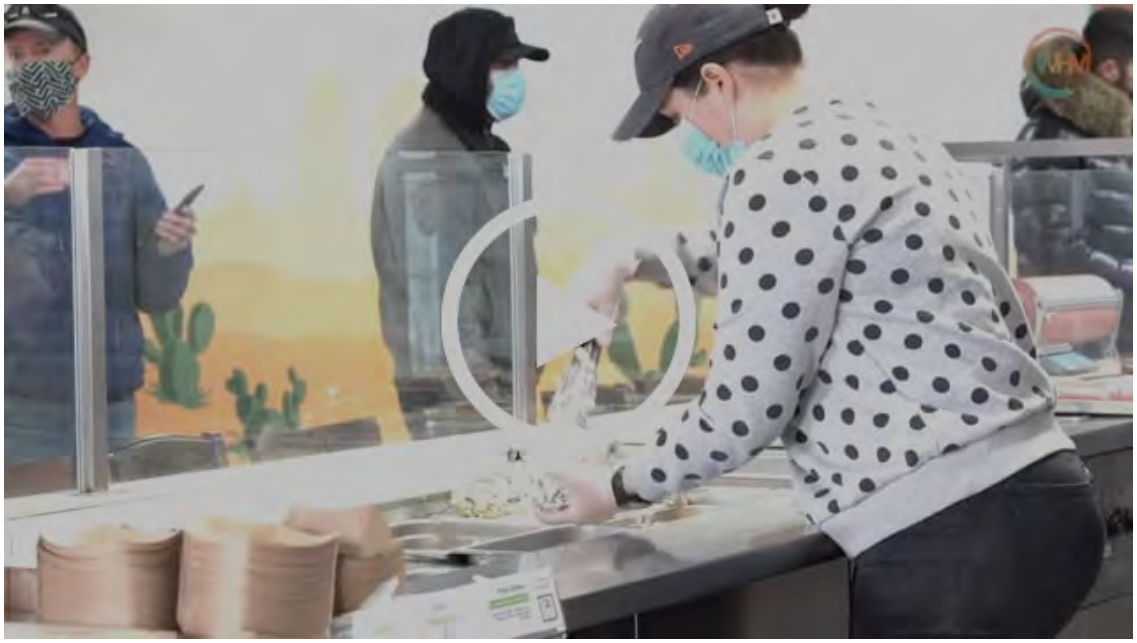
- This video by Mike Yeadon, former VP of Pfizer explains why lockdowns are a mistake

- This article by Brad Lamb presents a number of data points from the CDC, WHO and StatsCan that do not line up with the mainstream narrative.



What happened last week?

There are two sides to every story. I assume you've already seen the negative perspective from the media. Here's a more positive perspective by an independent journalist at Wholehearted Media:



Wholehearted Media: Where's The Beef?

On Tuesday and Wednesday, we had a peaceful, successful lunch service. Hundreds of people assessed the risk, and made their own decisions to visit the restaurant. Tables were spaced 8' apart, distancing from the counter was mandated, sanitizer at the entrance, and all other provincial guidelines- with the exception of allowing in-restaurant dining- were followed.

On Thursday, Eileen Devilla created a closure order, and the City of Toronto (directed by John Tory, who stated "throw the book at him" regarding my business) unlawfully sent over 200 police to the building over the course of the day to secure it. In my opinion, this was an excessive use of force- and the people in attendance agreed. It certainly created tensions between the authorities and my customers.

I made many promises (including to myself) not to back down- so I entered the building through the back unit and did what I had to do to open the restaurant. This got the police and bylaw to issue the charges under the "Reopening Ontario Act" that I was after. I also found out that the police were willing to throw people on the ground, push through crowds of people in an attempt to enter a building without a warrant, and arrest me ilke a criminal for exercising my right to earn a living.

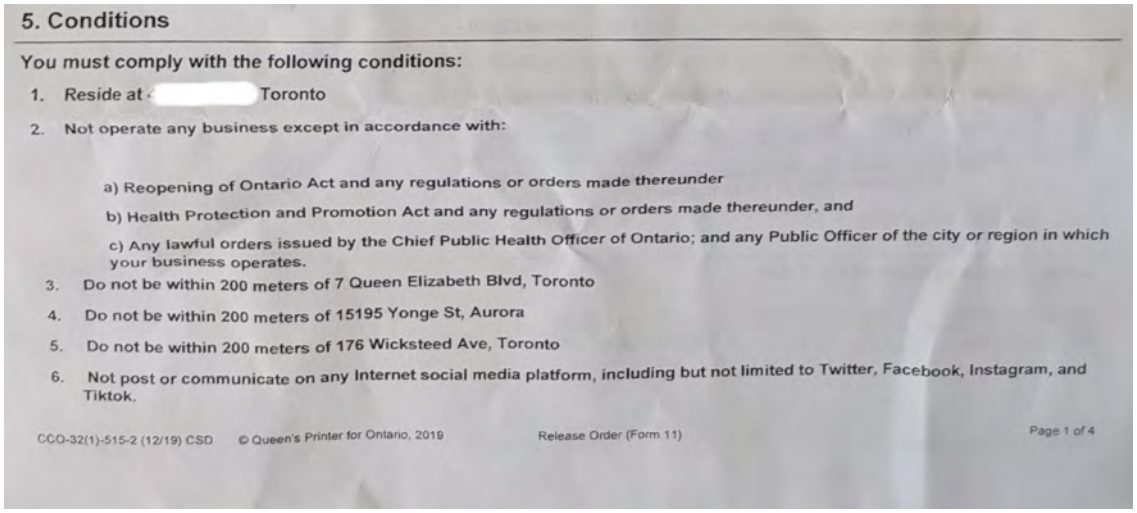
Take a look at this video from Thursday. How do you feel about this response by the city?

75 Cops Shoulder to Shoulder at Adamson Barbecue Etobicoke

I was arrested on charges of mischief (kicking through the door of my business, that was seized by an unelected doctor) and obstruction (for entering my own business). I was told by several police and lawyers that these charges will normally get you a notice to appear on the spot. I was brought to the station and detained for 30 hours.

At the station, the police told me that the Crown Attorney for the bail hearing was being advised at a province level on how to set the bail conditions. These conditions are:

- I **must comply with the Re-opening Ontario Act** (not open any locations for dine-in service)
- **I must stay 200m from any of my restaurants** (makes it challenging to operate the business)
- **I must not post or communicate on social media** (What happened to freedom of speech? I consider this charter violation very serious. This email newsletter is my only option to reach my customers at this time.)



5. Conditions

You must comply with the following conditions:

1. Reside at [redacted] Toronto
2. Not operate any business except in accordance with:
   a) Reopening of Ontario Act and any regulations or orders made thereunder
   b) Health Protection and Promotion Act and any regulations or orders made thereunder, and
   c) Any lawful orders issued by the Chief Public Health Officer of Ontario; and any Public Officer of the city or region in which your business operates.
3. Do not be within 200 meters of 7 Queen Elizabeth Blvd, Toronto
4. Do not be within 200 meters of 15195 Yonge St, Aurora
5. Do not be within 200 meters of 176 Wicksteed Ave, Toronto
6. Not post or communicate on any Internet social media platform, including but not limited to Twitter, Facebook, Instagram, and Tiktok.

CCO-32(1)-515-2 (12/19) CSD © Queen's Printer for Ontario, 2019 Release Order (Form 11) Page 1 of 4

While I was detained, a stranger set up a GoFundMe (check out the thousands of comments from donors- they warm my heart!) to collect funds for the inevitable legal battle. I am blown away by the generosity- over $320,000 has been donated so far. I promise to use these funds to defend my charges and challenge the constitutionality of the Reopening Ontario Act, in hopes to turn the tides for small businesses across the province. I will be transparent with how each penny is being spent.

In Conclusion

I knew taking this stand will polarize my customers. This was not a business move. It this causes the accelerated failure of my business, I accept the consequence. I am hopeful that my customers will see my true intentions, continue to support the business and help us retain the few job opportunities we have left at the restaurants.

You may still believe that I am putting public health at risk by opening my doors, despite overwhelming evidence showing otherwise. You may have unwavering trust in the authorities, despite their initial predictions being off by a factor of 10, repeated contradictions and blatant misrepresentation of data. That's OK, you are entitled to your beliefs. I will point you again to the unsubscribe button below.

I promise I will continue to fight for our freedoms, for small businesses, and for a brighter future for our children. And make the best barbecue in the country while I'm at it.

I'll send another message tomorrow to address some of the claims made by

the media, and some updates on what's happening with the authorities.

Thanks for reading,

Adam

Share Tweet Forward

Our mailing address is:
176 Wicksteed Ave, East York, ON M4G 2B6, Canada

TAB 1

R. v. St-Cloud

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

Heard: November 6, 2014;

Judgment: May 15, 2015.

File No.: 35626.

[2015] 2 S.C.R. 328 | [2015] 2 R.C.S. 328 | [2015] S.C.J. No. 27 | [2015] A.C.S. no 27 | 2015 SCC 27

Her Majesty The Queen, Appellant; v. Jeffrey St-Cloud, Respondent, and Attorney General of Ontario, Criminal Lawyers' Association (Ontario) and Canadian Civil Liberties Association, Interveners.

(168 paras.)

Appeal From:

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC

Case Summary

Catchwords:

Criminal law — Interim release — Grounds justifying detention — Justice of peace ordering detention of accused awaiting trial on ground set out in s. 515(10)(c) of Criminal Code, that is, that his detention "is necessary to maintain confidence in the administration of justice" — Reviewing judge ordering release of accused — Proper interpretation of s. 515(10)(c) of Criminal Code — Restrictive interpretation rejected — Criminal Code, R.S.C. 1985, c. C-46, s. 515(10)(c).

Criminal law — Interim release — Review of decision of justice of peace — Decision by justice of peace to order detention of accused reversed by reviewing judge — Cases in which review provided for in ss. 520 and 521 of Criminal Code is available in interim release context — Whether reviewing judge erred in exercising his role by simply substituting his assessment of evidence for that of justice of peace — Criminal Code, R.S.C. 1985, c. C-46, ss. 520, 521.

Summary:

S was charged with one count of aggravated assault under s. 268 of the *Criminal Code* for having assaulted a bus driver together with two other individuals. The Crown opposed the interim release of S. The justice of the peace [page329] who heard the initial application for release found that detention was necessary on the basis of s. 515(10)(*b*) and (*c*) *Cr. C.*, that is, because the interim detention of S was necessary for the protection or safety of the public, and to maintain confidence in the administration of justice. The justice who heard the second application for release on completion of the preliminary inquiry found that the detention of S was still justified under s. 515(10)(*c*). S then applied under s. 520 *Cr. C.* for a review by a Superior Court judge, who determined that the detention of S was not necessary under s. 515(10)(*c*) and ordered his release.

Held: The appeal should be allowed and the detention order restored.

The ground set out in s. 515(10)(*c*) of the *Criminal Code*, that is, that the detention of the accused "is necessary to maintain confidence in the administration of justice", is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused. It is not a residual ground for detention that applies only where the first two grounds for detention provided for in s. 515(10)(*a*) and (*b*) are not satisfied. The scope of s. 515(10)(*c*) has been unduly restricted by the courts in some cases; this provision must not be interpreted narrowly or applied sparingly. The application of this ground for detention is not limited to exceptional circumstances, to unexplainable crimes, to the most heinous of crimes or to certain classes of crimes. The fact that detention may be justified only in rare cases is but a consequence of the application of s. 515(10)(*c*), and not a precondition to its application, a criterion a court must consider in its analysis or the purpose of the provision. Section 515(10)(*c*) is worded clearly, and it does not require exceptional or rare circumstances. Nor is the question whether a crime is unexplainable or unexplained a criterion that should guide justices in their analysis under s. 515(10)(*c*). This concept is ambiguous and confusing. Because many crimes may be explainable in one way or another, the unexplainable crime criterion is of little assistance. The application of a criterion based on the notion of an unexplainable crime could also lead to undesirable conclusions, since crimes that are heinous and horrific might not satisfy it. Such a criterion could give the public the impression that justices are justifying certain crimes, that is, crimes that are explainable.

[page330]

In determining whether the detention of an accused is necessary to maintain confidence in the administration of justice, the justice must first consider the four circumstances that are expressly referred to in s. 515(10)(*c*). First of all, the justice must determine the apparent strength of the prosecution's case. The prosecutor is not required to prove beyond a reasonable doubt that the accused committed the offence, and the justice must be careful not to play the role of trial judge or jury: matters such as the credibility of witnesses and the reliability of scientific evidence must be analyzed at trial, not at the release hearing. The justice must nevertheless consider the quality of the evidence tendered by the prosecutor in order to determine the weight to be given to this circumstance in his or her balancing exercise. The justice must also consider any defence raised by the accused. If there appears to be some basis for the defence, the justice must take this into account in analyzing the apparent strength of the prosecution's case.

Next, the justice must determine the objective gravity of the offence in comparison with the other offences in the *Criminal Code*. This is assessed on the basis of the maximum sentence -- and the minimum sentence, if any -- provided for in the *Criminal Code* for the offence.

The justice must then consider the circumstances surrounding the commission of the offence, including whether a firearm was used. Those that might be relevant under s. 515(10)(*c*) include the following: the fact that the offence is a violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person. If the offence was committed by several people, the extent to which the accused participated in it may be relevant. The aggravating or mitigating factors that are considered by courts for sentencing purposes can also be taken into account.

Finally, the fourth circumstance to consider is the fact that the accused is liable for a potentially lengthy term of imprisonment. Although it is not desirable to establish a strict rule regarding the number of years that constitutes a lengthy term of imprisonment, some guidance is required. Because no crime is exempt from the possible application of s. 515(10)(*c*), the words "lengthy term of imprisonment" do not refer only to a life sentence. Moreover, to determine whether the accused is actually liable for a potentially lengthy term of imprisonment, the justice must consider all the circumstances of the case known at [page331] the time of the hearing, as well as the principles for tailoring the applicable sentence. This fourth circumstance is assessed subjectively.

The circumstances listed in s. 515(10)(*c*) are not exhaustive. The court must consider all the circumstances of each case, paying particular attention to the four listed circumstances. No single circumstance is determinative: the justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified. This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate

question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. Thus, the court must not order detention automatically even where the four listed circumstances support such a result. Some other circumstances that might be relevant are the personal circumstances of the accused (age, criminal record, physical or mental condition, and membership in a criminal organization), the status of the victim and the impact on society of a crime committed against that person, and the fact that the trial of the accused will be held at a much later date.

The justice's balancing of all the circumstances under s. 515(10)(*c*) must always be guided by the perspective of the "public", that is, of a reasonable person who is properly informed about the philosophy of the legislative provisions, the values of the *Canadian Charter of Rights and Freedoms*, and the actual circumstances of the case. The person in question is a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of the case is inaccurate or who disagrees with our society's fundamental values. However, this person is not a legal expert, and, although he or she is aware of the importance of the presumption of innocence and the right to liberty in our society, expects that someone charged with a crime will be tried within a reasonable period of time, and knows that a criminal offence requires proof of culpable intent and that the purpose of certain defences is to show the absence of such intent, the person is not able to appreciate the subtleties of the various defences that are available to the accused. This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.

[page332]

Sections 520 and 521 of the *Criminal Code* do not confer an open-ended discretion on the reviewing judge to vary the initial decision concerning the detention or release of the accused. They establish not a *de novo* proceeding, but a hybrid remedy. The judge must determine whether it is appropriate to exercise his or her power of review. Exercising this power will be appropriate in only three situations: (1) where there is admissible new evidence if that evidence shows a material and relevant change in the circumstances of the case; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate.

The four criteria from *Palmer v. The Queen*, *[1980] 1 S.C.R. 759*, are relevant to the determination of what constitutes new evidence for the purposes of the review provided for in ss. 520 and 521. Given the generally expeditious nature of the interim release process and the risks of violating the rights of the accused, and since the release hearing takes place at the very start of criminal proceedings and not at the end like the sentence appeal, a reviewing judge must be flexible in applying these four criteria. Regarding the first criterion, due diligence, the reviewing judge may consider evidence that is truly new or evidence that existed at the time of the initial release hearing but was not tendered for some reason that is legitimate and reasonable. Such new evidence is not limited to evidence that was unavailable to the accused before the initial hearing. In each case, the reviewing judge will have to determine whether the reason why the accused did not tender such pre-existing evidence earlier was legitimate and reasonable. As to the second criterion, it will suffice that the evidence be relevant for the purposes of s. 515(10). This criterion will therefore rarely be decisive in the context of an application for review under ss. 520 and 521, since the range of relevant evidence will generally be quite broad. The third criterion -- that the evidence must be credible in the sense that it is reasonably capable of belief -- must be interpreted in light of the relaxation of the rules of evidence at the bail stage and in particular of s. 518(1)(*e*) of the *Criminal Code*, which provides that "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case". Finally, the fourth *Palmer* criterion should be modified as follows: the new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice under s. 515(10)(*c*). The new evidence must therefore be significant. If the new [page333] evidence meets the four criteria for admissibility, the reviewing judge is authorized to repeat the analysis under s. 515(10)(*c*) as if he or she were the initial decision-maker.

It will also be appropriate to intervene if the justice has erred in law or if the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient

weight to another. The reviewing judge therefore does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently.

In this case, the Superior Court judge intervened even though there was no basis for a review, given that there was no change in circumstances and no error of law, and that the initial decision was not clearly inappropriate. When all the relevant circumstances are weighed as required by s. 515(10)(*c*), the detention of S was necessary to maintain confidence in the administration of justice.

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Tackling Violent Crime Act, S.C. 2008, c. 6, s. 37(5).

Young Offenders Act, R.S.C. 1985, c. Y-1, s. 16(9), (10).

Youth Criminal Justice Act, S.C. 2002, c. 1, s. 33(1).

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[page335]

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History and Disposition:

APPEAL from a decision of the Quebec Superior Court (Martin J.), 2013 QCCS 5021, [2013] AZ-51009868, [2013] J.Q. no 14227 (QL), 2013 CarswellQue 10825 (WL Can.), allowing an application under s. 520 of the *Criminal Code* for review of a detention order. Appeal allowed.

Counsel

Christian Jarry and *Geneviève Langlois*, for the appellant.

André Lapointe and *Guylaine Tardif*, for the respondent.

Robert E. Gattrell and *Avene Derwa*, for the intervener the Attorney General of Ontario.

John Norris and *Christine Mainville*, for the intervener the Criminal Lawyers' Association (Ontario).

Anil K. Kapoor and *Lindsay Daviau*, for the intervener the Canadian Civil Liberties Association.

English version of the judgment of the Court delivered by

WAGNER J.

I. Introduction

1 The repute of our criminal justice system rests on the deeply held belief of Canadians that the right to liberty and the presumption of innocence are fundamental values of our society that require protection. However, that repute also depends on the confidence citizens have that persons charged with serious crimes will not be able to evade justice, harm others or interfere with the administration of justice while awaiting trial. The risk that one of these events might tarnish the repute of the justice system was recognized by Parliament in enacting s. 515(10)(*a*) and

(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), under which the interim detention of an accused may [page336] be ordered where that is necessary to ensure the attendance of the accused in court or to guarantee the protection or safety of the public.

2 Moreover, Parliament judged that there are circumstances in which releasing an accused person could undermine the repute of the justice system, and this led it to provide, in s. 515(10)(*c*) *Cr. C.*, for a third ground for interim detention, maintaining confidence in the administration of justice. Thus, Parliament recognized that there are circumstances in which allowing a person charged with a serious crime to be released into the community pending trial in the face of overwhelming evidence might suggest to the public that justice has not been done: see *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 26.

3 This appeal affords the Court an opportunity to consider the circumstances in which pre-trial detention of an accused is necessary in order to maintain the confidence of the Canadian public in the administration of justice in accordance with s. 515(10)(*c*) *Cr. C.* This provision has already been considered by the Court in *Hall*, but the central issue in that case was the constitutionality of this ground for detention as it was worded at that time. In cases decided by lower courts since *Hall*, the provision has been given widely varying interpretations, making it necessary for the Court to provide further guidance on its application.

4 The ground for detention in s. 515(10)(*c*) *Cr. C.* requires that an effort be made to strike an "appropriate balance between the rights of the accused and the need to maintain justice in the community": *Hall*, at para. 41. In addition, judges must adopt the perspective of the public in determining whether detention is necessary. What the word "public" means is not always easy to understand. These difficulties no doubt explain why s. 515(10)(*c*) *Cr. C.* has generated so much discussion among legal experts and led to inconsistent results across the country.

[page337]

5 In my opinion, the scope of s. 515(10)(*c*) *Cr. C.* has been unduly restricted by the courts in some cases. This ground for detention is not necessarily limited to exceptional circumstances, to the most heinous of crimes involving circumstances similar to those in *Hall*, or to certain classes of crimes. The interpretation of s. 515(10)(*c*) *Cr. C.* has also been truncated by a misunderstanding of the meaning of the word "*public*" used in the provision's French version (and implied in the word "confidence" used in the English version), which I will discuss below. For now, I will simply note that the "public" are reasonable, well-informed members of the community, but not legal experts with in-depth knowledge of our criminal justice system.

6 This appeal is the first time this Court has been called upon to determine the extent of the power provided for in ss. 520 and 521 *Cr. C.* to review decisions with respect to detention or to interim release. Since a decision whether to order the pre-trial release of an accused involves a delicate balancing of all the relevant circumstances, the power of a judge hearing an application under s. 520 or 521 *Cr. C.* to review such a decision is not open-ended. I conclude that exercising this power will be appropriate in only three situations: (1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate. In the last of these situations, a reviewing judge cannot simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision. It is only if the justice gave excessive weight to one relevant factor or insufficient weight to another that the reviewing judge can intervene.

7 In the case at bar, the respondent, Jeffrey St-Cloud, was charged with aggravated assault under s. 268 *Cr. C.* The justice of the peace who heard the initial application for release found that detention [page338] was necessary on the basis of s. 515(10)(*b*) and (*c*) *Cr. C.* The justice who heard the respondent's second application for release on completion of the preliminary inquiry found that his detention was still justified under s. 515(10)(*c*). The respondent then applied under s. 520 *Cr. C.* for a review by a Superior Court judge, who determined that detention was not necessary under s. 515(10)(*c*) and ordered the respondent's release. The Crown is appealing that decision to this Court.

8 For the reasons that follow, I would allow the appeal. The detention of the respondent is necessary to maintain

confidence in the administration of justice. I will explain why.

II. Background and Judicial History

9 On the night of April 24, 2013, the respondent and two other individuals committed an extremely violent assault against a bus driver working for the Société de transport de Montréal. The incident was recorded by the video system on the bus, and the recording showed that the respondent had been an active participant in the assault. The three individuals struck the driver in the head many times, leaving him with serious long-term injuries. Even the intervention of passengers was not enough to stop the attack right away. The respondent was charged with aggravated assault under s. 268 *Cr. C.*

A. *Court of Québec (Judge Lavergne), No. 500-01-088824-138, April 29, 2013*[1]

10 The first release hearing took place on April 26, 2013 before Judge Lavergne. The appellant opposed the respondent's release. At the time of the hearing, the victim was still in the hospital [page339] and the medical prognosis was uncertain. However, it was known that he had, at the very least, a hairline fracture to a facial bone and a concussion.

11 Judge Lavergne stated at the outset that the onus was on the prosecutor to show that the respondent's detention was necessary. After balancing the relevant factors, he found on the basis of s. 515(10)(*b*) *Cr. C.* that the interim detention of the respondent was necessary for the protection or safety of the public.

12 Judge Lavergne nevertheless continued his analysis and considered the circumstances set out in s. 515(10)(*c*) *Cr. C.* The first three - (1) the apparent strength of the prosecution's case, (2) the gravity of the offence and (3) the circumstances surrounding the commission of the offence - had already been discussed in the context of the ground set out in s. 515(10)(*b*). He also considered the fourth circumstance, namely the fact that the respondent was liable, on conviction, for a potentially lengthy term of imprisonment (maximum sentence of 14 years). As well, he was of the opinion that aggravating factors were evident from the circumstances of the case.

13 Judge Lavergne then explained that s. 515(10)(*c*) [TRANSLATION] "calls for an analysis of whether, at the end of the day, after all the circumstances are considered ... there is a reasonable collective expectation that interim release must be denied to maintain public confidence in the administration of justice": pp. 18-19. He made the following comments in this regard:

> [TRANSLATION] But who then is the public? The public means persons who are reasonable, dispassionate and properly informed about the values expressed in legislation, including the presumption of innocence, which applies throughout the criminal process, as I have said, but who are also informed about all the circumstances associated with the commission of a crime.
>
> In light of the videotape and all the circumstances, the defendant's participation, the likelihood of a conviction and the chances of a significant term of imprisonment, [page340] the Court is satisfied that such a reasonable person would conclude that interim release must be denied. [p. 19]

14 Finding that the Crown had discharged its burden under s. 515(10)(*c*) *Cr. C.*, Judge Lavergne accordingly ordered the detention of the respondent until further order.

B. *Court of Québec (Judge Legault), No. 500-01-088824-138, June 21, 2013*

15 On completion of his preliminary inquiry, the respondent applied again to be released, this time on the basis of s. 523(2)(*b*) *Cr. C.* Judge Legault began by explaining that the onus was on the respondent to show some new cause for ordering his release and that the court had a [TRANSLATION] "limited power that requires [it] to show restraint": para. 2.

16 Noting that the evidence concerning the circumstances of the offence seemed to be the same that had been presented at the time of the initial application, however, Judge Legault expressed the opinion that there were also some new facts, including a substantial increase in the financial security provided by the respondent's family and the possibility of his obtaining regular employment at a garage.

17 Judge Legault found on the basis of the new facts that the risk of reoffending was [TRANSLATION] "reduced". He also considered it "credible" that the respondent was seriously committed to working or studying: paras. 20-21. However, he noted that the victim's medical condition had worsened.

18 Judge Legault therefore accepted Judge Lavergne's conclusion that the detention of the respondent was necessary to maintain confidence in the administration of justice, the ground provided for in s. 515(10)(*c*) *Cr. C.* He agreed with Judge Lavergne that there was [TRANSLATION] "a reasonable collective expectation that interim release must be denied [page341] to maintain public confidence in the administration of justice": para. 25.

C. *Quebec Superior Court (Martin J.),* *2013 QCCS 5021*

19 On July 2, 2013, the respondent applied to the Superior Court under s. 520 *Cr. C.* for a review of the detention order.

20 Martin J. began by stating that he understood from Judge Legault's decision that the latter had concluded that the detention of the respondent was not necessary for the protection or safety of the public within the meaning of s. 515(10)(*b*) *Cr. C.* In Martin J.'s opinion, Judge Legault would therefore have granted the respondent bail had it not been for the ground set out in s. 515(10)(*c*) *Cr. C.*, namely the need for detention in order to maintain confidence in the administration of justice.

21 Martin J. then noted that it was up to the respondent to show a reviewable error by the justices who had ordered his detention. Referring to *Hall*, he concluded that s. 515(10)(*c*) *Cr. C.* must be [TRANSLATION] "used sparingly": para. 22 (CanLII).

22 Martin J. stated the test he had to apply as follows:

> [TRANSLATION] ... Could a reasonable person who has no interest in the situation, but who is well versed in the content of the Charter of Rights, the provisions of the Criminal Code and the principles laid down by the Supreme Court, conclude that confidence in the administration of justice would be undermined if the person in question were released? It is in fact the justice who must assess this on the basis of the facts in evidence. [para. 23]

23 Martin J. concluded that, in the instant case, the incident was [TRANSLATION] "repugnant ... heinous and unjustifiable", but not unexplainable: para. 27. In his opinion, the two justices had therefore erred in denying release on the basis of the [page342] ground set out in s. 515(10)(*c*) *Cr. C.* He accordingly granted the respondent's application and ordered his release.

III. Issues

24 This appeal raises the following questions:

1. What is the proper interpretation of s. 515(10)(*c*) *Cr. C.*?
2. What are the cases in which the review provided for in ss. 520 and 521 *Cr. C.* is available in the interim release context?
3. In this case, did the Superior Court judge err in his interpretation of s. 515(10)(*c*) *Cr. C.*?

4. In this case, did the Superior Court judge err in exercising his role as a reviewing judge under s. 520 *Cr. C.* by simply substituting his assessment of the evidence for that of the justices?

IV. Analysis

A. *Proper Interpretation of Section 515(10)(c) Cr. C.*

(1) Legislative and Judicial Context

25 Although the legislative history of s. 515(10) *Cr. C.* was explained clearly by this Court in *Hall*, I believe that it will be helpful to summarize it here.

26 I should begin by mentioning that the pre-trial release provisions are of relatively ancient origin:

> In 1869, the Federal Government enacted legislation making bail discretionary for all offences: see *An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to persons charged with Indictable Offences*, S.C. 1869, c. 30. Bail was therefore left to the discretion of the judge. Although the primary determinant for denying [page343] bail was the need to compel the accused's attendance, courts also considered other factors such as the nature of the offence, the severity of the penalty, the evidence against the accused, and the character of the accused: see, for example, *R. v. Gottfriedson* *(1906), 10 C.C.C. 239* (B.C. Co. Ct.); *Re N.* *(1945), 87 C.C.C. 377* (P.E.I.S.C.).
>
> In 1972 the law of bail was recodified: *Bail Reform Act*, S.C. 1970-71-72, c. 37. The Act iden-tified two branches for refusing bail: (1) where the accused's detention was necessary to ensure his attendance in Court; or (2) where detention was "necessary in the public interest or for the protection or safety of the public" against the accused re-offending or interfering with the administration of justice. The use of "or" in the second branch led to the view that there were in effect three grounds for denying bail: (1) ensuring appearance at trial; (2) protection against criminal offences pending trial; and (3) the "public interest". These grounds were originally enacted as s. 457(7)(*a*) and (*b*) of the *Criminal Code*, and later became s. 515(10)(*a*) and (*b*).

(*Hall*, at paras. 14-15)

27 Since the enactment of the *Canadian Charter of Rights and Freedoms* ("*Charter*") in 1982, any person charged with an offence has the right "not to be denied reasonable bail without just cause": s. 11(*e*). This Court has stated that s. 11(*e*) creates "a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise": *R. v. Pearson*, *[1992] 3 S.C.R. 665*, at p. 691. Section 11(*e*) has two distinct components: (1) the right to "reasonable bail" in terms of quantum of any monetary component and any other conditions that might be imposed; and (2) the right not to be denied bail without "just cause".

28 In *R. v. Morales*, *[1992] 3 S.C.R. 711*, this Court struck down the component of s. 515(10)(*b*) *Cr. C.* that authorized pre-trial detention on the ground that detaining the accused was necessary in [page344] the "public interest". The Court held that this wording was vague and imprecise and that it authorized a "standardless sweep" allowing a "court [to] order imprisonment whenever it [saw] fit": p. 732.

29 In 1997, Parliament therefore changed the wording of s. 515(10) and also added para. (*c*) to it: *Criminal Law Improvement Act, 1996*, S.C. 1997, c. 18, s. 59(2). The detention of an accused could then be justified "on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice". At the time, Parliament had not drawn up a list of circumstances the justice was required to consider in this analysis.

30 The validity of that provision was the issue before the Court in *Hall*. The Court held that the first part of s. 515(10)(*c*) *Cr. C.*, which authorized the denial of bail for "any other just cause", was unconstitutional because it was inconsistent with the presumption of innocence and with s. 11(*e*) of the *Charter*. The Court found that this wording conferred a broad discretion on justices to grant or deny bail in that it did not specify any particular basis upon

which bail could be denied: *Hall*, at para. 22. However, the balance of s. 515(10)(*c*) *Cr. C.* was found to be constitutional.

31 In 2008, Parliament amended s. 515(10)(*c*) *Cr. C.* so as to make it consistent with the Court's decision in *Hall*: *Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 37(5). That version of s. 515(10)(*c*) *Cr. C.*, which is still in force today, is the one at issue in this appeal:

> (*c*) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> (i) the apparent strength of the prosecution's case,
>
> [page345]
>
> (ii) the gravity of the offence,
>
> (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
>
> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

The remainder of s. 515(10) *Cr. C.* is reproduced, together with other relevant statutory provisions, in the Appendix at the end of these reasons.

(2) Principles From *Hall*

32 The central issue in *Hall* was the constitutionality of s. 515(10)(*c*) *Cr. C.* However, the Court provided some guidance on how to interpret this provision.

(a) *Basis for Section 515(10)(c) Cr. C.*

33 McLachlin C.J., writing for the majority of the Court, explained that in some circumstances it may be necessary to deny an accused bail, even where there is no risk he or she will not attend trial or may reoffend or interfere with the administration of justice: *Hall*, at para. 25. According to the Chief Justice, "[w]here justice is not seen to be done by the public, confidence in the bail system and, more generally, the entire justice system may falter": para. 26. Yet, she wrote, "[p]ublic confidence is essential to the proper functioning of the bail system and the justice system as a whole": para. 27, citing *Valente v. The Queen*, *[1985] 2 S.C.R. 673*, at p. 689.

(b) *Distinctiveness of the Ground Set Out in Section 515(10)(c) Cr. C.*

34 McLachlin C.J. also explained that s. 515(10)(*c*) *Cr. C.* creates not a ground for detention that [page346] might be characterized as "residual" in the sense that it applies only as a last resort, but one that is separate and distinct:

> Bail denial to maintain confidence in the administration of justice is not a mere "catch-all" for cases where the first two grounds have failed. It represents a separate and distinct basis for bail denial not covered by the other two categories. The same facts may be relevant to all three heads... . But that does not negate the distinctiveness of the three grounds. [Emphasis added.]

(*Hall*, at para. 30)

(c) *Test Under Section 515(10)(c) Cr. C.*

35 McLachlin C.J. did not elaborate at length on the analysis to be conducted by a justice who must determine whether s. 515(10)(*c*) *Cr. C.* applies. However, I will reproduce the following remarks:

> Section 515(10)(*c*) sets out specific factors which delineate a narrow set of circumstances under which bail can be denied on the basis of maintaining confidence in the administration of justice. As discussed earlier, situations may arise where, despite the fact the accused is not likely to abscond or commit further crimes while awaiting trial, his presence in the community will call into question the public's confidence in the administration of justice. Whether such a situation has arisen is judged by all the circumstances, but in particular the four factors that Parliament has set out in s. 515(10)(*c*) - the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for lengthy imprisonment... .
>
> This, then, is Parliament's purpose: to maintain public confidence in the bail system and the justice system as a whole... . Most importantly, the judge makes this appraisal objectively through the lens of the four factors Parliament has specified. The judge cannot conjure up his own reasons for denying bail; while the judge must look at all the circumstances, he must focus particularly on the factors Parliament has specified. At the end of [page347] the day, the judge can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice... . [T]he provision does not authorize a "standardless sweep" nor confer open-ended judicial discretion. Rather, it strikes an appropriate balance between the rights of the accused and the need to maintain justice in the community. In sum, it is not overbroad. [Emphasis added.]

(*Hall*, at paras. 40-41)

36 I will come back to *Hall* below and consider certain passages I have not discussed here.

(3) Principles That Must Guide the Analysis

(a) *Rejecting a Narrow Application of Section 515(10)(c) Cr. C.*

37 The appellant submits that, despite the very clear principles enunciated in *Hall*, the courts have artificially added factors to s. 515(10)(*c*) *Cr. C.* for the avowed purpose of restricting its scope and limiting the cases in which its application is justified. The appellant asserts that such an approach must be rejected.

38 The respondent counters that it follows from the principles established in *Hall* that the cases in which s. 515(10)(*c*) applies will be few and far between. The respondent submits that the four factors must be assigned a relative weight and that the justice must not lose sight of the key question, namely whether confidence in the administration of justice would be maintained if the accused were released.

39 It is true that some decisions reflect a strict application of s. 515(10)(*c*): see, e.g., *R. v. Thomson* (2004), 21 C.R. (6th) 209 (Ont. S.C.J.); *R. v. B. (A.)* (2006), 204 C.C.C. (3d) 490 (Ont. S.C.J.); *R. v. Pichler*, 2009 ABPC 24; *R. v. Teemotee*, 2011 NUCJ 17. [page348] This approach has also been adopted by some appellate courts. For example, the British Columbia Court of Appeal and the Ontario Court of Appeal have stated that the use of s. 515(10)(*c*) is justified only in rare or exceptional circumstances: *R. v. Bhullar*, 2005 BCCA 409, at paras. 62 and 65; *R. v. Brotherston*, 2009 BCCA 431, 71 C.R. (6th) 81, at paras. 30 and 35; *R. v. LaFramboise* (2005), 203 C.C.C. (3d) 492 (Ont. C.A.), at para. 30. A variant of this prerequisite is that s. 515(10)(*c*) must be used "sparingly": *LaFramboise*, at para. 30; *R. v. D. (R.)*, 2010 ONCA 899, 273 C.C.C. (3d) 7, at paras. 51-53. The Saskatchewan Court of Appeal has also held that s. 515(10)(*c*) requires that there be "something more", something in addition to the four factors set out in it: *R. v. Blind* (1999), 139 C.C.C. (3d) 87, at para. 16. Although the latter case predated this Court's decision in *Hall*, this statement has been reiterated since *Hall*, including by the Ontario Court of Appeal: *LaFramboise*, at para. 38. In a judgment subsequent to *LaFramboise*, the Ontario Court of Appeal found instead

that the words "something more" were simply a way to convey the need to use s. 515(10)(*c*) sparingly: *D. (R.)*, at para. 53. However, it expressed the view that the third ground for detention is not limited to the most heinous of offences and can be invoked even if the community has not experienced the same horror and fear as was the case in *Hall*.

40 I see two reasons - one based on legislation and the other on the case law - why Canadian appellate courts may have adopted such interpretations.

41 First, the former wording of s. 515(10) *Cr. C.* - the one in effect, *inter alia*, at the time of *Morales* - specified two grounds for pre-trial detention, a *primary* ground and a *secondary* ground. The primary ground, set out in s. 515(10)(*a*), was that detention of the accused was necessary "to ensure his or her attendance in court in order to be dealt with according to law". The secondary ground, under s. 515(10)(*b*), was that detention of the accused was necessary "in [page349] the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice". An accused could be detained on the secondary ground only if detention was not justified on the primary ground set out in s. 515(10)(*a*). It was the secondary ground for detention that was at issue in *Morales* and, as I mentioned above, its "public interest" component was struck down by this Court. However, since the change made to the wording in 1997, s. 515(10) has no longer provided for a hierarchy of grounds for detention.

42 Second, it seems to me that the position taken by certain courts originates in a misinterpretation of *Hall*. As Justice Trotter points out, there are cases in which courts, although acknowledging the authority of the Chief Justice's reasons in *Hall*, have actually seemed to prefer the minority's reasons: *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at p. 3-45. The dissenting judges would have struck down s. 515(10)(*c*) *Cr. C.* in its entirety, since they did not think it lent itself to a piecemeal analysis: *Hall*, at para. 88. In their view, the factors listed in that provision served as a "facade of precision", and it was difficult to see how they could promote the proper administration of justice in cases in which the grounds set out in s. 515(10)(*a*) and (*b*) were not already applicable: paras. 98-99. They were also of the opinion that the phrase "maintain confidence in the administration of justice" essentially revived the old "public interest" ground that the Court had struck down in *Morales* and invoked "similarly vague notions of the public image of the criminal justice system": para. 104. Since *Hall*, some courts have therefore found, using the minority's reasons to bolster this view, that the majority's reasons advocated a restrictive interpretation of s. 515(10)(*c*): Trotter, at p. 3-45.

[page350]

43 The crime at issue in *Hall* was a particularly heinous one: the murder of a woman who had 37 slash wounds on her body. Her assailant had intended to cut her head off. The murder had caused significant public concern. The accused had applied for bail, which the justice had denied on the basis of s. 515(10)(*c*) *Cr. C.*

44 This Court described the crime as "heinous and unexplained": *Hall*, at para. 25. It also quoted a comment from *R. v. Rondeau* *(1996), 108 C.C.C. (3d) 474* (C.A.), at p. 480, that [TRANSLATION] "[t]he more a crime like the present one is unexplained and unexplainable, the more worrisome bail becomes for society": *Hall*, at para. 25. I note that the decision in *Rondeau* concerned what was at that time the secondary ground for detention, that is, the need to detain the accused for the protection or safety of the public. Section 515(10)(*c*) *Cr. C.* was not yet in force when that case was decided.

45 The following passage from *Hall* is also worth reproducing:

> Where, as here, the crime is horrific, inexplicable, and strongly linked to the accused, a justice system that cannot detain the accused risks losing the public confidence upon which the bail system and the justice system as a whole repose. [para. 40]

46 I am of the opinion that some courts have misinterpreted this Court's decision in *Hall*. First of all, the Court's

comments must be viewed in the context of that case and analyzed in light of the case's very specific circumstances: the crime was an extremely horrific one. It was therefore natural for the Court to take this into account when applying s. 515(10)(*c*) *Cr. C.* The Court's description of the crime as horrific, heinous and unexplained was simply an observation, a description of the facts considered by the Court in its analysis of s. 515(10)(*c*) *Cr. C.* It cannot be read as imposing conditions or prerequisites.

[page351]

47 In my view, the question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide justices in their analysis under s. 515(10)(*c*). Apart from the fact that the provision itself does not even refer to such a criterion, I consider the concept ambiguous and confusing. What is meant by an "unexplainable" crime? Is it a crime against a random victim? A crime that could be committed only by a person who is not rational? An especially horrific crime?

48 Moreover, many crimes may be "explainable" in one way or another; for example, it may be that the assailant was provoked by the victim or that he or she had a mental illness or was intoxicated. From this perspective, the "unexplainable" crime criterion is of little assistance.

49 The application of a criterion based on the notion of an "unexplainable" crime could also lead to undesirable conclusions. Crimes that are truly heinous and horrific might not satisfy it. Such a criterion could therefore give the public the impression that justices are "justifying" certain crimes, that is, crimes that are "explainable". Although this Court used the words "unexplained and unexplainable" in *Hall* in referring to the murder at issue in that case, its decision was based, first and foremost, on the brutal and heinous nature of the crime, the strong evidence tying the accused to the crime and the fact that people in the community were afraid: para. 25. In any event, the drift in the case law since *Hall* and the reasons I have stated demonstrate the need to limit recourse to such a criterion. As much as possible, it would also be wise for justices hearing applications for release to avoid attaching such a label to the circumstances of the alleged crimes that come before them so as not to give the public the impression that they are "justifying" them.

50 Furthermore, I agree with the appellant that detention may be justified only in rare cases, but that this is simply a consequence of the application [page352] of s. 515(10)(*c*) and not a precondition to its application, a criterion a court must consider in its analysis or the purpose of the provision.

51 This interpretation is consistent with the following comment made by this Court in *Hall*:

> While the circumstances in which recourse to this ground for bail denial may not arise frequently, when they do it is essential that a means of denying bail be available. [Emphasis added; para. 31.]

52 I am of the view that a "rareness" of circumstances criterion would be vague and unmanageable in practice. How would such a criterion be assessed? Should justices consider how many cases have been heard (in their jurisdictions, in Canada, in the last year, etc.) and, at the same time, ensure that cases of detention based on s. 515(10)(*c*) will remain "rare" if they order detention in the cases before them? Should a justice review the cases in which detention has been ordered and determine whether the facts of the case before him or her are the same (or nearly the same) as the facts of those cases? In any event, it seems to me that a "rareness" of circumstances criterion would prompt justices to engage in a comparative exercise and thus to move away from the careful examination of the circumstances of individual cases that the situation requires. In my opinion, a comparative approach such as this could potentially undermine the public's confidence in the administration of justice.

53 Moreover, the appellant correctly points out that s. 515(10)(*c*) *Cr. C.* is worded clearly and that it does not require exceptional or rare circumstances. This interpretation is consistent with this Court's recent decision in *R. v. Summers*, *2014 SCC 26*, *[2014] 1 S.C.R. 575*, which concerned the sentencing provisions of s. 719(3) and (3.1) *Cr. C.* Section 719(3) provides that in determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence and may credit a

maximum of one day for each day spent in [page353] custody. However, s. 719(3.1) specifies that, "if the circumstances justify it", the maximum can be increased to one and one-half days for each day spent in custody. The Court interpreted this provision as follows:

> ... this provision is free of any language limiting the scope of what may constitute "circumstances". The legislature could easily have provided that only "exceptional circumstances" or "circumstances other than the loss of eligibility for early release and parole" justify enhanced credit.
>
> As Cronk J.A. observed, language limiting the scope of the word "circumstances" is used elsewhere in the *Criminal Code*. For example, reference is made to "exceptional circumstances" or "compelling circumstances" in s. 672.14(3) (fitness assessments last no longer than 30 days, except they may last for 60 if "compelling circumstances" so warrant), s. 672.47(2) (when an accused is found unfit to stand trial, a disposition must be made within 45 days but, in "exceptional circumstances", may be made within 90 days) and s. 742.6(16) (when an offender breaches a conditional sentence order, in "exceptional cases" some of the suspended sentence may be deemed to be time served).
>
> The absence of qualifications on "circumstances" in s. 719(3.1) is telling since Parliament *did* restrict enhanced credit, withholding it from offenders who have been denied bail primarily as a result of a previous conviction (s. 515(9.1)), those who contravened their bail conditions (ss. 524(4)(*a*) and 524(8)(*a*)), and those who committed an indictable offence while on bail (ss. 524(4)(*b*) and 524(8)(*b*)). Parliament clearly turned its attention to the circumstances under which s. 719(3.1) should *not* apply, but did not include any limitations on the scope of "circumstances" justifying its application. [Underlining added.]

(*Summers*, at paras. 37-39)

54 In conclusion, the application of s. 515(10)(*c*) is not limited to exceptional circumstances, to "unexplainable" crimes or to certain types of crimes such as murder. The Crown can rely on s. 515(10)(*c*) [page354] for any type of crime, but it must prove - except in the cases provided for in s. 515(6) - that the detention of the accused is justified to maintain confidence in the administration of justice.

(b) *Circumstances Set Out in Section 515(10)(c) Cr. C.*

55 Section 515(10)(*c*) expressly refers to four circumstances that must be considered by a justice in determining whether the detention of an accused is necessary to maintain confidence in the administration of justice. The justice must assess each of these circumstances - or factors - and consider their combined effect. This is a balancing exercise that will enable the justice to decide whether detention is justified.

56 It must be kept in mind that, at this stage of criminal proceedings, the accused is still presumed innocent regardless of the gravity of the offence, the strength of the prosecution's case or the possibility of a lengthy term of imprisonment.

(i) Apparent Strength of the Prosecution's Case

57 An interim release hearing is a summary proceeding in which more flexible rules of evidence apply. As a result, some of the evidence admitted at this hearing may later be excluded at trial. As Justice Trotter notes, it may be difficult to assess the strength of the prosecution's case at such a hearing: "The expeditious and sometimes informal nature of a bail hearing may reflect an unrealistically strong case for the Crown" (p. 3-7).

58 Despite these difficulties inherent in the release process, the justice must determine the apparent strength of the prosecution's case. On the one hand, the prosecutor is not required to prove beyond a reasonable doubt that the accused committed the offence, and the justice must be careful [page355] not to play the role of trial judge or jury: matters such as the credibility of witnesses and the reliability of scientific evidence must be analyzed at trial, not at the release hearing. However, the justice who presides at that hearing must consider the quality of the evidence

tendered by the prosecutor in order to determine the weight to be given to this factor in his or her balancing exercise. For example, physical evidence may be more reliable than a mere statement made by a witness, and circumstantial evidence may be less reliable than direct evidence. The existence of ample evidence may also reinforce the apparent strength of the case.

59 On the other hand, the justice must also consider any defence raised by the accused. Rather than raising a defence at the initial hearing, the latter will most likely not do so before the release hearing held upon completion of the preliminary inquiry, and may not even raise one before trial. If the accused does raise a defence, however, this becomes one of the factors the justice must assess, and if there appears to be some basis for the defence, the justice must take this into account in analyzing the apparent strength of the prosecution's case. As the Quebec Court of Appeal noted in a relatively recent decision, [TRANSLATION] "it would be unfair to allow the prosecution to state its case if the justice is not in a position to consider not only the weaknesses of that case, but also the defences it suggests": *R. v. Coates*, *2010 QCCA 919*, at para. 19 (CanLII).

(ii) Gravity of the Offence

60 For the purposes of s. 515(10)(*c*), what the justice must determine is the "objective" gravity of the offence in comparison with the other offences in the *Criminal Code*. This is assessed on the basis of the maximum sentence - and the minimum sentence, if any - provided for in the *Criminal Code* for the offence.

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(iii) Circumstances Surrounding the Commission of the Offence, Including Whether a Firearm Was Used

61 Without drawing up an exhaustive list of possible circumstances surrounding the commission of the offence that might be relevant under s. 515(10)(*c*), I will mention the following: the fact that the offence is a violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person (for example, a child, an elderly person or a person with a disability). If the offence was committed by several people, the extent to which the accused participated in it may be relevant. The aggravating or mitigating factors that are considered by courts for sentencing purposes can also be taken into account.

(iv) Fact That the Accused Is Liable for a Potentially Lengthy Term of Imprisonment

62 The fourth circumstance set out in s. 515(10)(*c*) is "the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more".

63 Although it is not desirable, for the purposes of s. 515(10)(*c*) *Cr. C.*, to establish a strict rule regarding the number of years that constitutes a "lengthy term of imprisonment", some guidance is nonetheless required for the exercise to be undertaken by justices in this regard.

64 First of all, since I have found that no crime is exempt from the possible application of s. 515(10)(*c*) *Cr. C.*, it is self-evident that the words "lengthy term of imprisonment" do not refer only to a life sentence.

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65 Moreover, to determine, on a case-by-case basis, whether the accused is actually liable for a potentially "lengthy term of imprisonment", the justice must consider all the circumstances of the case known at the time of the hearing, as well as the principles for tailoring the applicable sentence. But this does not mean that the justice would be justified in embarking on a complex exercise to calculate the sentence the accused might receive: it must be

borne in mind that interim release occurs at the beginning of the criminal process and that the justice must avoid acting as a substitute for the trial judge. That being said, there will be cases in which a claim of mitigating or aggravating circumstances appears to have sufficient merit for it to be open to the justice to consider it in determining whether the accused is liable for a potentially "lengthy term of imprisonment". As far as possible, therefore, this fourth circumstance is assessed *subjectively*, unlike the second circumstance - the gravity of the offence - which is assessed *objectively*.

(c) *The Listed Circumstances Are Not Exhaustive*

66 The appellant, relying on *R. v. Mordue* *(2006), 223 C.C.C. (3d) 407* (Ont. C.A.), submits that a detention order must be made when the four circumstances set out in s. 515(10)(*c*) weigh in favour of that result, unless there are other "circumstances" that might justify a release order.

67 In my opinion, the appellant is mistaken.

68 Section 515(10)(*c*) could not be worded more clearly: it refers to "all the circumstances, including ...". In my opinion, Parliament would have worded this provision differently (although I will not comment on the validity of such a wording) if it had intended a detention order to be automatic where the four listed circumstances weigh in favour of such an order. In fact, Parliament intended the opposite. As the Chief Justice stated in *Hall*, a justice dealing with an application for detention based on s. 515(10)(*c*) must consider all the relevant circumstances, but must *focus particularly on the factors Parliament has specified*: para. 41. The automatic [page358] detention argument also seems to be inconsistent with the following statement by the Chief Justice, at para. 41:

> At the end of the day, the judge can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice. [Emphasis added.]

69 Moreover, the automatic detention argument disregards the fact that the test to be met under s. 515(10)(*c*) is whether the detention of the accused is necessary to maintain confidence in the administration of justice. The four listed circumstances are simply the main factors to be balanced by the justice, together with any other relevant factors, in determining whether, in the case before him or her, detention is necessary in order to achieve the purpose of maintaining confidence in the administration of justice in the country. This is the provision's purpose. Although the justice must consider all the circumstances of the case and engage in a balancing exercise, this is the ultimate question the justice must answer, and it must therefore guide him or her in making a determination. The argument that detention must automatically be ordered if the review of the four circumstances favours that result is incompatible with the balancing exercise required by s. 515(10)(*c*) and with the purpose of that exercise.

70 Finally, it is important not to overlook the fact that, in Canadian law, the release of accused persons is the cardinal rule and detention, the exception: *Morales*, at p. 728. To automatically order detention would be contrary to the "basic entitlement to be granted reasonable bail unless there is just cause to do otherwise" that is guaranteed in s. 11(*e*) of the *Charter*: *Pearson*, at p. 691. This entitlement rests in turn on the cornerstone of Canadian criminal law, namely the presumption of innocence that is guaranteed by s. 11(*d*) of the *Charter*: *Hall*, at para. 13. These fundamental rights require the justice to ensure that interim detention is truly [page359] justified having regard to all the relevant circumstances of the case.

71 Although I will not set out an exhaustive list of the circumstances relevant to the analysis required by s. 515(10)(*c*) *Cr. C.*, I think it will be helpful to give a few examples. Section 515(10)(*c*)(iii) refers to the "circumstances surrounding the commission of the offence". I would add that the personal circumstances of the accused (age, criminal record, physical or mental condition, membership in a criminal organization, etc.) may also be relevant. The justice might also consider the status of the victim and the impact on society of a crime committed against that person. In some cases, he or she might also take account of the fact that the trial of the accused will be held at a

much later date.

(d) *Meaning of "Public"*

72 I should point out that although the French version of s. 515(10)(*c*) refers to "*la confiance du public*" (public confidence) - "*sa détention est nécessaire pour ne pas miner la confiance du public envers l'administration de la justice, compte tenu de toutes les circonstances, notamment les suivantes*..." - the word "public" does not actually appear in the provision's English version. However, this Court has confirmed that detention under this provision is based on the need to maintain *public* confidence in the administration of justice: *Hall*, at para. 41. This means that the justice's balancing of all the circumstances under s. 515(10)(*c*) must always be guided by the perspective of the "public".

73 In *Mordue*, the Ontario Court of Appeal provided an interesting analysis of the relationship between "public confidence" for the purposes of s. 515(10)(*c*) and the "safety of the public" factor set out in s. 515(10)(*b*):

> Public fear and concern about safety, while relevant, are not the exclusive considerations in assessing the public's confidence in the administration of justice. The [page360] effect of the accused's release on confidence in the administration of justice must be considered more broadly.
>
> Limiting the analysis of confidence in the administration of justice to the public's safety concerns results in the tertiary ground amounting to little more than a recapitulation of the secondary ground... .
>
> Here, the bail judge placed decisive weight on the quality of the respondent's bail arrangements. By doing so, he erred by not considering whether the tertiary ground established a separate and distinct basis for denying bail. Having quite appropriately considered the level of public concern about safety in this case, the bail judge erred by not going on to consider the effect the release of the respondent would have more broadly on the public confidence in the administration of justice. [Emphasis added; paras. 23-25.]

74 In *Hall*, this Court explained that the "public" in question consists of reasonable members of the community who are properly informed about "the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case": para. 41, quoting *R. v. Nguyen* *(1997), 119 C.C.C. (3d) 269* (B.C.C.A.), at para. 18.

75 In a pre-*Hall* decision concerning the "public interest" ground formerly provided for in s. 515(10)(*b*) *Cr. C.*, the Quebec Court of Appeal stated the following:

> [TRANSLATION] With respect to the perception of the public, as we know, a large part of the Canadian public often adopts a negative and even emotional attitude towards criminals or [potential] criminals. The public wants to see itself protected, see criminals in prison and see them punished severely. To get rid of a criminal is to get rid of crime. It [unjustifiably] perceives the judicial system ... and the administration of justice in general as too indulgent, too soft, too good to the criminal. This perception, almost visceral in respect of crime, is surely not the perception which a judge must have in deciding the issue of interim release. If this were the case, persons charged with certain types of [page361] offences would never be released because the perception of the public is negative with respect to the type of crime committed, while others, on the contrary, would almost automatically be released where the public's perception is neutral or more indulgent... . Therefore, the perception of the public must be situated at another level, that of a public reasonably informed about our system of criminal law and capable of judging and perceiving without emotion that the application of the presumption of innocence, even with respect to interim release, has the effect that people, who may later be found guilty of even serious crimes, will be released for the period between the time of their arrest and the time of their trial. In other words, the criterion of the public perception must not be that of the lowest common denominator. [Emphasis added.]

(*R. v. Lamothe* *(1990), 58 C.C.C. (3d) 530*, at p. 541)

76 In my opinion, these comments are still relevant.

77 Although the "public interest" ground was subsequently held to be unconstitutional, these passages remain helpful in underscoring the fact that the word "public" used in the context of the new s. 515(10)(*c*) does not mean Canadians who tend to react impulsively. This being said, although it is true that the public in question consists of reasonable, well-informed persons, and not overly emotional members of the community, it seems to me that some of the decisions have rendered the word "public" meaningless in this context. Parliament made an express choice by using the word "*public*" in the French version of s. 515(10)(*c*) in requiring that the courts take confidence in the administration of justice into account in deciding whether an accused should be detained pending trial. It referred not to legal experts or judges, but to the "public". Meaning must therefore be given to this legislative choice. Public confidence cannot be equated with the confidence of legal experts in the administration of justice. The Canadian public - even its most knowledgeable members - cannot be expected to have the same level of legal knowledge as judges or lawyers. That would distort the meaning of the word [page362] "public". It would also disregard the purpose of this provision, which is to maintain public confidence in the administration of justice.

78 I note that this position is similar to the one taken by this Court concerning s. 24(2) of the *Charter*, which provides for the exclusion of evidence obtained in violation of the *Charter* if "the admission of it in the proceedings would bring the administration of justice into disrepute". In *R. v. Collins*, *[1987] 1 S.C.R. 265*, Lamer J., writing for the majority, put the relevant question in figurative terms: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?" (p. 282, quoting Y.-M. Morissette, "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What To Do and What Not To Do" (1984), 29 McGill L.J. 521, at p. 538). Lamer J. stated that "[t]he reasonable person is usually the average person in the community, but only when that community's current mood is reasonable": *Collins*, at p. 282. He explained that the reasonable person test "serves as a reminder to each individual judge that his discretion is grounded in community values, and, in particular, long term community values. He should not render a decision that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events": *ibid.*, at pp. 282-83; see also *R. v. Burlingham*, *[1995] 2 S.C.R. 206*, at para. 142.

79 Thus, a reasonable member of the public is familiar with the basics of the rule of law in our country and with the fundamental values of our criminal law, including those that are protected by the *Charter*. Such a person is undoubtedly aware of the importance of the presumption of innocence and the right to liberty in our society and knows that these are fundamental rights guaranteed by our Constitution. He or she also expects that someone charged with a crime will be tried within a reasonable period of time, and is aware of the adage that "justice [page363] delayed is justice denied": *R. v. Trout*, *2006 MBCA 96*, *205 Man. R. (2d) 277*, at para. 15. Finally, a reasonable member of the public knows that a criminal offence requires proof of culpable intent (*mens rea*) and that the purpose of certain defences is to show the absence of such intent. A well-known example of this type of defence is the mental disorder defence. The person contemplated by s. 515(10)(*c*) *Cr. C.* therefore understands that such a defence, once established, will enable an accused to avoid criminal responsibility. However, it would be going too far to expect the person in question to master all the subtleties of complex defences, especially where there is overwhelming evidence of the crime, the circumstances of the crime are heinous and the accused admits committing it.

80 In short, the person in question in s. 515(10)(*c*) *Cr. C.* is a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of a case is inaccurate or who disagrees with our society's fundamental values. But he or she is not a legal expert familiar with all the basic principles of the criminal justice system, the elements of criminal offences or the subtleties of criminal intent and of the defences that are available to accused persons.

81 It is of course not easy for judges to strike an appropriate balance between the unrealistic expectations they might have for the public on the one hand, and the need to refuse to yield to public reactions driven solely by emotion on the other. This exercise may be particularly difficult in this era characterized by the multiplication and diversification of information sources, access to 24-hour news reports and the advent of social media.

82 Canadians may in fact think they are very well informed, but that is unfortunately not always the case. Moreover, people can also make their reactions known much more quickly, more effectively and on a wider scale than in the past, in particular through the social media mentioned above, which are conducive to chain reactions. The courts must therefore be careful not to yield to purely emotional public reactions or reactions that may be based on [page364] inadequate knowledge of the real circumstances of a case.

83 However, the courts must also be sensitive to the perceptions of people who are reasonable and well informed. This enables the courts to act both as watchdogs against mob justice and as guardians of public confidence in our justice system. It would therefore be dangerous, inappropriate and wrong for judges to base their decisions on media reports that are in no way representative of a well-informed public. Indeed, the Quebec Court of Appeal recognized this risk in its recent decision in *R. v. Turcotte*, *2014 QCCA 2190*:

> [TRANSLATION] The press clippings show how risky it is to rely on this mode of proof. They contain several different opinions that vary in the degree to which they are balanced, objective, moderate or superficial. Many of them contain inaccurate facts or do not mention the essential facts. Most of them say nothing about the legal principles that must be applied in making release decisions. Certain opinions stir up anger and distort the debate. Few accurately report the facts and correctly state the applicable principles. On the whole, it must be acknowledged that they do not satisfy the reasonable person test defined in the case law. [para. 68 (CanLII)]

84 Having said this, I wish to point out that this does not mean the courts must automatically disregard evidence that comes from the news media. It must be recognized that the media are part of life in society and that they reflect the opinions of certain segments of the Canadian public. In *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, *[1991] 3 S.C.R. 459*, at p. 475, this Court noted: "The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being." Such opinion evidence can therefore be considered by the courts when it is [page365] admissible and relevant. This will be the case where it corresponds to the opinion of the reasonable person I described above.

85 I should mention, however, that since *Turcotte* has not been brought before this Court, it would be inappropriate for me to speak to the correctness of the Court of Appeal's conclusion with respect to release in that case. I will simply observe that the soundness of that conclusion must be assessed in light of the principles I have already outlined.

86 In short, there is not just one way to undermine public confidence in the administration of justice. It may be undermined not only if a justice declines to order the interim detention of an accused in circumstances that justify detention, but also if a justice orders detention where such a result is not justified.

(4) Conclusion on the Application of Section 515(10)(*c*) *Cr. C.*

87 I would summarize the essential principles that must guide justices in applying s. 515(10)(*c*) *Cr. C.* as follows:

* Section 515(10)(*c*) *Cr. C.* does not create a residual ground for detention that applies only where the first two grounds for detention ((*a*) and (*b*)) are not satisfied. It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.
* Section 515(10)(*c*) *Cr. C.* must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare cases or exceptional circumstances or only to certain types of crimes.
* The four circumstances listed in s. 515(10)(*c*) *Cr. C.* are not exhaustive.
* A court must not order detention automatically even where the four listed circumstances support such a result.

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* The court must instead consider all the circumstances of each case, paying particular attention to the four listed circumstances.
* The question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide the analysis.
* No single circumstance is determinative. The justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified.
* This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. This is the test to be met under s. 515(10)(*c*).
* To answer this question, the court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.
* This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.

88 In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.

89 Having completed the interpretation of s. 515(10)(*c*) *Cr. C.*, I will now consider the power [page367] of review of superior court judges, which enables them to vary release or detention orders made under s. 515(10)(*a*), (*b*) or (*c*) *Cr. C.*

B. *Availability of a Review Under Sections 520 and 521 Cr. C.*

90 Section 520 *Cr. C.* gives an *accused* the right to apply to a judge for a review of an interim detention order made against him or her by a justice. Similarly, s. 521 *Cr. C.* enables the *prosecutor* to apply to a judge for a review of a release order made in relation to an accused. Sections 520 and 521 are worded similarly. In both cases, the application may be made "at any time before the trial": ss. 520(1) and 521(1) *Cr. C.* It should be noted that these sections are limited to the review of orders made in connection with offences other than the ones referred to in s. 469 *Cr. C.*

91 This is the first time this Court has considered the scope of ss. 520 and 521 *Cr. C.* Not all lower courts in Canada are agreed on the nature of this review process. Some consider it an appeal, which means that only an error of law or principle will provide a basis for a "review". Others take the view that they have full discretion to vary the initial order even in the absence of an error. This approach is sometimes described as a "*de novo*" hearing, although, as Justice Trotter points out, a true *de novo* hearing is conducted as if there were no previous proceedings: p. 8-13. Finally, other courts treat the review under ss. 520 and 521 *Cr. C.* as a hybrid remedy. In their view, the section authorizes the accused and the prosecutor to present new evidence to show a change in circumstances, and to raise an error of law or principle by the justice to justify a review of the initial order.

92 For the reasons that follow, I am of the opinion that ss. 520 and 521 *Cr. C.* do not confer an open-ended discretion on the reviewing judge to [page368] vary the initial decision concerning the detention or release of the accused. Nonetheless, they establish a hybrid remedy and therefore provide greater scope than an appeal for

varying the initial order.

(1) Wording of Sections 520 and 521 *Cr. C.*

93 The provisions - ss. 520(1) and (7) and 521(1) and (8) - that establish the power of review read as follows:

> **520.** (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(*b*), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.
>
> ...
>
> (7) ...
>
> and [the judge] shall either
>
> (*d*) dismiss the application, or
>
> (*e*) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.
>
> ...
>
> **521.** (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(1), (2), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(*b*), the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order.
>
> ...
>
> (8) ...
>
> and [the justice] shall either
>
> (*d*) dismiss the application, or
>
> [page369]
>
> (*e*) if the prosecutor shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.
>
> ...

94 It should be mentioned that ss. 520 and 521 do not provide for a *de novo* hearing, whereas Parliament expressly provided for such a hearing in the *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 33(1), where an application for release is made to a youth justice court and that court has not ruled on the initial application. If Parliament had intended for reviewing judges to conduct a true *de novo* hearing, it would have specified this in the legislation. As well, ss. 520(7) and 521(8) provide that the review is conducted on the basis of the transcript and exhibits from the initial proceedings, although some new evidence is admissible. I will return to this point below. For the moment, it is enough to say that these factors confirm my conclusion that ss. 520 and 521 *Cr. C.* do not establish a *de novo* proceeding.

95 Moreover, even though the power of review may seem broad at first glance, ss. 520 and 521 *Cr. C.* expressly limit its exercise in favour of the accused or the prosecutor, as the case may be, to cases in which cause is shown. It should be borne in mind that, in the old *Young Offenders Act*, R.S.C. 1985, c. Y-1, Parliament used the word

"discretion" in referring to the reviewing court's power over the transfer of young accused persons to ordinary court: s. 16(9) and (10). This Court found that the use of that word conferred a broad power of review on the reviewing court and authorized that court to make an independent evaluation and to arrive at an independent conclusion on the same facts: *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446. But Parliament did not choose to use the same wording in ss. 520 and 521 *Cr. C.*

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96 The wording of ss. 520 and 521 *Cr. C.* therefore seems to preclude an interpretation to the effect that the reviewing judge has an open-ended discretion. It remains to be seen whether this conclusion can be confirmed through a comparison with other similar provisions, having regard to the nature of the initial release decision.

(2) Difference Between the Wording of Sections 520 and 521 *Cr. C.* and That of Other Review Provisions

97 The appellant argues that the difference between the wording of ss. 520(7)(*e*) and 521(8)(*e*) *Cr. C.*, which provide that a reviewing judge may vary the initial decision "if the accused [or the prosecutor, as the case may be,] shows cause", and that of s. 680(1) *Cr. C.* and s. 18(2) of the *Extradition Act*, S.C. 1999, c. 18, which contain no such words, favours a standard of review requiring greater deference to the initial release decision.

98 Section 680 *Cr. C.* deals, *inter alia*, with the review of release decisions in the context of the offences listed in s. 469 *Cr. C.* Section 680(1) *Cr. C.* reads as follows:

> **680.** (1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,
>
> (*a*) vary the decision; or
>
> (*b*) substitute such other decision as, in its opinion, should have been made.

99 The appellant concedes that the case law on the nature and availability of a review under s. 680 *Cr. C.* is not consistent. This has even been recognized by certain provincial courts of appeal: *R. v. Oliver*, 2008 NLCA 27, 287 Nfld. & P.E.I.R. 123; *R. v. Massan*, 2012 MBCA 26, 289 C.C.C. (3d) 285; *R. v. White*, 2005 ABCA 403, 202 C.C.C. (3d) 295; see also Trotter, at p. 8-23; T. Quigley, *Procedure in [page371] Canadian Criminal Law* (2nd ed. (loose-leaf)), at p. 11-17.

100 Section 18(2) of the *Extradition Act* concerns the review of an order made with regard to a person arrested under that statute. It reads as follows:

> (2) A decision respecting judicial interim release may be reviewed by a judge of the court of appeal and that judge may
>
> (*a*) confirm the decision;
>
> (*b*) vary the decision; or
>
> (*c*) substitute any other decision that, in the judge's opinion, should have been made.

101 It can be seen immediately that the various decisions open to the reviewing judge are set out in a similar way to those provided for in s. 520 *Cr. C.* However, like s. 680(1) *Cr. C.*, s. 18(2) of the *Extradition Act* does not limit the variation of the initial decision to cases in which "cause" is shown.

102 The case law of Canadian appellate courts is nearly unanimous. Section 18(2) of the *Extradition Act* provides

that a reviewing judge may vary the initial decision only on the basis of an error in principle: *United States of America v. Chan* (2000), 144 C.C.C. (3d) 93 (Ont. C.A.); *United States of America v. Pannell* (2005), 193 C.C.C. (3d) 414 (Ont. C.A.); *United States of America v. Yuen*, 2004 ABCA 368, 363 A.R. 28; *Tenenbaum v. United States of America*, 2008 ABCA 396, 446 A.R. 155; *Delagarde v. United States of America* (2005), 293 N.B.R. (2d) 80 (C.A.); *United States of America v. Palmucci*, 2001 CanLII 38680 (Que. C.A.); *Boily v. États-Unis Mexicains*, 2005 QCCA 599; *Ivanov v. United States of America*, 2003 NLCA 11, 223 Nfld. & P.E.I.R. 44.

103 Only the British Columbia Court of Appeal has taken the position that, although this is not a *de novo* hearing or a proceeding in which it can [page372] render a decision as if it were the first judge, it must determine whether the initial decision is "correct" while at the same time according the usual deference to the first judge's findings of fact: *Seifert v. Canada (Attorney General)*, 2002 BCCA 385, 171 B.C.A.C. 203, at para. 6; *United States of America v. Graham*, 2004 BCCA 162, 195 B.C.A.C. 245, at paras. 8-10. Paradoxically, the British Columbia Court of Appeal and the Newfoundland and Labrador Court of Appeal arrived at different outcomes even though they both based their decisions on an analogy with the review procedure provided for in s. 680 *Cr. C.* This is hardly surprising given that the courts do not agree on the nature of the latter procedure.

104 For the purposes of this appeal, I do not have to determine the validity of the positions taken by appellate courts with respect to s. 680(1) *Cr. C.* and s. 18(2) of the *Extradition Act*. The comparison between those provisions and ss. 520 and 521 *Cr. C.* is nonetheless not without relevance. The fact that s. 680(1) *Cr. C.* and s. 18(2) of the *Extradition Act* - unlike ss. 520 and 521 *Cr. C.* - do not require cause to be shown for the court of appeal to exercise its power of review suggests that Parliament intended, in ss. 520 and 521 *Cr. C.*, to limit the reviewing judge's discretion.

(3) Comparison Between the Appeal From a Sentence and the Review Procedure Provided for in Sections 520 and 521 *Cr. C.*

105 The appellant points to similarities between the interim release decision and the sentencing decision. In the appellant's view, these similarities mean that a release decision should be reviewed on the basis of the same principles that guide a sentence appeal under s. 687 *Cr. C.* Relying on *R. v. Shropshire*, [1995] 4 S.C.R. 227, *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, *R. v. McDonnell*, [1997] 1 S.C.R. 948, *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, the appellant asserts that a superior court conducting a review under ss. 520 and 521 should reverse the initial decision and substitute another one for it only if the initial decision contains an error in principle that [page373] affects the result, or if it is clearly inappropriate or clearly unreasonable.

106 In the respondent's view, the distinctions between the sentencing decision and the interim release decision are so great that no similarity would justify equating the rules for one with the rules for the other. According to the respondent, the right to interim release is a constitutional right, whereas the sentencing principle requiring consideration of whether "less restrictive sanctions may be appropriate in the circumstances" (s. 718.2(*d*) *Cr. C.*) is not important enough to justify this analogy.

107 It is true that there are similarities between the interim release decision and the sentencing decision. Although both these decisions are discretionary, specific statutory rules apply to each of them. In both cases, the rules on the admissibility of evidence are relaxed: ss. 518 and 723 *Cr. C.* As well, the release of an accused must be ordered unless the prosecution shows cause why detention is justified: s. 515(2) and (10) *Cr. C.* Similarly, the sentencing judge must opt for the least restrictive sanction having regard to the circumstances: s. 718.2(*d*) *Cr. C.* Finally, the various possibilities available to the judge are similar. In the case of interim release, the justice may release the accused without conditions, impose statutory conditions for interim release of the accused (with or without sureties), require the payment of a deposit or order the detention of the accused: s. 515(1), (2)(*a*) to (*d*), (4) to (4.3), (5) and (8) *Cr. C.* In the case of sentencing, the judge may discharge the accused, impose statutory conditions of probation, fine the accused or sentence the accused to a term of imprisonment: ss. 730, 731, 734 and 732.1(3) *Cr. C.*

108 However, there are also some significant differences between the interim release decision and the sentencing decision. In *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, this Court discussed the expeditious nature of [page374] our interim release system and the implications of that nature:

> ... s. 503(1)(*a*) *Cr. C.* requires that a person who is arrested and detained be taken before a justice "without unreasonable delay" and in any event within 24 hours after the arrest. Section 515 *Cr. C.* provides that the justice *shall* release the person unless the prosecution shows cause why the detention should be continued. The grounds that can be relied on to deny the person's release are limited. In the short time it has before it must show cause why the detention of the accused is justified, the prosecution has to gather the evidence it intends to use at the bail hearing, which means it may have insufficient time to meet with witnesses and further investigate the matters relevant to bail. Section 516(1) *Cr. C.* provides that the adjournment of a bail hearing cannot exceed three days except with the consent of the accused; and orders can be reviewed at the request of the accused provided that the accused has given the prosecution two days' notice (s. 520(1) and (2) *Cr. C*.).
>
> To avoid any delay prejudicial to an accused who ought to be released, while at the same time ensuring that those who do not meet the criteria for release are kept in custody, compromises had to be made regarding the nature of the evidence to be adduced at the bail hearing. There are practically no prohibitions as regards the evidence the prosecution can lead to show cause why the detention of the accused in custody is justified. According to s. 518(1)(*e*) *Cr. C*., the prosecutor may lead any evidence that is "credible or trustworthy", which might include evidence of a confession that has not been tested for voluntariness or consistency with the *Charter*, bad character, information obtained by wiretap, hearsay statements, ambiguous post-offence conduct, untested similar facts, prior convictions, untried charges, or personal information on living and social habits. The justice has a broad discretion to "make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable" (s. 518(1)(*a*)). The process is informal; the bail hearing can even take place over the phone (s. 515(2.2)). [Underlining added; paras. 27-28.]

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109 This conscious choice to expedite the release hearing is grounded in the importance our society attaches to the presumption of innocence and the right of individuals to liberty even when charged with a serious criminal offence. However, this expeditious process is not without consequences for the accused, who generally has very little time to choose counsel and may even have no legal representation at the release hearing. The accused, or his or her counsel, also has very little time to, *inter alia*, review and analyze the prosecutor's evidence, devise a defence strategy and make the best possible decisions on how to proceed.

110 On the other hand, the sentencing judge is often the judge who presided over the trial of the accused. Thus, even though the appellant argues that the rules on the admissibility of evidence are relaxed, a sentencing decision is made at the end of a long process during which the judge has generally analyzed an abundance of evidence and is more familiar with the situation of the accused. The sentencing judge is therefore not in the same position as the justice who must decide whether to grant the accused interim release.

111 Finally, it is important to note that, at the time of sentencing, the accused has already been convicted and is therefore no longer presumed innocent. However, the sentence could have a longer-term impact on the life of the accused than would interim detention.

112 Thus, although a comparison between the interim release decision and the sentencing decision is interesting, it cannot in itself be determinative, given the differences between these two types of decisions.

(4) Nature of the Decision Reviewed Under Sections 520 and 521 *Cr. C.*

113 The decision concerning the interim release of an accused is often characterized as "discretionary". This word must be used carefully in the context of this provision of the *Criminal Code*, [page376] since release of the accused remains the rule, the exception being where his or her detention is justified on one of the grounds set out in s. 515(10) *Cr. C.*

114 Nevertheless, s. 515(10)(*c*) requires the justice to balance several factors, including the ones listed in that provision. In this balancing exercise, the justice must for the most part make findings of fact and assess the weight of those findings to determine whether detention is justified. Thus, the provision requires the justice to assess the appropriateness of a decision, which, from this perspective, can be characterized as "discretionary".

115 I have already dealt with the argument concerning the similarity between the release decision and the sentencing decision. It will be helpful to return here to the discretionary nature of the sentencing decision. In *Shropshire*, this Court reproduced comments that had been made by the Nova Scotia Court of Appeal, quoting *R. v. Muise* *(1994), 94 C.C.C. (3d) 119*, at pp. 123-24:

> In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate... .
>
> ...
>
> The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts... . My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive. [para. 48]
>
> [page377]
>
> ...

It then added:

> Unreasonableness in the sentencing process involves the sentencing order falling outside the "acceptable range" of orders; this clearly does not arise in the present appeal. [Emphasis added; para. 50.]

116 In *Nasogaluak*, the Court noted that an appellate court cannot interfere with a sentence simply because it would have weighed the relevant factors differently (para. 46, quoting *R. v. McKnight* *(1999), 135 C.C.C. (3d) 41* (Ont. C.A.), at para. 35):

> ... The weighing of relevant factors, the balancing process is what the exercise of discretion is all about... . Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle. [Emphasis added.]

117 Allow me to repeat that the accused has a right to be presumed innocent at the time of the release hearing, which is no longer the case at the time of sentencing. However, the passages reproduced above aptly convey the implications of a discretionary decision that involves the balancing of a number of factors. As I explained above, a decision with respect to release made on the basis of s. 515(10)(*c*) *Cr. C.* calls for the consideration of several factors that may be difficult to balance. This is a delicate exercise whose essence would be distorted if an open-ended discretion to review the initial release decision were to be conferred on the judge.

118 As I mentioned above, I am of the opinion that ss. 520 and 521 *Cr. C.* do not provide for a *de novo* hearing. Thus, unless there is new evidence - a subject I will address below - the reviewing judge is not in a better position than the justice to evaluate whether the detention of the accused is necessary. In addition, the reviewing judge has, in [page378] relation to the justice, no special expertise with respect to release.

119 I therefore have difficulty seeing any possible justification for allowing a reviewing judge, at all times, to substitute his or her assessment of the various circumstances for that of the justice.

(5) Conclusion: The Review Provided for in Sections 520 and 521 *Cr. C.* Is a Hybrid Remedy

120 On the basis of the wording of ss. 520 and 521 *Cr. C.*, a comparison with other review provisions and with sentence appeals, and the nature of the decision being reviewed, I conclude that these sections do not confer on the reviewing judge an open-ended power to review the initial order respecting the detention or release of the accused. The reviewing judge must therefore determine whether it is appropriate to exercise this power of review.

121 It will be appropriate to intervene if the justice has erred in law. It will also be appropriate for the reviewing judge to exercise this power if the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient weight to another. The reviewing judge therefore does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently. I reiterate that the relevant factors are not limited to the ones expressly specified in s. 515(10)(*c*) *Cr. C.* Finally, where new evidence is submitted by the accused or the prosecutor as permitted by ss. 520 and 521 *Cr. C.*, the reviewing judge may vary the initial decision if that evidence shows a material and relevant change in the circumstances of the case.

(6) Material Change in Circumstances

122 Sections 520(7) and 521(8) *Cr. C.* provide for the tendering of new "evidence or exhibits". Section 520(7) reads as follows:

[page379]

> **520.** (7) On the hearing of an application under this section, the judge may consider
>
> (*a*) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
>
> (*b*) the exhibits, if any, filed in the proceedings before the justice, and
>
> (*c*) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

Section 521(8) is essentially identical to s. 520(7).

123 The question is what is admissible as new evidence.

124 The appellant submits that this evidence is limited to facts that are truly new in the sense that they have come to light since the initial decision. It therefore does not include facts that could have been alleged at the initial hearing or during a previous review. Otherwise, the system could encourage "judge shopping".

125 It is true that the principle of finality of judgments and that of the need to avoid a multiplicity of unwarranted court proceedings are important, and the courts must not facilitate "judge shopping". However, it is going too far to say, as the appellant does, that it might be in an arrested person's interest to tender a minimum of evidence at the initial release hearing and then, should that prove to be insufficient, to adduce evidence on review that had existed at the time of that hearing but had not been used then. Detained persons generally do everything in their power to

be released as quickly as possible. The appellant's argument reflects a misunderstanding of the impact of detention on an individual, particularly when it may be unjustified: see, e.g., *Toronto Star Newspapers Ltd.*, at para. 51, quoting *Hall*, at para. 47; *Ell v. Alberta*, *2003 SCC 35*, *[2003] 1 S.C.R. 857*, at para. 24.

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126 That the fear expressed by the appellant goes too far seems even clearer to me given the fact that, following a first application for review under ss. 520 and 521 *Cr. C.*, a further application may not be made, except with leave of a judge, prior to the expiration of 30 days: ss. 520(8) and 521(9) *Cr. C.*

127 I am instead of the opinion that the reason why detained persons may not always tender all possible evidence at their first hearing lies in the generally expeditious nature of the release process and in the consequences of that nature, namely the short time between arrest and hearing, a lack of representation for accused persons, and incomplete evidence at this stage. The interests of justice would therefore be undermined if courts acting under ss. 520 and 521 *Cr. C.* were to adopt a narrow view regarding the "new evidence" that can be admitted under those sections.

128 In *Palmer v. The Queen*, *[1980] 1 S.C.R. 759*, at p. 775, this Court established the following criteria that must be met for evidence to be considered "new evidence" on appeal:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial ... .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

(Reproduced in *R. v. Warsing*, *[1998] 3 S.C.R. 579*, at para. 50.)

129 In my opinion, the four criteria from *Palmer* are relevant, with any necessary modifications, to the determination of what constitutes new evidence for the purposes of the review provided for in ss. 520 and 521 *Cr. C.* Given the generally expeditious nature of the interim release process and the risks of violating the rights of the accused, and since [page381] the release hearing takes place at the very start of criminal proceedings and not at the end like the sentence appeal, a reviewing judge must be flexible in applying these four criteria. I reiterate at the outset that the rules of evidence are relaxed in the context of the release hearing: s. 518 *Cr. C.*

130 The first criterion - due diligence - exists to ensure finality and order, which are values that are essential to the integrity of the criminal process: *R. v. G.D.B.*, *2000 SCC 22*, *[2000] 1 S.C.R. 520*, at para. 19, quoting *R. v. M. (P.S.)* *(1992), 77 C.C.C. (3d) 402* (Ont. C.A.), at p. 411. The appellant relies on these same values to limit what constitutes new evidence in this case. However, the pre-trial detention of accused persons - like their release - is, by its nature, very often "interim" and not final.

131 Moreover, despite the importance of these values, this Court has also stated that the due diligence criterion should not be applied as strictly in criminal matters as in civil cases: *Palmer*, at p. 775, quoting *McMartin v. The Queen*, *[1964] S.C.R. 484*, at p. 493. The weight to be given to this criterion depends on the strength of the other criteria or, in other words, on the totality of the circumstances: *R. v. Price*, *[1993] 3 S.C.R. 633*, at p. 634; see also *Warsing*, at para. 51. In *G.D.B.*, this Court stated that "an appellate court should determine the reason why the evidence was not available at the trial": para. 20. A generous and liberal interpretation of the meaning of "new evidence" in the context of ss. 520 and 521 *Cr. C.* is thus quite consistent with the principles developed by this Court.

132 I am therefore of the opinion that a reviewing judge may consider evidence that is truly new or evidence that existed at the time of the initial release hearing but was not tendered for some reason that is legitimate and reasonable. This is how the "due diligence" criterion from *Palmer* must be [page382] understood in the context of the review provided for in ss. 520 and 521 *Cr. C.* The nature of the release system and the risks associated with it demand no less.

133 I wish to be clear that such new evidence is not limited to evidence that was unavailable to the accused before the initial hearing because, for example, the prosecutor did not disclose it to the accused. It is possible that the prosecutor will give the evidence to the accused only at the very last minute before, or very shortly before, the initial hearing. Depending on the circumstances of a given case, it could be unreasonable and unfair to say that if the accused does not use such evidence at the initial hearing, he or she will be precluded from adducing it on a subsequent application for review, that is, after his or her counsel has had the necessary time to analyze it and weigh the advantages and disadvantages of using it. In each case, the reviewing judge will have to determine whether the reason why the accused did not tender such pre-existing evidence earlier was legitimate and reasonable.

134 This requirement to show a reason that was legitimate and reasonable means that it will be open to the reviewing judge to refuse to admit new evidence where it is alleged to have actually been in the interest of the accused to drag out the application for release or where the accused is alleged to have tried to use the review to engage in judge shopping. In this way, the conception of new evidence in the context of ss. 520 and 521 *Cr. C.* reflects both the need to ensure the integrity of our criminal justice system and the need to protect the rights of accused persons in proceedings that are generally expeditious.

135 As to the second *Palmer* criterion, the evidence obviously does not have to "bea[r] upon a decisive or potentially decisive issue in the trial": p. 775. It will suffice if the evidence is relevant for the purposes of s. 515(10) *Cr. C.* Where, more specifically, the third ground for detention under s. 515(10)(*c*) - the one at issue here - is concerned, I note that the justice must consider "all the [page383] circumstances". The second *Palmer* criterion will therefore rarely be decisive in the context of an application for review under ss. 520 and 521 *Cr. C.*, since the range of "relevant" evidence will generally be quite broad.

136 The third criterion - that the evidence "must be credible in the sense that it is reasonably capable of belief" (*Palmer*, at p. 775) - must be interpreted in light of the relaxation of the rules of evidence at the bail stage and in particular of s. 518(1)(*e*) *Cr. C.*, which provides that "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case".

137 Finally, the fourth *Palmer* criterion should be modified as follows: the new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice under s. 515(10)(*c*) *Cr. C.* The new evidence must therefore be significant.

138 If the new evidence meets the four criteria for admissibility, the reviewing judge is authorized to repeat the analysis under s. 515(10)(*c*) *Cr. C.* as if he or she were the initial decision-maker. The reviewing judge must therefore consider all the circumstances of the case, focusing in particular on the circumstances specified in that provision. The judge must then undertake a balancing exercise and determine, from the perspective of the public, whether the detention of the accused is still justified. The *Palmer* criteria, modified as I have just done, must not be applied in a manner that delays or needlessly complicates the release process. As I explained above, that process, by its very nature, generally requires an expeditious and flexible procedure. The criteria therefore serve as guidelines for the reviewing judge, but they must not have the effect of creating a procedural straightjacket that would interfere with the administration of justice.

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139 In conclusion, a reviewing judge can intervene where relevant new evidence is tendered, where an error of law

has been made or, finally, where the decision was clearly inappropriate.

C. *Application to the Facts of This Case*

(1) No New Facts

140 In making the initial decision on whether the respondent should be released, Judge Lavergne considered the fact that, according to the witnesses, the respondent and his co-accused had shouted abuse and insults at the driver during the entire ride, had tried to provoke him and had threatened to beat him up. Judge Lavergne also noted that the video showed that the young men had spat at the driver while getting off the bus. This appeared to provoke a reaction by the driver, who stood up and went to the door of the bus. Judge Lavergne wrote that the driver had in all likelihood said something to the young men, who had then rushed back onto the bus. That was when the assault began.

141 On review, Martin J. of the Superior Court found that not all elements of the incident had been in evidence before Judge Lavergne. According to Martin J., the starting point for the events taken into account by Judge Lavergne seemed to be the moment when the three young men had stood up at the back of the bus to go to the front. However, in Martin J.'s view, the events had instead started when the driver had refused to open the bus doors to let the young men on at a previous stop. Martin J. also pointed out that, once the three young men had gotten off the bus, the driver had jumped up from his seat and headed for the door. Following a verbal exchange, the driver went back to sit down, followed by the young men, who got back on the bus. At that moment, the driver turned toward them and took [TRANSLATION] "a certain physical action against one of the individuals": para. 11. It was from that point on, according to Martin J., that the situation degenerated.

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142 It is true that Judge Lavergne did not state in his decision that the driver had refused to let the three young men board at a previous stop. The transcript from the initial hearing seems to indicate that this was not discussed by counsel of record. Judge Lavergne also did not refer to the physical action the driver had taken against the young men before they assaulted him. These details came from a statement made by a passenger, which was not given to counsel for the respondent until the morning of the hearing before Judge Lavergne. The investigating officer, who testified for the prosecution, referred to the passenger's statement, but this specific point was not mentioned. When cross-examining the investigating officer, counsel for the respondent did not bring up the passenger's statement. In light of my conclusions with respect to "new evidence" and of the fact that counsel did not receive the statement until the morning of the initial hearing, this fact could have constituted a reason that was legitimate and reasonable for not using it at that hearing but then doing so at a subsequent hearing.

143 However, it can be seen from the transcript of the second release hearing, held on completion of the preliminary inquiry, that counsel for the respondent submitted at that hearing that the bus driver had not stopped at a previous stop. Counsel also observed that, after being spat at, the driver had spoken aggressively to the three young men and had allegedly pushed the first of the young men who had gotten back on the bus. Counsel for the respondent then filed the passenger's statement in evidence.

144 In the decision he rendered following the preliminary inquiry, Judge Legault noted that the young men had complained to the driver for not waiting for them at a previous stop. He also observed that, when the young men had gotten off the bus throwing what remained of their pizza at him and spitting at him, the driver had gone to the door of the bus to object to their behaviour.

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145 Judge Legault nevertheless found that the detention of the respondent was still justified under s. 515(10)(*c*) *Cr. C.*:

> [TRANSLATION] The Court sees no reason to interfere with Judge Lavergne's observations on the third ground, which concerns confidence in the administration of justice, having regard to all the factors, namely the likelihood of conviction, the circumstances surrounding the commission of the offence, the gravity of the offence, which is even greater because of the serious consequences for the personal life and work of the accused, the lack of prospects for independence in the future and, finally, the fact that the accused is liable for a potentially lengthy term of imprisonment.
>
> ...
>
> The Court is not of the opinion that it has evidence that would allow it to qualify or temper the judge's findings concerning the aggravating factors involved in the significant participation of the accused in the offence that was committed. [paras. 26 and 30]

146 Thus, no new facts were presented to Martin J. in the context of the application for review. Judge Lavergne may not have had all the elements of the incident before him at the initial hearing, but Judge Legault did have them on completion of the preliminary inquiry. He found that the new details in the sequence of events did not alter Judge Lavergne's initial conclusion.

147 It is true that, in his decision, Judge Legault did not mention the [TRANSLATION] "physical action" taken by the driver to which the Superior Court judge referred. However, it can be seen from the evidence that Judge Legault was aware of that fact. It must be assumed that he considered it in making his decision. "The judge is not required to demonstrate that he or she knows the law [or] has considered all aspects of the evidence": *R. v. Burns*, *[1994] 1 S.C.R. 656*, at p. 664. I do not think this is a case in which the judge failed to appreciate, or completely disregarded, relevant evidence: *Harper v. The Queen*, *[1982] 1 S.C.R. 2*, at p. 14. In light of all the relevant circumstances, the driver's action could not in itself have tipped the balance in the respondent's favour.

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148 It was therefore not open to Martin J. to review the initial detention order on the basis of new facts.

(2) Question Whether the Alleged Crime Is "Unexplainable"

149 Judge Lavergne began by properly identifying the test set out in s. 515(10)(*c*) *Cr. C.*, as can be seen from the following comment:

> [TRANSLATION] But above all, this provision, s. 515(10)(c) of the Criminal Code, essentially calls for an analysis of whether, at the end of the day, after all the circumstances are considered, including the four (4) factors I have already mentioned, there is a reasonable collective expectation that interim release must be denied to maintain public confidence in the administration of justice. [Emphasis added; pp. 18-19.]

150 Judge Lavergne also stated that [TRANSLATION] "[t]he public means persons who are reasonable, dispassionate and properly informed about the values expressed in legislation, including the presumption of innocence ... but who are also informed about all the circumstances associated with the commission of a crime": p. 19. This statement is perfectly consistent with this Court's decision in *Hall*. Judge Lavergne added that the onus was on the prosecutor to show that the detention of the accused was justified.

151 It is true that Judge Lavergne did not elaborate on his finding that the prosecution had discharged its burden of proof under s. 515(10)(*c*) in this case. However, when considered as a whole, his decision was detailed enough for a reviewing judge to be able to understand the grounds on which he had based his detention order. He referred to the first three factors, which he had already discussed in the context of s. 515(10)(*b*). On the fourth factor, he stated that the accused was liable for a potentially [TRANSLATION] "significant" term. In his analysis under s. 515(10)(*b*), Judge Lavergne considered the following circumstances surrounding the offence: (1) the three young men had

allegedly shouted abuse and insults at the driver during the bus ride; (2) they had spat at him when getting off the bus; (3) the driver had then stood up and gone to the door and [page388] had, in all likelihood, said something to the young men; and (4) the young men had gotten back on the bus, rushed at the driver and beat him severely. Judge Lavergne also noted that the respondent had been an active participant and that the existence of the videotape meant that a conviction was highly likely.

152 Judge Lavergne repeatedly stressed the brutality and gratuitousness of the assault as well as the fact that it was unexplainable and unexplained:

> [TRANSLATION] [The video footage] illustrates the brutality of the assault, which is matched only by its gratuitousness.
>
> ...
>
> The Court will refrain [from describing such conduct] except to again emphasize the unexplainable and unexplained brutality of such behaviour.
>
> ...
>
> The defendant and the driver do not know each other, which makes this even more incomprehensible. There was nothing to predispose the defendant to attack the driver so violently, which makes the assault that much more senseless and heinous.
>
> ...
>
> Conduct as unpredictable and disturbing as this does not weigh in favour of release. [pp. 2, 9-10 and 14-15]

153 Judge Lavergne's reasons may suggest that the fact that the assault was gratuitous or unexplainable played a key part in his conclusion that the detention of the respondent was necessary under s. 515(10)(*c*) *Cr. C.*, and not only under s. 515(10)(*b*). As I mentioned above, however, the question whether an offence is unexplainable or unexplained is not a criterion that should guide justices in their analysis under s. 515(10)(*c*) *Cr. C.*

[page389]

154 In any event, there is no doubt that Martin J. made the crime being "explainable" a criterion in his analysis, in addition to unduly restricting the scope of s. 515(10)(*c*) *Cr. C.* After finding that Judge Lavergne had not had all the circumstances before him at the initial hearing, Martin J. wrote that this was not a totally gratuitous and unexplained or unexplainable incident. He then reviewed the history of s. 515(10) *Cr. C.* and the case law on s. 515(10)(*c*), finding that the latter provision had to be used [TRANSLATION] "sparingly": para. 22.

155 Martin J. disagreed with the view that the incident was unexplainable. He added:

> [TRANSLATION] Do not misunderstand me. Such behaviour is heinous and cannot be justified. However, it is not unexplainable. [para. 27]

156 I note as well that Martin J. quoted, with approval, *Trout*, in which the Manitoba Court of Appeal had found that the facts of the case before it, though brutal, "pale[d] in comparison to the vicious butchering of the victim in *Hall*": para. 26, quoting *Trout*, at para. 12.

157 With all due respect for the reviewing judge, I believe he erred in stating that s. 515(10)(*c*) *Cr. C.* must be interpreted narrowly and applied only in rare cases. In addition, the offence being "explainable" proved to be a determinative factor in his decision, although he did properly recognize the seriousness of the offence and its [TRANSLATION] "heinous" and "repugnant" nature. Moreover, he reversed the decisions of Judge Lavergne and

Judge Legault without even considering the four factors set out in s. 515(10)(*c*) *Cr. C.* Martin J. therefore made several errors that justify reviewing his entire decision.

158 Finally, Martin J. intervened even though there was no basis for a review, given that there was no material change in circumstances and no error [page390] of law, and that the initial decision was not clearly inappropriate. Indeed, in my opinion, the detention of the respondent was justified under s. 515(10)(*c*) *Cr. C.*

(3) Necessity of the Respondent's Detention

159 All the relevant factors in this case must be analyzed to determine whether, when they are balanced as they should have been had it not been for the errors, the detention of the respondent is necessary to maintain confidence in the administration of justice.

160 First of all, the prosecution's case appears to be strong, since the incident was videotaped and there is eyewitness testimony. Real evidence such as a videotape is more reliable than circumstantial or testimonial evidence. In addition, the respondent does not seem, *prima facie*, to have a valid defence to put forward, even if the driver's [TRANSLATION] "physical action" against the respondent and his co-accused were to be taken into account. Indeed, the respondent did not argue in this Court that he had a valid defence that could limit the apparent strength of the prosecution's case. Although it is not my role - nor is it the role of a bail judge - to analyze in detail the possible outcomes of a future trial, it is difficult to imagine, at first glance, how self-defence could be available to the respondent. At this stage of the proceedings, the evidence does not logically support an argument by the respondent that he used reasonable force to defend or protect himself or to protect another person, or that the act he committed was reasonable in the circumstances: s. 34 *Cr. C.* It should also be noted that the defence of provocation is not available, given that it applies only to reduce a murder charge: s. 232 *Cr. C.*

161 The offence is objectively very serious, since it is aggravated assault and since the maximum sentence of 14 years for that offence is among the most severe in the *Criminal Code* after imprisonment for life: para. 268(2).

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162 As for the circumstances surrounding the commission of the offence, I am considering the fact that the respondent was an active participant in the assault and that the assault was extremely brutal: even the intervention of passengers could not put a quick stop to it. The fact that an offence is violent, brutal or heinous is clearly an important factor that a justice can consider. The fact that the driver had refused to wait for the young men at a previous stop is of no relevance in this analysis. Moreover, I have difficulty seeing why the physical action the driver allegedly took - pushing a friend of the respondent's - should even be considered to favour the respondent in light of the insults and threats directed at him during the ride.

163 Finally, the maximum sentence for aggravated assault is 14 years. If the respondent were instead convicted of assault causing bodily harm, the maximum sentence would be 10 years: s. 267(*b*) *Cr. C.* Neither offence carries a minimum sentence. Courts have held that [TRANSLATION] "this type of crime, aggravated assault, generally demands an unconditional term of imprisonment to properly express society's denunciation of crimes of violence against the person and to send a clear message of deterrence": *R. v. Dagenais*, *2012 QCCA 244*, at para. 18 (CanLII); *R. v. Riendeau*, *2012 QCCA 1155*, at para. 32; see also C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at s. 23.230. Even though the respondent had no criminal record and was only 20 years old at the time of the events, he will, if convicted, likely be sentenced to a significant term of imprisonment in light of the circumstances of the offence, and in particular of his active participation in and the violent nature of the assault. Therefore, there is no doubt that he is liable for a potentially "lengthy term of imprisonment" within the meaning of s. 515(10)(*c*) *Cr. C.* if he is convicted of either aggravated assault or assault causing bodily harm.

164 Accordingly, the four circumstances set out in s. 515(10)(*c*) *Cr. C.* strongly support the detention of the respondent.

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165 In my view, the fact that the assault was committed against a bus driver, a civil servant who works in the community to ensure the well-being of the public, makes the offence even more heinous. Also relevant are the nature and severity of the injuries sustained by the driver, and in particular the long-term effects and the impact on his career and his personal life.

166 In short, I find that, when all the relevant circumstances are weighed as required by s. 515(10)(*c*) *Cr. C.*, the detention of the respondent was necessary to maintain confidence in the administration of justice.

167 I believe that a reasonable member of the public who, although not a legal expert, is nonetheless properly informed about the philosophy underlying the legislative provisions, *Charter* values and the actual circumstances of the case would not understand why the respondent should not remain in custody pending his trial. Such members of the public are not people who would allow themselves to be guided by their emotions and to be swayed by the mob or by incomplete or distorted information. In the face of such a brutal attack that was committed by several people in the middle of the night against a bus driver, a person who was serving the community, and that had serious consequences for the victim's health and integrity and was captured on a videotape that left no doubt as to the respondent's active participation in the assault, I believe that the confidence in our justice system of a reasonable member of our society would be undermined if the interim detention of the respondent were not ordered.

V. Disposition

168 I would allow the appeal. It was not open to the Superior Court judge to interfere with the initial release decision, and he unduly restricted the scope of s. 515(10)(*c*) *Cr. C.* and erred in basing his decision on the question whether that the offence was "unexplainable". The detention of the [page393] respondent is justified on the basis of s. 515(10)(*c*) *Cr. C.* The detention order is accordingly restored.

* * * * *

APPENDIX

Criminal Code, *R.S.C. 1985, c. C-46*

> **515...** .
>
> (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (*a*) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
>
> (*b*) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
>
> (*c*) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> (i) the apparent strength of the prosecution's case,
>
> (ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

517. (1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or [page394] to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as

...

(*b*) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

520. (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(*b*), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

(2) An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

(4) A judge may, before or at any time during the hearing of an application under this section, on application by the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

(6) A warrant issued under subsection (5) may be executed anywhere in Canada.

(7) On the hearing of an application under this section, the judge may consider

(*a*) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,

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(*b*) the exhibits, if any, filed in the proceedings before the justice, and

(*c*) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

(*d*) dismiss the application, or

(*e*) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.

(8) Where an application under this section or section 521 has been heard, a further or other application under this section or section 521 shall not be made with respect to that same accused, except with leave of

a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

(9) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of an application under this section.

521. (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(1), (2), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(*b*), the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order.

(2) An application under this section shall not be heard by a judge unless the prosecutor has given to the accused at least two clear days notice in writing of the application.

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

(4) A judge may, before or at any time during the hearing of an application under this section, on application of the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

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(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

(6) Where, pursuant to paragraph (8)(*e*), the judge makes an order that the accused be detained in custody until he is dealt with according to law, he shall, if the accused is not in custody, issue a warrant for the committal of the accused.

(7) A warrant issued under subsection (5) or (6) may be executed anywhere in Canada.

(8) On the hearing of an application under this section, the judge may consider

(*a*) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,

(*b*) the exhibits, if any, filed in the proceedings before the justice, and

(*c*) such additional evidence or exhibits as may be tendered by the prosecutor or the accused,

and shall either

(*d*) dismiss the application, or

(*e*) if the prosecutor shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.

(9) Where an application under this section or section 520 has been heard, a further or other application under this section or section 520 shall not be made with respect to the same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

(10) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of an application under this section.

Appeal allowed.

Solicitors:

Solicitor for the appellant: Poursuites criminelles et pénales du Québec, Montréal.

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Solicitors for the respondent: André Lapointe, Montréal; Guylaine Tardif, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): John Norris, Toronto; Henein Hutchison, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Kapoor Barristers, Toronto.

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1 Judge Lavergne issued a publication ban under s. 517(1)(b) of the Criminal Code (see Appendix) on April 26, 2013. I note that no one raised the issue of the publication ban in this appeal, and I do not interpret s. 517(1)(b) as preventing the Court from publishing these reasons for judgment in the Supreme Court Reports and from posting them online following the Court's usual practice.

End of Document

TAB 2

R. v. K.G.K.

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

Heard: September 25, 2019;

Judgment: March 20, 2020.

File No.: 38532.

[2020] S.C.J. No. 7 | [2020] A.C.S. no 7 | 2020 SCC 7 | 2020 CSC 7 | 2020EXP-782 | EYB 2020-349903 | [2020] 4 W.W.R. 377 | 443 D.L.R. (4th) 361 | 61 C.R. (7th) 233 | 453 C.R.R. (2d) 288 | 2020 CarswellMan 85

K.G.K., Appellant; v. Her Majesty The Queen, Respondent, and Director of Public Prosecutions, Attorney General of Ontario, Director of Criminal and Penal Prosecutions and Criminal Lawyers' Association of Ontario, Interveners

(94 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Procedural rights — Trial within a reasonable time — Calculation of delay — Presumptive ceiling — Appeal by KGK from judgment refusing his appeal of dismissal of his motion for stay of proceedings based on violation of s. 11(d) right dismissed — Approximately 42 months separated date charges were laid and date verdict was rendered — Although right in s. 11(b) Charter extended beyond end of evidence and argument, presumptive ceilings established in Jordan did not include deliberation time — Judges should be presumed to have struck reasonable balance between need for timeliness and trial fairness considerations, as well as other practical constraints — Only where trial judge's verdict deliberation time was found to have taken markedly longer than it reasonably should have would presumption be displaced — Nine months taken for deliberations in KGK's case came perilously close to delay markedly longer than should reasonably have been required — However, deliberation time occurred mostly before release of Jordan, and parties conducted themselves complacently — Had Jordan been available to trial judge, case's proximity to ceiling would have been factor he would have considered in assessing how much time he reasonably needed to render verdict.

Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — On being charged with an offence — To be tried within a reasonable time — Appeal by KGK from judgment refusing his appeal of dismissal of his motion for stay of proceedings based on violation of s. 11(d) right dismissed — Approximately 42 months separated date charges were laid and date verdict was rendered — Although right in s. 11(b) Charter extended beyond end of evidence and argument, presumptive ceilings established in Jordan did not include deliberation time — Judges should be presumed to have struck reasonable balance between need for timeliness and trial fairness considerations, as well as other practical constraints — Only where trial judge's verdict deliberation time was found to have taken markedly longer than it

reasonably should have would presumption be displaced — Nine months taken for deliberations in KGK's case came perilously close to delay markedly longer than should reasonably have been required — However, deliberation time occurred mostly before release of Jordan, and parties conducted themselves complacently — Had Jordan been available to trial judge, case's proximity to ceiling would have been factor he would have considered in assessing how much time he reasonably needed to render verdict.

Appeal by KGK from a judgment of the Manitoba Court of Appeal refusing his appeal of a judgment that dismissed his motion for a stay of proceedings based on violation of his rights under s. 11(d) of the Canadian Charter of Rights and Freedoms ("Charter") to be tried within a reasonable time. KGK was charged in April 2013 with sexual offences against his minor stepdaughter. His trial concluded on January 21, 2016, and the trial judge reserved judgment. Following inquiries by both parties about the status of the case, they were informed on Septemberá30, 2016, that the trial judge would render his decision on Octoberá25, 2016. On October, 24, 2016, KGK filed a motion seeking to stay the proceedings on the basis that the delay between the date the charges were laid and the date the verdict was to be rendered - approximately 42 months - was unreasonable and infringed his s. 11(b) rights. Despite receiving that motion, the trial judge rendered his decision as planned, convicting KGK of one count each of sexual interference, invitation to sexual touching, and sexual assault. The trial judge then recused himself from the case and KGK's motion was heard by a new judge, who dismissed the motion on the basis that including verdict deliberation time in the ceilings established under the R. v. Jordan framework would not strike an appropriate balance between the constitutional imperatives of s. 11(b) of the Charter and judicial independence. The motion judge concluded that verdict deliberation time would only be unreasonable within the meaning of s. 11(b) where, in the overall context of a case, the time taken was "shocking, inordinate and unconscionable". In KGK's case, although the deliberation time was longer than desirable it did not result in a breach of KGK's s. 11(b) rights. A majority of the Court of Appeal upheld that decision.

HELD: Appeal dismissed.

Section 11(b) of the Charter reflected and reinforced the notion that "[t]imely justice is one of the hallmarks of a free and democratic society". The parties agreed that the right to be tried within a reasonable time enshrined in s. 11(b) of the Charter encompassed verdict deliberation time. However, the presumptive ceilings established in Jordan were not intended to cover the entire period of time to which s. 11(b) applied and did not include deliberation time. The Jordan ceilings were not designed to exhaust the s. 11(b) analysis and cover all sources of delay. Rather, the ceilings represented a specific solution designed to address a specific problem: the culture of complacency towards excessive delay associated with "bringing those charged with criminal offences to trial". There was no suggestion that delay arising from verdict deliberation time contributed to the systemic problem that Jordan sought to address. The decision called upon the courts to change "courtroom culture" by implementing more efficient trial procedures. Jordan was squarely focused on delay in bringing accused persons to trial and that was the scope of its application.áWhen assessing whether an accused person's right to be tried within a reasonable time was infringed by delay in verdict deliberation time, the question was whether the deliberation time took markedly longer than it reasonably should have in all of the circumstances. This test should be approached in light of the presumption of judicial integrity, which acknowledged that judges were bound by their judicial oaths and would carry out the duties they had sworn to uphold.áA trial judge should be presumed to have struck a reasonable balance between the need for timeliness and trial fairness considerations, as well as the practical constraints that judges faced. The burden lay on the accused to rebut this presumption. Trial fairness took on a different character after the trial ended and the case was left in the hands of the trier of fact. Prior to the end of evidence and argument, time was the enemy of trial fairness. By contrast, once the evidence was preserved in the record, necessary verdict deliberation time worked to ensure fairness.áThis was so because verdict deliberation time reflected the time a trial judge considered reasonably necessary to carefully assess the evidence, research points of law, and write reasons, which helped to ensure fair and accurate decision making. Reasonable verdict deliberation time also had to account for the practical constraints that trial judges faced, both individually and institutionally. Very often, a balancing of the foregoing considerations resulted in a verdict being rendered within the sixmonth guideline set by the Canadian Judicial Council. However, this sixmonth guideline was not a determinative measure of constitutionality. Simply showing that this guideline had been exceeded would not, in itself, establish a breach of s. 11(b). Only where the trial judge's verdict deliberation time was found to have taken markedly longer than it reasonably should have would

this presumption be displaced. Factors a court could consider in assessing the reasonableness of deliberation time included how close to the relevant Jordan ceiling the case was before the trial judge reserved judgment; the complexity of the case; any information concerning the judge's workload or institutional constraints affecting courts in the local jurisdiction; and the length of time taken for deliberations in other cases of a similar nature in similar circumstances. The nine months taken for deliberations in KGK's case came perilously close to a markedly longer delay than should reasonably have been required to render a verdict. Had this case been heard entirely post-Jordan, the s. 11(b) issue might have been decided differently.áHowever, the trial judge's verdict deliberation time occurred before the release of Jordan. Until Jordan was released, the parties in this matter appeared to have conducted themselves in a complacent manner. Had Jordan been available to the trial judge when he took KGK's case under reserve, the case's proximity to the ceiling would no doubt have been a factor that he would have considered in assessing how much time he reasonably needed to render his verdict. The impossibility of taking this consideration into account preJordan should not be held against him.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s.á11(b)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Right to be tried within reasonable time -- Verdict deliberation time -- Delay of nine months between conclusion of evidence and argument at trial and trial judge's verdict -- Whether s. 11(b) of Canadian Charter of Rights and Freedoms applies to verdict deliberation time -- If so, whether verdict deliberation time is included in presumptive ceilings established in Jordan -- Test to be applied in assessing whether right to be tried within reasonable time infringed by delay occasioned by verdict deliberation time.

Court Summary:

K was charged in April 2013 with sexual offences against his stepdaughter. The evidence and argument at his trial concluded on January 21, 2016. The trial judge reserved judgment. After inquiring as to the status of K's case, the parties were informed on September 30, 2016, that the trial judge would render his decision on October 25, 2016. The trial judge rendered his decision as planned and convicted K. However, the day before, K filed a motion seeking a stay of proceedings on the basis that the delay between the date the charges were laid and the date the verdict was to be rendered was unreasonable and infringed his s. 11(*b*) *Charter* right to be tried within a reasonable time. The trial judge recused himself from the stay motion. The motion judge dismissed K's motion, finding that neither the verdict deliberation time taken by the trial judge, nor the delay between the charge and the last day of trial, breached K's s. 11(*b*) rights. A majority of the Court of Appeal dismissed K's appeal.

Held: The appeal should be dismissed.

Per Wagner C.J. and **Moldaver**, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.: Although the right to be tried within a reasonable time enshrined in s. 11(*b*) extends beyond the end of the evidence and argument at trial and encompasses verdict deliberation time, the presumptive ceilings established by the Court in *Jordan* do not. Where an accused claims that the trial judge's verdict deliberation time breached their s. 11(*b*) right to be tried within a reasonable time, they must establish that the deliberations took markedly longer that they reasonably should have in all of the circumstances. The burden on the accused is a heavy one due to the operation of the presumption of judicial integrity.

The presumptive ceilings established in *Jordan* were not intended to cover the entire period of time to which s. 11(*b*) applies. Properly construed, the *Jordan* ceilings apply from the date of the charge until the actual or anticipated end of the evidence and argument. They represent a specific solution designed to address a specific problem: the culture of complacency towards excessive delay associated with bringing those charged with criminal offences to trial. There is no suggestion in this case, nor was there any suggestion in *Jordan*, that delay arising from verdict deliberation time contributes to the systemic problem that *Jordan* sought to address. Further, a host of practical problems would arise if the presumptive ceilings were to include verdict deliberation time, which would run counter to *Jordan*'s goals of clarity and predictability.

When assessing whether an accused person's right to be tried within a reasonable time has been infringed by reason of delay occasioned by verdict deliberation time, the question to be asked is whether the deliberation time took markedly longer than it reasonably should have in all of the circumstances. This test should be approached in light of the presumption of integrity from which judges benefit. The presumption of judicial integrity operates in this context to create a presumption that the trial judge balanced the need for timeliness, trial fairness considerations, and the practical constraints they faced, and took only as much time as was reasonably necessary in the circumstances to render a just verdict. The burden lies on the accused to rebut this presumption by explaining why, in all the circumstances of the case, the verdict deliberation time was markedly longer than it reasonably should have been. The threshold is high because of the considerable weight that the presumption of integrity carries.

In conducting this objective assessment, the reviewing court should consider all of the circumstances. Some relevant considerations include: the length of the verdict deliberation time; how close to the relevant *Jordan* ceiling the case was before the trial judge reserved judgment; the complexity of the case; and anything on the record from the judge or the court. It may also be helpful to compare the length of time taken with the time that a case of a similar nature in similar circumstances would typically take to be decided.

Taking into account all of the circumstances, K has not met his onus of establishing that his right to be tried within a reasonable time under s. 11(*b*) was violated. While this case is close to the line, the time taken by the trial judge to arrive at his verdict was not markedly longer than it reasonably should have been in all of the circumstances. The most important feature of this case is that K's trial and a substantial portion of the trial judge's verdict deliberation time occurred before the release of the Court's decision in *Jordan*. The trial judge's pre-*Jordan* assessment of the requisite balance between the need for timeliness, fair trial considerations, and the practical constraints he faced was reasonable at the time. Although the end of evidence and argument occurred close to the 30-month ceiling, the proximity of a transitional case (like this one) to the *Jordan* ceilings cannot inform whether the verdict deliberation time taken was reasonable. That said, had *Jordan* been available to the trial judge when he took K's case under reserve, the case's proximity to the ceiling would no doubt have been a factor that he would have considered in assessing how much time he reasonably needed to render his verdict. The impossibility of taking this consideration into account pre-*Jordan* should not be held against him. Additionally, the motion judge did not err in finding that, once the reserve time is subtracted from the total delay to verdict, this case constitutes a transitional exceptional circumstance pursuant to *Jordan*.

*Per***Abella** J.: There is agreement with the majority's disposition of the appeal and most of its analysis. However, there is no basis for requiring an accused to rebut the presumption of judicial integrity to show deliberative delay to be unreasonable. The objective and contextual factors laid out by the majority for determining whether the deliberation time took markedly longer that it reasonably should have do not require assessing the judge's integrity. The "markedly longer" standard already creates a high threshold. Adding an additional, conceptually irrelevant, burden on the accused of demonstrating that the trial judge acted without integrity elevates the burden to an impossible threshold.

Moreover, the majority appears to have eliminated the role of the reasonable person in the assessment of whether the presumption has been rebutted. Eliminating the role of the reasonable person, a key feature of the assessment of whether the presumption of judicial integrity has been rebutted, compounds the weight of the accused's burden by essentially requiring the reviewing court to make a direct finding about the judge's subjective state of mind and

integrity. The test for unreasonable deliberative delay would be more effective and fair, and more consistent with *Jordan*, if it assessed only the objective and contextual factors for the delay, without the added hurdle of having to rebut the presumption of judicial integrity.

Cases Cited

By Moldaver J.

Considered: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. MacDougall*, [1998] 3 S.C.R. 45; **referred to:** *R. v. K.J.M.*, 2019 SCC 55; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Jordan*, 2014 BCCA 241, 357 B.C.A.C. 137; *R. v. Jordan*, 2012 BCSC 1735; *R. v. Brown*, 2018 NSCA 62, 364 C.C.C. (3d) 238; *R. v. Lamacchia*, 2012 ONSC 2583, 258 C.R.R. (2d) 370; *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357; *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Allen* (1996), 92 O.A.C. 345; *R. v. Potvin*, [1993] 2 S.C.R. 880.

By Abella J.

Considered: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; **referred to:** *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357; *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267; *R. v. Chan*, 2019 ABCA 82, 82 Alta. L.R. (6th) 1; *8640025 Canada Inc. (Re)*, 2019 BCCA 473; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.

Statutes and Regulations Cited

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Canada. Canadian Judicial Council. *Ethical Principles for Judges*. Ottawa, 2004.

Canada. Senate. Standing Senate Committee on Legal and Constitutional Affairs. *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*. Ottawa, 2017.

History and Disposition:

APPEAL from a judgment of the Manitoba Court of Appeal (Hamilton, Monnin and Cameron JJ.A.), 2019 MBCA 9, 429 C.R.R. (2d) 1, [2019] 5 W.W.R. 492, 373 C.C.C. (3d) 1, [2019] M.J. No. 24 (QL), 2019 CarswellMan 47 (WL Can.), affirming a decision of Joyal C.J.Q.B, 2017 MBQB 96, [2017] 11 W.W.R. 179, [2017] M.J. No. 148 (QL), 2017 CarswellMan 236 (WL Can.). Appeal dismissed.

Counsel

Katherine L. Bueti and *Amanda Sansregret*, for the appellant.

Michael Conner, *Renée Lagimodière* and *Charles Murray*, for the respondent.

John Walker, for the intervener the Director of Public Prosecutions.

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The judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ. was delivered by

M.J. MOLDAVER J.

I. Overview

1 Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be tried within a reasonable time. In *R. v. Jordan*, *2016 SCC 27*, *[2016] 1 S.C.R. 631*, this Court set out a new framework under s. 11(*b*) designed to overcome a culture of complacency that had grown in the criminal justice system and was causing excessive delays in bringing accused persons to trial. To that end, the Court established ceilings beyond which delay would be presumed to be unreasonable under s. 11(*b*).

2 This appeal requires the Court to consider the application of s. 11(*b*) when a trial judge reserves judgment. It gives rise, initially, to two questions: does s. 11(*b*) apply to verdict deliberation time, namely the time taken by a trial judge to deliberate and render a decision after the evidence and closing arguments at trial have been made; and, if so, is verdict deliberation time included in the presumptive ceilings established in *Jordan*?

3 Turning to the first of these questions, it is settled law that the protection of s. 11(*b*) extends beyond the end of the evidence and argument at trial, up to and including the date upon which sentence is imposed (see *R. v. Rahey*, *[1987] 1 S.C.R. 588*; *R. v. MacDougall*, *[1998] 3 S.C.R. 45*). It follows from this that verdict deliberation time, which necessarily precedes the imposition of sentence, is subject to s. 11(*b*) scrutiny. Second, for the reasons that follow, I am of the view that the ceilings in *Jordan*, beyond which delay is presumed to be unreasonable under s. 11(*b*), apply to the end of the evidence and argument at trial, and no further. They do not include verdict deliberation time.

4 Those conclusions give rise to a further question, namely: how should the delay attributable to verdict deliberation time be assessed in determining whether an accused's right to be tried within a reasonable time has been infringed? The answer, in my view, is that an accused's right to be tried within a reasonable time under s. 11(*b*) will have been infringed where the verdict deliberation time is found to have taken markedly longer than it reasonably should have in all of the circumstances. The burden on the accused is, as I will explain, a heavy one due to the operation of the presumption of judicial integrity. This presumption presupposes that trial judges are best placed to balance the various considerations that inform verdict deliberation time, and that the verdict deliberation time taken by a judge in a particular case was no longer than reasonably necessary in the circumstances.

5 Turning to the case at hand, the trial judge took slightly over nine months to render his verdict in a relatively straightforward case of minimal to modest complexity -- a lengthy delay to be sure. That said, when all of the circumstances are taken into account -- including the fact that the evidence and argument, and most of the verdict deliberation time, took place prior to the release of this Court's decision in *Jordan* -- I am not satisfied that K.G.K.

has met his onus of establishing that his right to be tried within a reasonable time under s. 11(*b*) was violated. While this case is close to the line, I cannot say that the time taken by the trial judge to arrive at his verdict was markedly longer than it reasonably should have been in all of the circumstances. Accordingly, I would dismiss the appeal.

II. Facts

6 K.G.K. was charged in April 2013 with sexual offences against his stepdaughter, who was a minor at the time. The charges spanned from 2002 to 2013. K.G.K. initially denied the allegations, but later admitted to three or four specific instances of sexual assault between 2011 and 2013.

7 Four days after being charged, K.G.K. appeared in the provincial court at Winnipeg, Manitoba, and was granted judicial interim release. From that point forward, the matter proceeded slowly. Counsel for the Crown and the defence had no significant discussions between April and August 2013, and did not set dates for a preliminary inquiry until September 2013.

8 The preliminary inquiry did not proceed until over a year later, on October 14, 2014. On December 15, 2014, after K.G.K. was committed to stand trial before a judge of the Court of Queen's Bench of Manitoba sitting alone, the parties met for a pre-trial conference. However, a trial date could not be set because the Crown was considering further charges against K.G.K. involving other complainants and was planning to make a motion for joinder if those charges were authorized. The conference was adjourned without complaint from the defence.

9 A second pre-trial conference was held on January 15, 2015. Again, the conference adjourned without setting a trial date.

10 Two weeks later, at the third pre-trial conference, the Crown advised it would not pursue a motion for joinder, and K.G.K.'s trial was scheduled for January 11 to 22, 2016. While earlier dates (October 19 to 30, 2015) were available, defence counsel was not.

11 At no point between the laying of the charges in April 2013, and the commencement of K.G.K.'s trial on January 11, 2016, did either the Crown or the defence raise concerns about delay in any meaningful way. They appear to have expected, if not accepted, that such delays were routine.

12 The evidence and argument at K.G.K.'s trial concluded on January 21, 2016. The trial judge reserved judgment, indicating that he had "a few matters under reserve" but was hoping "to get to this one as soon as [he could]".

13 The parties did not hear anything for several months. In May 2016, when defence counsel was appearing before the trial judge on another matter, she inquired as to the status of K.G.K.'s case. The trial judge advised that his decision was forthcoming.

14 On September 14, 2016, the Crown wrote to the Associate Chief Justice of the Court of Queen's Bench (General Division) to inquire about the status of the verdict. The Associate Chief Justice replied that counsel would be contacted shortly to schedule a date for the decision to be delivered.

15 The parties were informed on September 30, 2016, that the trial judge would render his decision on October 25, 2016. On October 24, 2016, K.G.K. filed a motion seeking a stay of proceedings on the basis that the delay between the date the charges were laid and the date the verdict was to be rendered was unreasonable and infringed his s. 11(*b*) rights. Despite receiving that motion, the trial judge rendered his decision as planned on October 25, convicting K.G.K. of one count each of sexual interference, invitation to sexual touching, and sexual assault.

16 K.G.K. candidly acknowledges that "[t]he release of *Jordan* [on July 8, 2016,] triggered the filing of the delay motion" (A.F., at para. 174). Because the judge's verdict deliberation time was a central feature of his stay motion,

K.G.K. also moved for the trial judge to recuse himself, alleging that there was a reasonable apprehension of bias in the circumstances. The trial judge granted the recusal motion, and the s. 11(*b*) stay motion was heard by Joyal C.J.Q.B.

III. Decisions Below

A. *Court of Queen's Bench of Manitoba (Joyal C.J.Q.B.) (2017 MBQB 96, [2017] 11 W.W.R. 179)*

17 On the s. 11(*b*) motion, K.G.K. argued that his right to be tried within a reasonable time was breached because approximately 42 months had elapsed from the date of the charges to the date of the trial judge's verdict. The central legal issue before the motion judge was whether the verdict deliberation time taken by the trial judge should be assessed under the *Jordan* framework. He concluded that it should not. In his view, including the verdict deliberation time in the presumptive ceilings established in *Jordan* would not strike an appropriate balance between the constitutional imperatives of s. 11(*b*) of the *Charter* and judicial independence. Moreover, it would give rise to serious practical difficulties. For example, he noted that including judicial deliberation time within the applicable ceiling "would put both the Crown and the courts in the untenable position of having to schedule all matters in a manner so as to have them completed many months below the ceiling in order to accommodate potential judicial writing time" (para. 55). This, he observed, would undermine the certainty and predictability *Jordan* sought to bring to s. 11(*b*). Instead, relying on this Court's decision in *Rahey*, the motion judge concluded that verdict deliberation time would only be unreasonable within the meaning of s. 11(*b*) where, in the overall context of a case, the time taken was "shocking, inordinate and unconscionable".

18 Applying that test, the motion judge concluded that the delay in K.G.K.'s case was not unreasonable. Despite characterizing the verdict deliberation time taken by the trial judge as "longer than desirable" (para. 103), the motion judge found that it did not result in a breach of K.G.K.'s s. 11(*b*) rights since it did not rise to the level of "shocking, inordinate and unconscionable". With respect to the delay between the charge and the last day of trial (approximately 33 months), the motion judge took into account the fact that this was a transitional case in which most of the delay occurred pre-*Jordan*, and concluded that the transitional exceptional circumstance identified in *Jordan* applied. In his view, "the parties conducted themselves reasonably having regard to the previous and prevailing legal framework and culture" (para. 94). Accordingly, he dismissed K.G.K.'s s. 11(*b*) motion.

B. *Court of Appeal of Manitoba (Hamilton (Dissenting), Monnin and Cameron JJ.A.) (2019 MBCA 9, 373 C.C.C. (3d) 1)*

19 A majority of the Court of Appeal of Manitoba dismissed K.G.K.'s appeal. However, the two judges in the majority wrote separately. Justice Cameron agreed substantially with the motion judge. She concluded the motion judge "did not err in law in his interpretation of *Rahey* nor in his characterisation of the test of reasonableness as it applies to the time that it takes to render a judicial decision" (para. 228). In the result, Cameron J.A. was not persuaded that the motion judge's decision was unreasonable. Accordingly, she upheld his conclusion that neither the trial judge's verdict deliberation time nor the delay between the charge and the last day of trial worked a breach of s. 11(*b*).

20 Justice Monnin concurred with Cameron J.A. in the result. Although he agreed with her that the *Jordan* framework should not apply to verdict deliberation time, he rejected the "shocking, inordinate and unconscionable" test that the motion judge applied. Instead, he maintained that in determining whether verdict deliberation time resulted in a breach of an accused person's s. 11(*b*) rights, the court should take "a contextual approach which balances a number of facets of the decision-making process according to the relevant evidence of the case" (para. 288).

21 Justice Hamilton, writing in dissent, would have allowed the appeal. The presumptive ceilings, she found, applied from the date of the charge until the date of the verdict. She acknowledged that *Jordan* did not specifically refer to verdict deliberation time and that appellate courts have not been consistent in their treatment of this issue. However, she reasoned that the manner in which the pre-*Jordan* s. 11(*b*) jurisprudence treated such time as part of

the "inherent time requirements of the case", combined with this Court's stated intention to address the culture of complacency, led to the conclusion that verdict deliberation time should be included within the *Jordan* framework. Applying this approach, Hamilton J.A. concluded that the delay in K.G.K.'s case was unreasonable. Hence, she would have directed a stay of proceedings.

IV. Issues

22 This appeal requires the resolution of three issues:

1. Does s. 11(*b*) apply to verdict deliberation time, and, if so, is that time included in the presumptive ceilings established in *Jordan*?
2. If s. 11(*b*) applies to verdict deliberation time but the *Jordan* ceilings do not include that time, how should delay occasioned by verdict deliberation time be assessed in determining whether an accused's right to be tried within a reasonable time has been infringed?
3. Was the verdict deliberation time taken in K.G.K.'s case unreasonable?

V. Analysis

A. *The Jordan Ceilings Do Not Include Verdict Deliberation Time*

23 Although the right to be tried within a reasonable time enshrined in s. 11(*b*) of the *Charter* extends beyond the end of the evidence and argument at trial, I am of the view that the presumptive ceilings established by this Court in *Jordan* do not.

24 *Jordan* focused on the culture of complacency that had taken root in the criminal justice system -- a culture which contributed to significant delays in bringing accused persons to trial. When *Jordan* was decided, there was no suggestion that verdict deliberation time formed a part of this culture or that it contributed in any meaningful way to the delays in bringing accused persons to trial. Nor was any such suggestion made at the hearing of this appeal. Moreover, the practical difficulties that would arise from including verdict deliberation time in the *Jordan* ceilings lend credence to the conclusion that this Court did not intend for that time to be included. Instead, as I will explain, a different test is required in determining whether an accused person's s. 11(*b*) rights have been infringed on account of verdict deliberation time.

(1) The Temporal Scope of Section 11(*b*)

25 Section 11(*b*) of the *Charter* provides that "[a]ny person charged with an offence has the right ... to be tried within a reasonable time". This provision reflects and reinforces the notion that "[t]imely justice is one of the hallmarks of a free and democratic society" (*Jordan*, at para. 1). Section 11(*b*) protects both an accused's interests and society's interests. The individual dimension of s. 11(*b*) protects an accused person's interests in liberty, security of the person, and a fair trial. The societal dimension of s. 11(*b*) recognizes, among other things, that timely trials are beneficial to victims and witnesses, as well as accused persons, and they serve to instill public confidence in the administration of justice (see *R. v. K.J.M.*, *2019 SCC 55*, at para. 38).

26 On this appeal, no one disputes the temporal scope of s. 11(*b*). Specifically, the parties agree that the right to be tried within a reasonable time encompasses verdict deliberation time.

27 This point was implicitly decided in *MacDougall*, in which this Court held that the right to be tried within a reasonable time extends to sentencing. As McLachlin J. (as she then was) explained on behalf of the Court, at para. 19:

> The next question is whether the phrase "tried within a reasonable time" in s. 11(*b*) is capable of extending to sentencing. A purposive reading suggests that "s. 11(*b*) protects against an overlong

> subjection to a pending criminal case and aims to relieve against the stress and anxiety which continue until the outcome of the case is final": *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 610 (emphasis added), *per* Lamer J., Dickson C.J. concurring. In the same case La Forest J., with whom McIntyre J. concurred, stated that "tried" means not "brought to trial", but "adjudicated" (p. 632). Since the "outcome" of a criminal case is not known until the conclusion of sentencing, and since sentencing involves adjudication, it seems reasonable to conclude that "tried" as used in s. 11(*b*) extends to sentencing.

28 Given that s. 11(*b*) protects an accused from unreasonable delay up to and including the time of sentencing, it necessarily follows that the time taken by a judge to deliberate and render a verdict, all of which precedes the sentencing process, is also included.

29 This conclusion finds additional support in *Rahey*. Although divided among four sets of reasons, the Court unanimously held that a judge's failure to render a decision on a directed verdict application within a reasonable time violated the accused's s. 11(*b*) rights. Justice Lamer (as he then was) (Dickson C.J. concurring) reasoned that:

> The delay in the present case occurred prior to a determination of guilt or innocence and thus, while the case was pending, the appellant continued to be subjected to stress and anxiety... . The stigma of being an accused does not end when the person is brought to trial but rather when the trial is at an end and the decision is rendered. [pp. 610-11]

Further, Justice La Forest (McIntyre J. concurring) held that any ambiguity about whether s. 11(*b*) extends to deliberation time could be resolved by the French version of that section, which provides that "*[t]out inculpé a le droit ... d'être jugé dans un délai raisonnable*". He considered the word "*jugé*" to properly translate to "adjudicated", and concluded that s. 11(*b*) thus "clearly encompasse[d] the conduct of a judge in rendering a decision" (p. 632). He also recognized that "the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties", and that "[i]t would be cold comfort to an accused to be brought promptly to trial if the trial itself might be indefinitely prolonged by the judge" (p. 633).

30 That said, the mere fact that s. 11(*b*) encompasses verdict deliberation time does not lead inexorably to the conclusion that this time is included in the *Jordan* ceilings. On the contrary, as will become apparent, the presumptive ceilings established in *Jordan* were not intended to cover the entire period of time to which s. 11(*b*) applies.

(2) The Temporal Scope of the *Jordan* Ceilings

31 Properly construed, the *Jordan* ceilings apply from the date of the charge until the actual or anticipated end of the evidence and argument. That is when the parties' involvement in the merits of the trial is complete, and the case is turned over to the trier of fact. As I will explain, this date permits the straightforward application of the *Jordan* framework in a manner consistent with its design and goals.

32 In *Jordan*, this Court set out a new framework under s. 11(*b*) of the *Charter*. At the heart of this framework were two presumptive ceilings, beyond which delay is presumed to be unreasonable: (1) an 18-month ceiling for single-stage cases proceeding in the provincial court; and (2) a 30-month ceiling for cases proceeding in the superior court or in the provincial court after a preliminary inquiry (para. 49). Those ceilings operate as follows:

> If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.
>
> If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the

> onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases. [Emphasis in original; paras. 47-48.]

33 While *Jordan* states that the presumptive ceilings apply "from the charge to the actual or anticipated end of trial", the Court did not explicitly define the phrase "end of trial". It has been suggested that this phrase permits of four possible interpretations: (1) the end of the evidence and argument; (2) the date the verdict is delivered, excluding post-trial motions; (3) the conclusion of post-trial motions; or (4) the date of sentencing (see A.F., at para. 131). On close analysis, it is the first interpretation that accurately reflects the reasoning underlying *Jordan* and the mischief it sought to address. To be precise, the *Jordan* ceilings apply from the charge to the end of the evidence and argument, and no further.

34 Importantly, the *Jordan* ceilings were not designed to exhaust the s. 11(*b*) analysis and cover all sources of delay. To the contrary, the ceilings represented a specific solution designed to address a specific problem: the culture of complacency towards excessive delay associated with "bringing those charged with criminal offences to trial" (*Jordan*, at para. 2; see also paras. 4, 13, 117, 121 and 129).

35 This culture of complacency in bringing accused persons to trial arose in part from doctrinal shortcomings that marked the s. 11(*b*) framework set out in *R. v. Morin*, [*[1992] 1 S.C.R. 771*]. The *Morin* framework required courts to balance four factors in determining whether delay had become unreasonable: "(1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused's interests in liberty, security of the person, and a fair trial" (*Jordan*, at para. 30; see also *R. v. Godin*, *2009 SCC 26*, [*[2009] 2 S.C.R. 3*], at para. 18). Over time, that framework proved to be "too unpredictable, too confusing, and too complex" (*Jordan*, at para. 38). Among other problems, prejudice -- which was "confusing, hard to prove, and highly subjective" -- had become a determinative factor in the analysis (*Jordan*, at paras. 33-34).

36 Compounding those doctrinal shortcomings and further fostering the culture of complacency were a number of practical problems. Most notably, *Morin* did nothing to address this culture. Its retrospective approach did not inspire proactive measures to avoid delay; it was designed "not to prevent delay, but only to redress (or not redress) it" (*Jordan*, at para. 35). Further, unnecessary procedural steps and inefficient advocacy were burdening the system. As a matter of courtroom culture, excessive delay had become far too tolerable.

37 *Jordan* marked a clean break from the *Morin* approach to s. 11(*b*). The Court in *Jordan* set out to enhance the clarity and predictability of the s. 11(*b*) analysis and galvanize systemic change. Importantly, it did so based on cogent evidence that systemic change was needed. The well-documented extent of the culture of complacency in the criminal justice system and its effect on accused persons were significant justifications for creating a new approach to assess delays in bringing accused persons to trial (see para. 40, citing Alberta Justice and Solicitor General, Criminal Justice Division, "Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases", report by G. Lepp (April 2013) (online), at p. 17, B.C. Justice Reform Initiative, *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, report by D. Geoffrey Cowper, Q.C. (2012), at p. 4, P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at p. 15, and Canada, Department of Justice, "The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System" (2006) (online), at pp. 5-6). This evidence, together with the doctrinal and practical problems of *Morin*, constituted the necessary "compelling reasons" to introduce the presumptive ceilings (para. 45, quoting *R. v. Henry*, *2005 SCC 76*, [*[2005] 3 S.C.R. 609*], at para. 44).

38 There is no suggestion here, nor was there any suggestion in *Jordan*, that delay arising from verdict deliberation time contributes to the systemic problem that *Jordan* sought to address. As indicated (at para. 35), *Jordan* was squarely focused on delay in bringing accused persons to trial and that is the scope of its application.

39 The *Jordan* decision itself makes this limited temporal scope apparent. For one, the Court expressly declined to comment on whether the *Jordan* ceilings applied from the date of the charge through the date of the sentence, notwithstanding this Court's holding in *MacDougall* that s. 11(*b*) extends to sentence. Specifically, the Court stated that "[t]he issue of delay in sentencing ... is not before us, and we make no comment about how this ceiling should apply to s. 11(*b*) applications brought after a conviction is entered, or whether additional time should be added to the ceiling in such cases" (para. 49, fn. 2). Additionally, the guidance this Court offered to address the culture of complacency focussed almost exclusively on trial practice and procedure. For the Crown, the *Jordan* framework "clarifie[d] the content of the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time" (para. 112). It also "encourage[d] the defence to be part of the solution" by deducting defence-caused delay from the total delay at the outset, and by requiring the defence to demonstrate that it had taken "meaningful and sustained steps to expedite the proceedings as a prerequisite to a stay" in cases falling below the presumptive ceiling (para. 113).

40 While *Jordan* recognized that the judiciary had a role to play in addressing the culture of complacency, there was no suggestion that judicial deliberation time was contributing to that culture. Instead, *Jordan* called upon the courts to change "courtroom culture" by implementing more efficient trial procedures including scheduling practices, reviewing case management regimes, and making reasonable efforts to control and manage the conduct of trials (paras. 114 and 139; see also *R. v. Cody*, *2017 SCC 31*, *[2017] 1 S.C.R. 659*, at paras. 37-39).

41 That the focus in *Jordan* was directed not at delay attributable to verdict deliberation time but delay in bringing accused persons to trial is borne out when one considers the host of practical problems that would arise if the presumptive ceilings were to include the date on which a verdict might be rendered. As I will explain, including verdict deliberation time within the presumptive ceilings would run counter to *Jordan*'s goals of clarity and predictability, and likely prove unworkable in practice.

42 Perhaps the most significant problem that would arise if verdict deliberation time were included within the presumptive ceilings is that it would render the argument and adjudication of pre-trial s. 11(*b*) applications speculative, if not impossible. This is because there could be no way to predict in any given case whether the judge might reserve their decision and, if so, how long they might take to render a verdict.

43 *Jordan* encourages pre-trial s. 11(*b*) applications. It marked a shift away from the retrospective, reactive approach taken to excessive delay in *Morin*, preferring instead an approach that allows the parties to know "*in advance*, the bounds of reasonableness so proactive measures can be taken to remedy any delay" (para. 108 (emphasis in original)).

44 Assessing verdict deliberation time within the *Jordan* ceilings would require counsel to speculate as to the date on which a verdict might be delivered, which runs directly counter to the predictability that *Jordan* sought to foster. This, in turn, would impede counsel's ability to take proactive measures to bring the proceedings in under the ceiling, since counsel would not know in advance when the proceedings were expected to conclude. Nor could the judge provide counsel with guidance in this respect since they would not have seen the evidence or heard counsel's submissions, much less know what time pressures might arise in their own judicial schedule.

45 The anticipated last date of evidence and argument, by contrast, provides a workable and predictable date to use in calculating delay on pre-trial applications. Indeed, the scheduled end of trial was the date that was used in both *Jordan* (see *R. v. Jordan*, *2014 BCCA 241*, *357 B.C.A.C. 137*, at para. 18; *R. v. Jordan*, *2012 BCSC 1735*, at para. 12) and *Cody* (para. 21).

46 Extending the *Jordan* ceilings to the date of verdict rather than the date on which evidence and argument conclude would also lead to practical issues for post-trial s. 11(*b*) applications. Such applications would be particularly problematic for the Crown in cases where the ceiling was breached after evidence and argument concluded and the judge had taken the case under reserve.

47 Where the ceiling has been breached, *Jordan* places an onus on the Crown to show that the cause of the breach was "genuinely outside its control" (para. 112). This shift in onus was designed to encourage proactivity on the Crown's part. However, it does not make sense to hold the Crown accountable for the time a judge takes to deliberate on the verdict. As a matter of principle, it is improper for the Crown to interfere or be seen to interfere with the judicial deliberation process insofar as it could reasonably be seen as an attempt to influence the judge's decision (see *MacDougall*, at paras. 49-52). Nor as a general rule, will the Crown be in a position to explain why the judge took the time they did to arrive at a verdict.

48 Even if the Crown could learn the reasons why a judge took the deliberation time they did, those reasons could not as a rule be meaningfully tested, as "judges do not become witnesses nor do they file affidavits" (motion judge's reasons, at para. 59). Indeed, a judge becoming a witness in a case under reserve would in all likelihood compromise their ability to adjudicate that case.

49 Another undesirable result of including verdict deliberation within the *Jordan* framework would be that the amount of verdict deliberation time available in a given case would vary greatly depending on how close to the ceiling the evidence and argument concluded. As the motion judge observed:

> ... were judges subject to the categorical and unconditional obligation to come to determinations within the presumptive ceilings, the manner in which the case was conducted or unfolded would determine the manner in which a judge approaches and perhaps makes his own or her own decision. In other words, in some cases which might conclude well below the ceiling, a judge would have many months to render well-crafted written reasons. In other cases which conclude very close to the ceiling, the judge might be left with mere days. [para. 54]

The undesirability and absurdity of this result becomes apparent when one considers a case that concludes close to the ceiling due in part to the quantity and/or complexity of the evidence adduced. In such a case, the greater the volume of evidence and the greater its complexity -- assuming it does not rise to the level of an exceptional circumstance under *Jordan* -- the less time a judge would have to evaluate it. Surely, this cannot be so.

50 In sum, properly construed, *Jordan* did not resolve the issue of how to determine whether an accused's right to be tried within a reasonable time under s. 11(*b*) has been infringed by delay attributable to verdict deliberation time. As I have said, the presumptive ceilings set out in *Jordan* only apply until the actual or anticipated end of the evidence and argument at trial, and no further. This is consistent with the design of *Jordan* and it avoids the serious practical problems that would arise if the ceilings were extended to include verdict deliberation time. Put simply, the presumptive ceilings in *Jordan* do not provide an appropriate yardstick against which the reasonableness of delay attributable to verdict deliberation time may be measured.

B. *How to Determine Whether Verdict Deliberation Time Was Reasonable Within the Meaning of Section 11(b)*

51 Although it is not disputed that s. 11(*b*) applies to verdict deliberation time, no clear test for determining whether verdict deliberation time was reasonable within the meaning of s. 11(*b*) had developed in the jurisprudence pre-*Jordan*. In *Morin*, Sopinka J. observed that delay arising from "actions by trial judges" did not fit particularly well into any category of delay set out in that case (p. 800). In cases following *Morin*, this type of delay appears to have taken on different characterizations in different circumstances -- at times being considered part of the inherent time requirements of the case, and at others counting against the Crown (*MacDougall*, at paras. 45-46; see *R. v. Brown*, *2018 NSCA 62*, *364 C.C.C. (3d) 238*, at para. 73; *R. v. Lamacchia*, *2012 ONSC 2583*, *258 C.R.R. (2d) 370*, at para. 7). That said, as Cameron J.A. observed in the present case, "[p]rior to *Jordan*, there was nothing in the jurisprudence indicating that trial judges were to estimate how long a reserved decision might take in advance of the trial and include that in their calculation of inherent delay in the *Morin* analysis" (Court of Appeal reasons, at para. 198).

52 Nor, in my view, did this Court in *Rahey* establish a test whereby judicial deliberation time would only be held to violate s. 11(*b*) if it is "shocking, inordinate and unconscionable". None of the four sets of reasons in that case purports to do more than quote the trial judge's description of the delay as being "shocking, inordinate and unconscionable" (see pp. 604-5, per Lamer J.; p. 649, per La Forest J.; see also Court of Appeal reasons, at para. 287, per Monnin J.A., and paras. 166-68, per Hamilton J.A.). When speaking in their own words, each of the judges merely asked whether the delay was "unreasonable" or "reasonable" (p. 605, per Lamer J.; p. 616, per Le Dain J.; pp. 621-22, per Wilson J.; pp. 637 and 649-50, per La Forest J.). In sum, while one can conclude from *Rahey* that a breach of s. 11(*b*) based on verdict deliberation time will be made out where the delay occasioned by it is found to be "shocking, inordinate and unconscionable", it does not follow that these three features must necessarily exist in order to make out a s. 11(*b*) breach.

53 Finally, as I have explained, *Jordan* did not answer how verdict deliberation time should be assessed for the purposes of s. 11(*b*). It is to that question that I now turn.

54 In my view, when assessing whether an accused person's right to be tried within a reasonable time has been infringed by reason of delay occasioned by verdict deliberation time, the question to be asked is whether the deliberation time took markedly longer than it reasonably should have in all of the circumstances.[1]

55 This test should be approached in light of the presumption of integrity from which judges benefit. This presumption "acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold" (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, *2013 SCC 30*, *[2013] 2 S.C.R. 357*, at para. 17, quoting *R. v. Teskey*, *2007 SCC 25*, *[2007] 2 S.C.R. 267*, at para. 29, per Abella J., dissenting). As part of their duty to uphold *Charter* rights, judges are under an obligation to minimize delay at all stages of the trial process, including during the verdict deliberation phase. Post-*Jordan*, judges -- like all participants in the justice system -- should be acutely aware of the issues that promote delay and which can, in turn, give rise to a s. 11(*b*) violation.

56 As I will elaborate, the presumption of judicial integrity operates in this context to create a presumption that the trial judge took no longer than reasonably necessary to arrive at the verdict. Specifically, the trial judge should be presumed to have struck a reasonable balance between the need for timeliness and trial fairness considerations -- which take on a different character once the evidence and argument at trial have concluded -- as well as the practical constraints that judges face. The burden lies on the accused to rebut this presumption by explaining why, in all the circumstances of the case, the verdict deliberation time was markedly longer than it reasonably should have been. Where the accused meets that burden in a particular case, I hasten to add that, while significant, this finding should not be taken as casting doubt on the judge's overall competence or professionalism.

(1) The Considerations That Inform Verdict Deliberation Time

57 In determining whether the verdict deliberation time in any given case took markedly longer than it reasonably should have, it must be borne in mind that trial judges are in the best position to assess how much time is needed in all the circumstances of the case. Specifically, the trial judge should be presumed to have struck a reasonable balance between the need for timeliness and trial fairness considerations -- both of which animate s. 11(*b*) itself -- as well as the practical considerations that constrain the amount of time they can spend on a particular case.

58 Timeliness is essential to achieving the purposes of s. 11(*b*). These purposes are well-established. In *Morin*, Sopinka J. explained that the primary purpose of s. 11(*b*) is to protect the individual rights of the accused, but that it also protects societal interests (p. 786). This Court elaborated on these purposes in *K.J.M.*, at para. 38:

> At the individual level, [s. 11(*b*)] protects the accused's "liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can

> prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence". At the societal level, "[t]imely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the 'worry and frustration [they experience] until they have given their testimony'", and permit them to move on with their lives. Society also has an interest in seeing that citizens accused of crimes are treated humanely and fairly, and timely trials help maintain the public's confidence in the administration of justice, which is "essential to the survival of the system itself". "In short, timely trials further the interests of justice". [Citations omitted.]

59 With respect to the individual interests that s. 11(*b*) protects, the nature of the liberty and security of the person interests remains the same from the date on which charges are laid to the date when the verdict is rendered. While awaiting the verdict, accused persons typically remain subject to the same liberty restrictions, stresses, and stigma that existed between the laying of charges and the end of the evidence and argument at trial. Generally speaking, these interests are best protected by bringing the proceedings to a close as quickly as possible.

60 Trial fairness, however, takes on a different character after the trial proper ends and the case is left in the hands of the trier of fact. Prior to the end of evidence and argument, time can be the enemy of trial fairness. As this Court observed in *Jordan*, the accused's right to make full answer and defence and "[f]air trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence" (para. 20). By contrast, once the evidence is preserved in the record and the case is left in the hands of the trier of fact, those concerns are largely attenuated, and necessary verdict deliberation time works to ensure fairness. This is so because verdict deliberation time reflects the time a trial judge considers reasonably necessary to justly adjudicate a particular case. This includes carefully assessing the evidence, researching points of law, and writing reasons, which "help ensure fair and accurate decision making; the task of articulating the reasons directs the judge's attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law" (*R. v. R.E.M.*, *2008 SCC 51*, *[2008] 3 S.C.R. 3*, at para. 12). As such, this time inures to the benefit of the accused and society at large.

61 Finally, a reasonable amount of verdict deliberation time must account for the practical constraints that trial judges face, both individually and institutionally. Reasonableness under s. 11(*b*) has always accounted for the reality that "[n]o case is an island to be treated as if it were the only case with a legitimate demand on court resources" (*R. v. Allen* *(1996), 92 O.A.C. 345*, at para. 27). Trial judges know all too well that this is a zero-sum proposition: verdict deliberation time that goes to one case cannot go to another. The appropriate division of time between cases therefore has regard to individual judges' workloads, different approaches to reasons and reasoning, and the realities of their daily lives (see, e.g., *K.J.M.*, at para. 102). That said, trial judges can and should consider proximity to the *Jordan* ceiling in determining how to prioritize cases in their workload.

62 There are also limits on judicial and court administration resources. It stands to reason that this front-end burden has an impact on back-end deliberation time, particularly in jurisdictions that are still working to respond to *Jordan*. There is no shortage of commentary on this. For example, in *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (2017), the Standing Senate Committee on Legal and Constitutional Affairs reported that "[a] recurring concern voiced by witnesses and raised in *Jordan* was with respect to how the justice system has been underfunded for too long" (p. 1). This report identified essential contributors to delays in case flow and courthouse administration as being the overbooking and understaffing of courtrooms, and insufficient design and integration of technological solutions to improve efficiency (e.g., to permit videoconferencing and remote access, and to improve scheduling) (pp. 81 and 93). The report also describes an urgent need to "addres[s] the excessive vacancies of federally appointed judges" (p. 3; see also pp. 5 and 86 et seq.). It suggests that "[a]ll of the concerns with the administration of courthouses and effective case flow management would be significantly alleviated if Canada had enough judges to handle the number of criminal cases awaiting trial" (p. 86). Judges must work within these institutional restrictions and manage their workloads as efficiently as possible. That said, nothing in these reasons should be construed as diminishing the government's responsibility to ensure that courts are sufficiently resourced to fulfill the promise of s. 11(*b*) (see *Jordan*, at paras. 40-41, 117 and 140).

63 Very often, a balancing of the foregoing considerations results in a verdict being rendered within the six-month guideline set by the Canadian Judicial Council ("CJC"). In *Ethical Principles for Judges* (2004), the CJC describes adherence to this guideline as an "adjudicative dut[y]" (p. 20) associated with judicial office, and sets out the content of the duty as follows:

> [T]he decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances. Special circumstances may include illness, the length or complexity of the case, an unusually heavy workload or other factors making it impossible to give judgment sooner. In 1985, the Canadian Judicial Council resolved that, in its view, reserved judgments should be delivered within six months after hearings, except in special circumstances. [Footnote omitted; p. 21.]

64 The significance of this six-month guideline notwithstanding, it is not a determinative measure of constitutionality. Simply showing that this guideline has been exceeded will not, in itself, establish a breach of s. 11(*b*). Indeed, the *Ethical Principles for Judges* produced by the CJC is "advisory in nature" (p. 3). The statements and principles therein "are not and shall not be used as a code or a list of prohibited behaviours" and "[t]hey do not set out standards defining judicial misconduct" (p. 3). Moreover, the CJC's guideline acknowledges the inherent case-specific and judge-specific nature of the balance between the considerations of the need for timeliness, trial fairness, and practical limitations.

(2) Determining Whether the Trial Judge's Verdict Deliberation Time Took Markedly Longer Than It Reasonably Should Have in All of the Circumstances

65 Where an accused claims that the trial judge's verdict deliberation time breached their s. 11(*b*) right to be tried within a reasonable time, they must establish that the deliberations took markedly longer than they reasonably should have in all of the circumstances. This is -- appropriately, in my view -- a high bar. As indicated, the presumption of judicial integrity operates in this context to create a presumption that the trial judge balanced the need for timeliness, trial fairness considerations, and the practical constraints they faced, and took only as much time as was reasonably necessary in the circumstances to render a just verdict. Only where the trial judge's verdict deliberation time is found to have taken *markedly* longer than it reasonably should have will this presumption be displaced. The reason the threshold is so high -- "markedly longer" rather than just "longer" or some lesser standard -- is because of the "considerable weight" that the presumption of integrity carries (*Cojocaru*, at para. 20). Stays in this context are significant and, although distinct from stays below the ceiling, they too are likely to be "rare" and limited to "clear cases" (*Jordan*, at para. 48). It bears repeating, however, that where a trial judge's verdict deliberation time is found to have taken markedly longer than it reasonably should have in a particular case, this should not be taken as casting doubt on the judge's overall competence or professionalism.

66 The role the presumption of integrity plays in this context is entirely consistent with the manner in which it has been applied in this Court's jurisprudence. I agree with my colleague Abella J. that the presumption is used to avoid the "second-guessing of a judge's thought processes" (*Teskey*, at para. 47). I would add, however, that the presumption of integrity is not just about the judge's thought processes -- it is also about what the judge actually did. Specifically, it recognizes that judges are bound by their oaths of office and encompasses the expectation that they do in fact "carry out" their sworn duties "to the best of their ability" (*Teskey*, at para. 20; see also *Cojocaru*, at para. 17). In the present context, the presumption of integrity serves both of these purposes, namely: it significantly limits the circumstances in which a reviewing court may second-guess the trial judge's determination of how much verdict deliberation time was reasonably necessary in light of the competing considerations in play; and it provides a legitimate basis upon which to presume that the trial judge actually took only as much time as was reasonably necessary in all the circumstances.

67 In conducting this assessment, the reviewing court should consider all of the circumstances, some of which are identified below. This list is not intended to be exhaustive.

68 The starting point is, of course, the length of the verdict deliberation time. While it is extremely unlikely that the length of time will suffice on its own, there may be instances in which the time taken is so manifestly excessive that it constitutes a *per se* breach of s. 11(*b*), irrespective of the circumstances.

69 The reviewing court should also take into account how close to the relevant *Jordan* ceiling the case was before the trial judge reserved judgment. This is necessary to account for the fact that, even in the absence of a breach of the ceiling, the impact on an accused's liberty and security interests continues to intensify as a case proceeds and approaches the end of evidence and argument. This cumulative impact does not vanish when a trial judge reserves judgment. And that is why trial judges should consider a case's proximity to the *Jordan* ceilings in prioritizing their workloads.

70 The complexity of the case will be an important consideration. Necessary verdict deliberation time varies in accordance with a case's complexity (see *Jordan*, at para. 88, quoting *Morin*, at pp. 791-92). The amount and nature of the evidence adduced, the number of co-accused (if any), the legal issues raised by the case, and the parties' positions are all relevant in determining whether the time taken by the trial judge to deliberate on the verdict was markedly longer than it reasonably should have been in all of the circumstances.

71 Anything on the record from the judge or the court could also be relevant. This might include communications from the court to the parties (e.g., respecting a judge's illness), or communications from the judge to the parties, should the judge deem it appropriate to so communicate (e.g., about their workload and other cases that they may need to prioritize). Further, even if the judge did not put information about their personal workload on the record, the parties and/or the reviewing judge may be aware of the local conditions in a particular jurisdiction and may in turn be able to draw inferences about the trial judge's workload and the institutional constraints they may have faced. Keeping these constraints in mind ensures the proper application of s. 11(*b*) while state actors work to respond to *Jordan* and bring about the institutional change that s. 11(*b*) requires.

72 Finally, it may be helpful in some cases to compare the length of time taken with the time that a case of a similar nature in similar circumstances would typically take to be decided (see *Jordan*, at para. 89).

73 As my colleague notes, these factors are objective. However, with respect, the reviewing court is not tasked, as my colleague suggests, with "assessing", "inquir[ing] into", or "making a declaration on" the trial judge's actual subjective state of mind (Abella J.'s reasons, at paras. 87 and 91). Rather, the test that I propose requires the reviewing court to engage in an objective determination -- one that mirrors the reasonable observer test used in cases where the accused must directly rebut the presumption of integrity.

C. *A Final Practical Note*

74 Counsel often find themselves in a difficult position when significant time has passed since the trial judge took the matter under reserve and they have not received any updates on its status. The Crown may be reluctant to probe for information on the status of the case, insofar as it could risk the appearance of inappropriate interference with the judicial process. For their part, the accused may understandably not wish to be seen as applying pressure to the person in whose hands their fate lies.

75 In *Jordan*, this Court stressed that all participants in the criminal justice system must work together to minimize delay and safeguard an accused person's s. 11(*b*) interests. To that end, I see no reason why the parties cannot, in appropriate circumstances and through appropriate channels, communicate with the trial judge. This might entail meeting briefly in court or communicating through another procedure approved by the court. However this may happen, counsel can and should expect judges to be sufficiently resolute to consider a request for information without consequences to counsel, the accused, or the trial.

76 Indeed, some jurisdictions may find it useful to set out a standardized procedure through which counsel can

inquire as to the status of a verdict. This may involve a practice guideline contemplating a joint communication from the parties to the trial judge themselves, or to the regional senior judge or another appropriate person, after a certain amount of time has passed. Ultimately, instituting these procedures could serve to attenuate the anxiety and concern that accompanies the inherent unknowability of a verdict date and delay more generally (*MacDougall*, at para. 19, quoting *Rahey*, at p. 610, per Lamer J.; see also *R. v. Potvin*, *[1993] 2 S.C.R. 880*, at p. 887). Additionally, where the communication is with the court administration or regional senior judge, it may provide information that assists the court in managing judicial workloads. It may also assist in developing the record for s. 11(*b*) purposes.

VI. Application to K.G.K.'s Appeal

77 Notwithstanding the high bar that the presumption of integrity necessitates, this case comes close -- even perilously close -- to the line. However, when all of the circumstances are considered, I am not satisfied that K.G.K. has met his onus of establishing that the verdict deliberation time markedly exceeded what it reasonably should have been.

78 Much as I accept that the verdict deliberation time in this case was long, I am not persuaded that it was *per se* unreasonable. Nine months is not so manifestly excessive that it constitutes a *per se* breach of s. 11(*b*), irrespective of the circumstances.

79 Turning to the surrounding circumstances, I have already noted that this case was of minimal to modest complexity. While this factor calls into question the reasonableness of the time taken, it must be considered in context.

80 Beyond his statement that he had "a few matters under reserve" at the time he reserved judgment in this case, there is no information on the record regarding the trial judge's workload. Accordingly, this factor does not provide much assistance in determining whether the presumption of reasonableness has been rebutted.

81 As I see it, the most important feature of this case is that K.G.K.'s trial and a substantial portion of the trial judge's verdict deliberation time occurred before the release of this Court's decision in *Jordan*. This context matters. *Jordan* was a call to action which no one in this case could have foreseen. Indeed, until *Jordan* was released, the parties appear to have conducted themselves in the complacent manner that defined the pre-*Jordan* era. There is no hint that K.G.K. expressed any interest -- let alone concern -- about the pace of the proceedings, including the verdict deliberation time taken by the trial judge prior to the release of *Jordan* (some five and a half months after he reserved judgment). It is apparent that the release of *Jordan* caused an attitudinal shift among those involved in K.G.K.'s case: K.G.K. acknowledges that the release of *Jordan* triggered the filing of his delay motion; the Crown wrote to the Associate Chief Justice to inquire about the status of the verdict; and a date was subsequently set for the rendering of the verdict. Notably in all of this, K.G.K. offers no sufficient explanation for why he waited until the day before the trial judge rendered his verdict, almost four months following the release of *Jordan*, to file the s. 11(*b*) application at issue. Most significantly, the trial judge's pre-*Jordan* assessment of the requisite balance between the need for timeliness, trial fairness considerations, and the practical constraints he faced was reasonable at the time. Although the end of evidence and argument occurred close to the 30-month ceiling, the proximity of a transitional case (like this one) to the *Jordan* ceilings cannot inform whether the verdict deliberation time taken was reasonable. That said, had *Jordan* been available to the trial judge when he took K.G.K.'s case under reserve, the case's proximity to the ceiling would no doubt have been a factor that he would have considered in assessing how much time he reasonably needed to render his verdict. How long he would have taken to deliberate and release his verdict and reasons cannot be known with certainty, though it can be expected that he would have released his verdict and reasons sooner than he did. The impossibility of taking this consideration into account pre-*Jordan* should not be held against him.

82 That said, had this case been heard entirely post-*Jordan*, I would in all likelihood have decided the s. 11(*b*) issue differently. As such, I must respectfully disagree with my colleague that the test I have proposed "raises the accused's burden to a threshold that is both conceptually unhelpful and unreachable" and "could have the

unintended consequence of sheltering trial judges' deliberative delay from [*Charter*] scrutiny" (Abella J.'s reasons, at para. 94). That is simply not so.

83 In sum, taking all of the circumstances into account, K.G.K. has not established that the verdict deliberation time taken by the trial judge was markedly longer than it reasonably should have been. Additionally, I agree with the majority at the Court of Appeal, at paras. 246-50, that the motion judge did not err in finding that, once the reserve time is subtracted from the total delay to verdict, this case constitutes a transitional exceptional circumstance pursuant to *Jordan*.

VII. Conclusion

84 In the result, I would dismiss the appeal.

The following are the reasons delivered by

R.S. ABELLA J.

85 I agree with the majority's disposition of the appeal and most of its analysis. Where Iy part company is in the majority's use of the presumption of judicial integrity as part of the test for assessing whether deliberative delay violated an accused's right to be tried within a reasonable time. I see no reason why finding that a deliberative delay is unreasonable requires impugning the integrity of the trial judge, thereby elevating the accused's burden to an almost insurmountable one.

86 The majority's test for assessing whether deliberative delay violated an accused's right to be tried within a reasonable time is "whether the deliberation time took markedly longer than it reasonably should have in all of the circumstances". It concludes that, to meet this test, the accused must displace the presumption of judicial integrity. It is not clear to me, however, what role the presumption of judicial integrity can usefully play in assessing whether a delay is "markedly longer" than reasonable.

87 As the majority notes, assessing the reasonableness of judicial deliberation time involves considering factors such as the length of the verdict deliberation time, proximity to the relevant presumptive ceiling laid out in *R. v. Jordan*, [2016] 1 S.C.R. 631, the complexity of the case including the amount and nature of the evidence and legal issues, local conditions, and anything on the record from the judge that could explain the delay. These are objective and contextual factors. In my respectful view, the test does not require assessing, and should not seek to inquire into, the trial judge's integrity or subjective state of mind.

88 The presumption of judicial integrity "acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold" (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, at para. 17, citing *R. v. Teskey*, [2007] 2 S.C.R. 267, at para. 29, per Abella J., dissenting). It is invoked in cases which require assessing the judge's state of mind in order to determine whether "the judge has done her job as she is sworn to do" (*Cojocaru*, at para. 15). In these cases, the presumption of judicial integrity is used "to protect the judicial role from undue perceptual assault" and to avoid the "second-guessing of a judge's thought processes" (*Teskey*, at para. 47).

89 Under this jurisprudence, in order to rebut the presumption of judicial integrity, the party assailing the outcome must present "cogent evidence" showing that a reasonable person apprised of the relevant facts would conclude that the presumption is rebutted in all the circumstances (*Cojocaru*, at paras. 18 and 27-28; *Teskey*, at paras. 21 and 33; see also *R. v. Chan* (2019), 82 Alta. L.R. (6th) 1 (C.A.), at para. 12; *8640025 Canada Inc. (Re)*, 2019 BCCA 473, at para. 79 (CanLII)).

90 It is difficult to see what "cogent evidence" an accused could even offer in this context to demonstrate that the presumption of judicial integrity has been rebutted except evidence of the length of the delay in the circumstances.

The objective factors laid out by the majority allow for an assessment of the reasonableness of delay. The "markedly longer" standard it adopted already creates a high threshold. Adding an additional burden on the accused of demonstrating the trial judge acted without integrity, particularly without a clear way to demonstrate this, elevates the burden to an impossible threshold. In other words, it creates the risk that the presumption of judicial integrity will act as a justification for a deliberative delay that, objectively, took markedly longer than it reasonably should have.

91 Moreover, the majority appears to have eliminated the role of the "reasonable person", a key feature of the assessment of whether the presumption of judicial integrity has been rebutted. In the context of determining whether the presumption has been rebutted, the reasonable person was used in our jurisprudence in order to allow the reviewing court to avoid making a declaration on the judge's actual state of mind; a task that is "obviously impossible" (*Wewaykum Indian Band v. Canada*, *[2003] 2 S.C.R. 259*, at para. 64, citing Cory J. in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, *[1992] 1 S.C.R. 623*, at p. 636). Under the majority's test, without the objective lens of the reasonable person, the inescapable inference of a reviewing court concluding that the presumption of judicial integrity has been rebutted is that the trial judge did in fact act without integrity. This modification compounds the weight of the accused's burden by essentially requiring the reviewing court to make a direct finding about the judge's subjective state of mind and integrity.

92 It is worth noting that without the use of the presumption of judicial integrity, the majority's "markedly longer" test would be wholly consistent with *Jordan*. In *Jordan*, this Court established "presumptive ceilings" beyond which delay was presumed to be unreasonable. Above the presumptive ceiling, the onus shifted to the Crown to justify the length of time the case took (*Jordan*, at para. 58). Below the ceiling and prior to any shift in onus, the accused had the burden of showing that "the case took markedly longer than it reasonably should have" in order to establish that delay had been unreasonable (*Jordan*, at para. 48).[2] This standard is the one adopted by the majority in this case for assessing the reasonableness of verdict deliberation time.

93 The absence of presumptive ceilings in the case of deliberative delay means that the burden to demonstrate the unreasonableness of deliberative delay remains at all times with the accused. Adding to the accused's burden the requirement to show that the presumption of judicial integrity has been rebutted places the burden beyond the accused's reach.

94 The presumption of judicial integrity in the majority's test unreasonably raises the accused's burden to a threshold that is both conceptually irrelevant and unreachable. Requiring the accused to demonstrate, and a reviewing court to accept, that the trial judge acted without integrity in order to find that the deliberative delay was unreasonable could have the unintended consequence of sheltering trial judges' deliberative delay from *Canadian Charter of Rights and Freedoms* scrutiny and, ultimately, weakening the substance of the accused's right to be tried within a reasonable time. The majority's test, in my respectful view, would be more effective and fair without it.

Appeal dismissed.

Solicitors:

Solicitors for the appellant: Bueti Wasyliw Wiebe, Winnipeg; Legal Aid Manitoba, Winnipeg.

Solicitor for the respondent: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Director of Criminal and Penal Prosecutions: Director of Criminal and Penal Prosecutions, Québec.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Presser Barristers, Toronto.

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1 This test only applies when determining whether the time taken by a trial judge to deliberate and render a decision after the evidence and closing arguments at trial have been made violates s. 11(*b*). These reasons do not address the test applicable to post-verdict delay (e.g., delay in sentencing).

2 Under the *Jordan* framework, when seeking a stay for delay falling below the presumptive ceiling, in addition to demonstrating that "the case took markedly longer than it reasonably should have", the defence must also establish that "it took meaningful steps that demonstrate a sustained effort to expedite the proceedings" (*Jordan*, at para. 48). This consideration does not form part of the test for assessing verdict deliberation time since the accused does not have the ability to "expedite the proceedings" in this context.

End of Document

TAB 3

R. v. Zora

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

Heard: December 4, 2019;

Judgment: June 18, 2020.

File No.: 38540.

[2020] S.C.J. No. 14 | [2020] A.C.S. no 14 | 2020 SCC 14 | 2020 CSC 14 | 446 D.L.R. (4th) 358 | 63 C.R. (7th) 247 | 388 C.C.C. (3d) 1 | 2020 CarswellBC 1513 | 2020EXP-1474

Chaycen Michael Zora, Appellant; v. Her Majesty The Queen, Respondent, and Attorney General of Ontario, Attorney General of British Columbia, Criminal Lawyers' Association of Ontario, Vancouver Area Network of Drug Users, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, Independent Criminal Defence Advocacy Society, Pivot Legal Society and Association québécoise des avocats et avocates de la défense, Interveners

(127 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Criminal law — Criminal Code offences — Offences against the administration of law and justice — Escapes and rescues — Breach of undertaking or recognizance — Appeal by Zora from a decision of British Columbia Court of Appeal affirming his convictions for breach of recognizance allowed — New trial ordered — On two occasions, the appellant failed to answer the door when police went to his residence to check that he was complying with his bail conditions — The Crown was required to prove subjective mens rea, that the appellant committed the breach knowingly or recklessly, in order to establish a breach of recognizance — A new trial was needed to address whether the appellant knowingly or recklessly breached his condition — Criminal Code, s. 145(3).

Criminal law — Elements of the offence — Mens rea — Appeal by Zora from a decision of the British Columbia Court of Appeal affirming his convictions for breach of recognizance allowed — New trial ordered — On two occasions, the appellant failed to answer the door when police went to his residence to check that he was complying with his bail conditions — The Crown was required to prove subjective mens rea, that the appellant committed the breach knowingly or recklessly, in order to establish a breach of recognizance — A new trial was needed to address whether the appellant knowingly or recklessly breached his condition — Criminal Code, s. 145(3).

Statutory interpretation — Statutes — Construction — By context — Legislative intent — Real or apparent purpose — Appeal by Zora from a decision of the British Columbia Court of Appeal affirming his convictions for breach of recognizance allowed — New trial ordered — On two occasions, the appellant failed to answer the door when police went to his residence to check that he was complying with his bail

conditions — The Crown was required to prove subjective mens rea, that the appellant committed the breach knowingly or recklessly, in order to establish a breach of recognizance — A new trial was needed to address whether the appellant knowingly or recklessly breached his condition — Criminal Code, s. 145(3).

Appeal by Zora from a decision of the British Columbia Court of Appeal affirming his convictions for failure to comply with a condition of a recognizance. The appellant had been granted bail on his own recognizance after being charged with three counts of possession for the purpose of trafficking. A condition of the recognizance required the appellant to present himself at the door of his residence within five minutes of a peace officer attending to confirm his compliance with his house arrest condition. Twice on one weekend, the appellant failed to answer the door when police went to his residence to check that he was complying with his bail conditions. The appellant did not know he had missed the police at his door until two weeks later when he was informed he was being charged with two counts of breaching his condition to answer the door. The appellant, his mother and his girlfriend testified they were all at home at the time of the police checks. The appellant testified it was difficult to hear the doorbell from his bedroom and that he had been tired that weekend because he was withdrawing from heroin and on methadone treatment. The appellant was convicted at trial. His appeals were dismissed on the basis that s. 145(3) of the Criminal Code only required an objective mens rea.

HELD: Appeal allowed; new trial ordered.

The Crown was required to prove a subjective mens rea, that the appellant committed the breach knowingly or recklessly, in order to establish a breach of recognizance under s. 145(3) of the Criminal Code. From a constitutional perspective, most bail conditions restricted the liberty of persons who were presumed innocent and imposed a risk of further criminal liability because of the failure to comply offence under s.á145(3). Therefore, the setting of bail conditions had to be consistent with the presumption of innocence and the right not to be denied reasonable bail without just cause under s. 11(e) of the Charter. Nothing in the text or context of s.á145(3) suggested an intention by Parliament to depart from the long-standing presumption that Parliament intended crimes to have a subjective fault element. A subjective mens rea reflected the principles of restraint and review and mirrored the individual approach mandated for the imposition of bail conditions. The legislative history, context and purpose of s. 145(3), as well as the significant consequences associated with a charge or conviction under s. 145(3), required a subjective mens rea standard. The primary purpose of s. 145(3) was to sanction past behaviour and deter further breaches. It was not appropriate to apply the curative proviso in s. 686(1)(b)(iii) allowing the Court to dismiss an appeal because there was "no substantial wrong or miscarriage of justice" despite an error of law. Mens rea was an essential element of a criminal offence and identifying the wrong fault standard was not a "harmless or trivial" error. Applying a subjective mens rea would have required the trial judge to consider the appellant's state of mind, which clearly could have had an impact on the verdict. The evidence was not so overwhelming that a conviction was inevitable. A new trial was needed to address whether the appellant knowingly or recklessly breached his condition.

Statutes, Regulations and Rules Cited:

Bail Reform Act, S.C. 1970-71-72, c. 37, s. 133(3)

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 11(e)

Controlled Drugs and Substances Act, *S.C. 1996, c. 19*,

Criminal Code, *R.S.C. 1985, c. C-46, s. 2*, s. 19, s. 145, s. 145(2), s. 145(3), s. 145(4), s. 145(5), s. 145(5.1), s. 161(1), s. 161(4), s. 215, s. 216, s. 217, s. 217.1, s. 469, s. 493, s. 493.1, s. 493.2, s. 515, s. 515(1), s. 515(2)(a), s. 515(3), s. 515(4), s. 515(4)(a), s. 515(4)(b), s. 515(4)(c), s. 515(4)(d), s. 515(4)(e), s. 515(4)(f), s. 515(4)(h), s. 515(4.1), s. 515(4.2), s. 515(4.3), s. 515(6)(c), s. 515(10), s. 515(10)(b), s. 515(10)(c), s. 518(1)(c)(iii), s. 520, s. 521, s. 522(4), s. 523, s. 523(2), s. 523(2)(c), s. 523.1, s. 524, s. 524(1), s. 524(2), s. 524(4), s. 524(8), s. 524(9), s. 680, s. 686(1)(b)(iii), s. 733.1, s. 811(a), s. 811(b)

Subsequent History:

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Court Catchwords:

Criminal law -- Failure to comply with conditions of undertaking or recognizance -- Elements of offence -- Mens rea -- Accused convicted of failure to comply with conditions of undertaking or recognizance after failing to answer door when police attended his residence -- Whether mens rea for offence of failure to comply with conditions of undertaking or recognizance is to be assessed on subjective or objective standard -- Criminal Code, R.S.C. 1985, c. C-46, s. 145(3).

Court Summary:

Z was charged with drug offences and was granted bail with conditions, including a curfew and a requirement that he present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to confirm his compliance with his curfew. Z twice failed to present himself at his door when police attended, and was charged under s. 145(3) of the *Criminal Code* with two counts of breaching his curfew and two counts of breaching his condition to answer the door. Z led evidence that he was in his bedroom where it would have been difficult, if not impossible, to hear the doorbell or someone knocking on the door. The trial judge acquitted Z on the alleged curfew violations but convicted Z on the two counts of failing to appear at the door. A summary conviction appeal judge dismissed Z's appeal, concluding that objective *mens rea* is sufficient for a conviction under s. 145(3) and that Z's behaviour was a marked departure from what a reasonable person would do to ensure they complied with their bail conditions. The Court of Appeal dismissed Z's appeal. A majority of the court concluded that s. 145(3) created a duty-based offence that only requires an objective *mens rea*.

Held: The appeal should be allowed, Z's convictions quashed and a new trial ordered on the two counts of failing to attend at the door.

Under s. 145(3) of the *Criminal Code*, the Crown is required to prove subjective *mens rea*. The Crown must establish that the accused breached a condition of an undertaking, recognizance or order knowingly or recklessly. Accordingly, a new trial is required on the two counts charging Z with failing to attend at the door of his residence, in light of the lower courts' error of applying an objective standard of fault.

The default form of bail for most crimes is release on an undertaking to attend trial, without any other conditions. Bail conditions can be imposed, but only if they are clearly articulated, minimal in number, necessary, reasonable, the least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10): securing the accused's attendance in court, ensuring the protection or safety of the public, or maintaining confidence in the administration of justice. The setting of bail conditions must be consistent with the presumption of innocence and the right not to be denied reasonable bail without just cause under s. 11(*e*) of the *Canadian Charter of Rights and Freedoms*. In addition, s. 515 of the *Criminal Code* codifies the ladder principle, which requires that the form of release and the conditions of release imposed on an accused be no more onerous than necessary to address the risks listed in s. 515(10). Only conditions specifically tailored to the individual circumstances of the accused can meet the required criteria. Bail conditions are intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person and are to be imposed with restraint. Restraint is required because bail conditions limit the liberty of someone who is presumed innocent of the underlying offence and, through the offence in s. 145(3), create new sources of potential criminal liability personal to that individual accused.

Section 145(3) of the *Criminal Code* creates a hybrid offence that applies to breaches of conditions imposed on an accused by a court order when the accused person is released prior to trial, while awaiting sentencing, or during an

appeal. It is a crime against the administration of justice and carries a maximum penalty of two years' imprisonment. Accused persons may therefore be subject to imprisonment under s. 145(3) if they breach a condition of their bail, even if they are never ultimately convicted of any crimes for which they were initially charged. In many cases, an accused person faces criminal sanctions for conduct which, but for the stipulated bail condition, would be a lawful exercise of personal freedom. Accordingly, the fault element under s. 145(3) has far-reaching implications for civil liberties and the fair and efficient functioning of bail in this country, and there is a direct link between what conditions may be imposed in a bail order and Parliament's intent in criminalizing their breach under s. 145(3).

Determining the *mens rea* of s. 145(3) involves discerning the fault standard intended by Parliament. The presumption is that Parliament intends crimes to have a subjective fault element unless there is a clear legislative intention to overturn the presumption. If the offence in the *Criminal Code* is ambiguous as to the *mens rea*, then the presumption has not been displaced. The text and context of s. 145(3) suggest that Parliament intended for subjective fault to apply. The wording in s. 145(3) is neutral insofar as it does not show a clear intention on the part of Parliament with regard to either the subjective or objective *mens rea*. The absence of express words indicating a subjective intent cannot on its own displace the presumption of subjective *mens rea*. Furthermore, nothing establishes a clear intention to create a duty-based offence which calls for an objective *mens rea*. Duty-based offences are directed at legal duties very different from the obligation to comply with the conditions of a judicial order. And, unlike these duty-based offences, bail conditions do not impose a minimum uniform standard of conduct having regard to societal interests rather than personal standards of conduct. Parliament legislated a bail system based upon an individualized process and the bail order is expected to list personalized and precise standards of behaviour. As a result, there is no need to resort to a uniform societal standard to make sense of what standard of care is expected of an accused in fulfilling their bail conditions and no need to consider what a reasonable person would have done in the circumstances to understand the obligation imposed by s. 145(3). In addition, the highly individualized nature of bail conditions excludes the possibility of a uniform societal standard of conduct applicable to all potential failure to comply offences. Bail conditions and the risks they address also vary dramatically among individuals on release, so it is not intelligible to refer to the concepts of a "marked" or "mere" departure from the standard of a reasonable person. The offence under s. 145(3) is not comparable to other objective fault offences, and reasonable bail cannot be compared to a regulated activity that is entered into voluntarily. Further, the offence of failure to comply with bail conditions is similar to the offence of breach of probation for which a subjective *mens rea* is required.

A subjective fault requirement is consistent with the penalties and consequences which flow from conviction under s. 145(3). A conviction has profound implications for the liberty interests of the offender, including imprisonment even if the offender is acquitted of the underlying charge or further conditions imposed as part of a sentence. A conviction under s. 145(3) creates or adds to that person's criminal record. Being charged under s. 145(3) also places a reverse onus on accused persons to show why they should be released on bail again. Previous convictions under s. 145(3) inform bail hearings for future offences and may lead to the denial of bail or more stringent bail conditions for future unrelated offences. Breach charges often accumulate quickly, leading to a vicious cycle of increasingly numerous and onerous conditions, more breach charges and eventually pre-trial detention. These serious consequences presuppose that the person knowingly, rather than inadvertently, breached their bail condition.

Parliament's intention to require subjective fault is further demonstrated by the distinct purpose of s. 145(3), being to punish and deter those who knowingly or recklessly breach their bail conditions. Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions. Such risks or concerns are to be managed through the setting of conditions that are minimal, reasonable, necessary, least onerous, and sufficiently linked to the accused's risk; variations to those conditions when necessary through bail reviews and vacating bail orders; and bail revocation when bail conditions are breached. Charges under s. 145(3) are not, and should not be, the principal means of mitigating risk. Bail review is the primary way to challenge or change bail conditions. Bail revocation under s. 524 of the *Criminal Code* and criminal charges under s. 145(3) work together to promote compliance with conditions of bail, but they serve distinct and different legislative purposes. Section 524 fulfills a risk management role; s. 145(3) exists to punish and deter. Section 145(3) is a means of last resort when other risk management tools have not served their purposes. Specific

deterrence has little or no effect if an accused does not know they were doing anything wrong. An accused must know what standard of behaviour to meet and that their conduct is failing to meet that standard in order to be deterred from engaging in prohibited conduct.

The requirement that bail conditions must be tailored to the accused points to a subjective *mens rea* so that the individual characteristics of the accused will be considered when bail is set and if bail is breached. Requiring a subjective *mens rea* reinforces, mirrors, and respects the individualized approach mandated for the imposition of bail conditions. In practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, indicates insufficient individualization of bail conditions. The majority of bail orders include numerous conditions of release which often do not clearly address an individual accused's risks. A culture of risk aversion contributes to courts applying excessive conditions. The expeditious nature of bail hearings generates a culture of consent which aggravates the lack of restraint in imposing excessive bail conditions and encourages accused persons to agree to onerous terms of release rather than run the risk of detention. Onerous conditions disproportionately impact vulnerable and marginalized populations, including those living in poverty or with addictions or mental illnesses, and Indigenous people. The presence of too many unnecessary, excessive and onerous conditions provides legislative context for finding no clear intention of Parliament to displace the presumed subjective fault standard for s. 145(3) and illustrates the need for restraint and careful review of bail conditions.

The principle of restraint and the ladder principle require anyone proposing bail conditions to consider what risks might arise if the accused is released without conditions. Only conditions which target the accused's risk in relation to flight, public protection and safety, or maintaining confidence in the administration of justice are necessary. A bail condition must attenuate a risk that would otherwise prevent release without that condition. Conditions cannot be imposed for gratuitous or punitive purposes and should not be behaviourally-based. They must be sufficiently linked to the defined statutory risks, as narrowly defined as possible to meet their objective, and reasonable. They will only be reasonable if they realistically can and will be met by the accused. They cannot contravene federal or provincial legislation or the *Charter*, and must be clear, minimally intrusive, and proportionate to any specific risk posed by the accused. The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether bail is contested or the product of consent. Some specific non-enumerated conditions are commonly included in release orders, but must be scrutinized to ensure that each condition is necessary, reasonable, least onerous and sufficiently linked to a risk in s. 515(10). All persons involved in the bail system are required to act with restraint and to carefully review bail conditions they propose or impose. The Crown, defence, and the court all have obligations to respect the principles of restraint and review. Ultimately, the obligation to ensure appropriate bail orders lies with the judicial official. These obligations carry over to consent releases. Judicial officials should not routinely second-guess joint proposals by counsel, however, they have the discretion to reject overbroad proposals and must act with caution when reviewing and approving consent release orders.

Subjective *mens rea* under s. 145(3) can be satisfied where the Crown proves: (1) the accused had knowledge of the conditions of their bail order or were wilfully blind to those conditions; and (2) either the accused knowingly failed to act according to the bail conditions or they were wilfully blind to those circumstances and failed to comply despite that knowledge, or the accused recklessly failed to act according to the conditions, meaning they perceived a substantial and unjustified risk that their conduct would likely fail to comply with the conditions and persisted in this conduct. Genuinely forgetting a condition could be a mistake of fact and would negate *mens rea*. The accused need not have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. Knowledge in the second component of the *mens rea* means that the accused must be aware of, or be wilfully blind to, the factual circumstances requiring them to act or refrain from acting. The second component of the *mens rea* can also be met by showing that the accused was reckless. Knowledge of risk is key to recklessness -- the accused must know of their bail conditions and the risk of factual circumstances arising that would require them to act (or refrain from acting) to comply with their bail conditions. Recklessness is a subjective standard and the accused must be aware that their conduct created a substantial risk of non-compliance with their bail conditions and aware of any factors that contributed to that risk being unjustified.

In the instant case, a new trial should be ordered in light of the error in law by the courts below in applying an objective rather than a subjective standard of fault for s. 145(3). This is not a case where the curative proviso under

s. 686(1)(b)(iii) of the *Criminal Code* applies -- identifying the wrong fault standard is not a harmless or trivial error. A subjective *mens rea* would have required the trial judge to consider Z's state of mind, which clearly could have had an impact on the verdict. The evidence is not so overwhelming that a conviction is inevitable. A new trial is therefore needed to address whether Z knowingly or recklessly breached his conditions.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Stromberg-Stein, Willcock, Savage, Fenlon and Fisher JJ.A.), *2019 BCCA 9*, *370 C.C.C. (3d) 111*, *53 C.R. (7th) 373*, *[2019] B.C.J. No. 18* (QL), *2019 CarswellBC 19* (WL Can.), affirming a decision of Thompson J., 2017 BSCS 2070, *[2017] B.C.J No. 2298* (QL), 2017 CarswellBC 3175 (WL Can.), affirming the convictions of the accused for failure to comply with a condition of a recognizance. Appeal allowed.

Counsel

Sarah Runyon, *Garth Barriere* and *Michael Sobkin*, for the appellant.

Éric Marcoux and *Ryan Carrier*, for the respondent.

Susan Reid, for the intervener the Attorney General of Ontario.

Susanne Elliott, for the intervener the Attorney General of British Columbia.

Christine Mainville, for the intervener the Criminal Lawyers' Association of Ontario.

Jason B. Gratl and *Toby Rauch-Davis*, for the intervener the Vancouver Area Network of Drug Users.

Alexandra Luchenko, *Roy W. Millen* and *Danny Urquhart*, for the intervener the British Columbia Civil Liberties Association.

Danielle Glatt, for the intervener the Canadian Civil Liberties Association.

Matthew Nathanson and *Chantelle van Wiltenburg*, for the intervener the Independent Criminal Defence Advocacy Society.

David N. Fai and *Caitlin Shane*, for the intervener the Pivot Legal Society.

Nicholas St-Jacques and *Pauline Lachance*, for the intervener Association québécoise des avocats et avocates de la défense.

The judgment of the Court was delivered by

S.L. MARTIN J.

I. Introduction

1 When individuals are charged with a crime, they are presumed innocent and have the right not to be denied reasonable bail without just cause. Most accused are not held in custody between the date of the charge and the time of trial because the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Code*") and the *Canadian Charter of Rights and Freedoms* ("*Charter*") typically require that accused be released on what is known as "bail".[1] Accused who are not released from custody by the police will be brought before a justice of the peace or a judge ("judicial official")[2] for a bail hearing. For most crimes, the default form of bail is to release accused persons based on an undertaking to attend trial, without any conditions restricting their activities or actions (s. 515(1) of the *Code*). However, conditions of release can be imposed if the Crown satisfies the judicial official that particular restrictions are required to secure the accused's attendance in court, ensure the protection or safety of the public, or maintain confidence in the administration of justice (s. 515(10); *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, at paras. 21, 34 and 67(j)).

2 Parliament made it a separate criminal offence to breach bail conditions under s. 145(3) of the *Code*.[3] This is a crime against the administration of justice and carries a maximum penalty of two years' imprisonment. Accused persons may therefore be subject to imprisonment under s. 145(3) if they breach a condition of their bail, even if they are never ultimately convicted of any of the crimes for which they were initially charged. In many cases, an accused person faces criminal sanctions for conduct which, but for the stipulated bail condition, would be a lawful exercise of personal freedom. As the gravamen of the offence is a failure to comply with a court order, there is often no victim, no violence, or no direct harm to the public or property.

3 The appellant, Mr. Zora, appeals his convictions under s. 145(3) for twice failing to comply with his bail condition to answer the door when police went to his residence to check that he was complying with his bail conditions. He committed the guilty act, or the *actus reus*, by failing to answer the door when police attended. We are asked to determine what fault or mental element the Crown must prove to secure a conviction under s. 145(3): is the *mens rea* for this offence to be assessed on a subjective or objective standard?

4 I conclude that the Crown is required to prove subjective *mens rea* and no lesser form of fault will suffice. Under s. 145(3), the Crown must establish that the accused committed the breach knowingly or recklessly. Nothing in the text or context of s. 145(3) displaces the presumption that Parliament intended to require a subjective *mens rea*. Further, this intention is supported by this Court's jurisprudence on the interpretation of the breach of probation offence, the consequences of charges and convictions under s. 145(3), the role of s. 145(3) within the constitutional and legislative scheme of bail, and the practical operation of the bail system. A subjective *mens rea* standard for breach under s. 145(3), like Parliament's recent amendments to the bail scheme, keeps the focus on the individual accused, where it belongs.

5 The parties and intervenors recognize that the question of the *mens rea* requirement for s. 145(3) raises broader considerations about the functioning of our complex bail system. The breach of a bail condition reaches back to, and is based upon, the conditions imposed at the beginning of the bail process. In *Antic*, this Court endorsed principles for reasonable bail based on documented concerns over how the bail system operates across Canada. Three years after *Antic*, and with the same goal of providing guidance, I address the imposition of non-monetary bail conditions and the criminal offences that result from their breach. A similarly wide-angle lens is required. Offences under s. 145(3) are very common, on the rise, and often involve questionable conditions imposed upon vulnerable and marginalized persons. Parliament has recently acted to address how numerous and onerous bail conditions interact with s. 145(3) to create a cycle of incarceration, especially among the most vulnerable in our population. This Court cannot ignore the current context in which the bail system operates, and in response provides guidance on both the interpretation of s. 145(3) and the imposition of the bail conditions that lead to these charges.

6 All those involved in the bail system are to be guided by the principles of restraint and review when imposing or enforcing bail conditions. The principle of restraint requires any conditions of bail to be clearly articulated, minimal in number, necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10). The principle of review requires everyone, and especially judicial officials, to carefully scrutinize bail conditions at the release stage whether the bail is contested or is on consent. Most bail conditions restrict the liberty of a person who is presumed innocent. Breach can lead to serious legal consequences for the accused and the large number of breach charges has important implications for the already over-burdened justice system. Before transforming bail conditions into personal sources of potential criminal liability, judicial officials should be alive to possible problems with the conditions. Requiring subjective *mens rea* to affix criminal liability under s. 145(3) reflects the principles of restraint and review and mirrors the individualized approach mandated for the imposition of bail conditions.

7 I approach these reasons as follows. First, I outline the factual background and judicial history of this appeal. Second, I review the legislative and constitutional framework of bail, which provides necessary background for interpreting the failure to comply offence in s. 145(3). Third, I set out why my interpretation of s. 145(3) leads me to conclude that the offence requires subjective *mens rea*. Fourth, I provide broader guidance on what is required for a bail condition to be necessary, reasonable, least onerous, and sufficiently linked to the risks listed in s. 515(10). Fifth, I explain what will be required to prove subjective *mens rea* for the failure to comply offence. Lastly, I describe why I would order a new trial in this case.

II. Factual Background and Judicial History

8 Mr. Zora was charged with three counts of possession for the purpose of trafficking contrary to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and was granted bail on his own recognizance[4] with conditions and with his mother as surety.[5] His twelve bail conditions required that he "keep the peace and be of good behaviour", report to his bail supervisor as directed, remain in the province of British Columbia unless consent was granted by his bail supervisor, obey all rules and regulations of his residence, remain in his residence except during the day in the company of his mother or father or a person approved by his bail supervisor and with the consent of his bail supervisor (referred to as the curfew or house arrest condition), present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to confirm his compliance with his house arrest condition, not possess any non-prescribed controlled substances, not possess drug paraphernalia, not possess or have a cell phone, attend a residential treatment facility if he consented, and not possess any weapon (A.R., at p. 137).

9 The police came almost every day, at different times in the evening, to check his compliance with the curfew in the approximately one month between his release from custody on September 17, 2015 and his alleged breaches in October 2015. The trial judge found that due to the nature of the charges, the RCMP "were quite diligent in investigating any possible violation" of Mr. Zora's bail conditions (B.C. Prov. Ct., File Nos. 38980-6-CAC, 38980-7-CAC, March 29, 2017, at para. 2 ("Trial Judge Reasons"), reproduced in A.R., at p. 2).

10 On two evenings on Thanksgiving weekend, October 9 and 11, 2015, Mr. Zora failed to present himself at his door when police attended his residence around 10:30 p.m. Mr. Zora did not know that he had missed the police at his door until two weeks later when informed that he was being charged with two counts of breaching his curfew condition and two counts of breaching his condition to answer the door. Following his breach charges, Mr. Zora was released on bail on a similar recognizance, but with the added condition that he personally and immediately answer the phone at his residence when any peace officer or bail supervisor called the residence. Mr. Zora testified that he subsequently set up an audio-visual system at his front door and moved his bedroom so that he would not miss future police checks.

11 Mr. Zora, his mother, and his girlfriend testified that they were all at home during the Thanksgiving weekend. Mr. Zora said it would have been difficult, if not impossible, to hear the doorbell or someone knocking on the front door from his bedroom. His bedroom was downstairs on the far side of the residence, and he was tired and retiring early because he was withdrawing from heroin and in a methadone treatment program. The trial judge raised concerns with the credibility and reliability of the defence witnesses, but did not make clear findings of fact, however, on whether Mr. Zora knew that he was unable to hear his doorbell from his room when police attended his door that weekend (Trial Judge Reasons, at paras. 11-14).

12 The trial judge acquitted Mr. Zora on the alleged curfew violations as he was not satisfied beyond a reasonable doubt that Mr. Zora had been outside of his house at the time. He convicted Mr. Zora on the two counts of failing to appear at the door for curfew compliance checks. The trial judge analogized s. 145(3) offences to strict liability offences and therefore found that Mr. Zora was guilty of breach of his conditions as he had not "arrange[d his] life to comply with the terms of bail" (Trial Judge Reasons, at para. 16). Mr. Zora was fined a total of $920.

13 The summary conviction appeal judge dismissed the appeal and concluded that objective *mens rea* was sufficient for a conviction under s. 145(3) because the British Columbia Court of Appeal decision in *R. v. Ludlow*, *1999 BCCA 365*, 125 B.C.A.C. 194, adopted an objective fault standard for these types of offences (*2017 BCSC 2070*, at para. 7 (CanLII)). This meant that Mr. Zora's convictions were upheld because his behaviour was a marked departure from what a reasonable person would do to ensure they complied with their conditions.

14 A five-judge panel of the British Columbia Court of Appeal dismissed the appeal (*2019 BCCA 9*, *53 C.R. (7th) 373*). Stromberg-Stein J.A., writing for the majority of four, concluded that s. 145(3) only requires an objective *mens rea*. The majority found that the text, context, and purpose of s. 145(3) created a duty-based offence grounded in the specific legal duty to comply with bail conditions, which demonstrated Parliament's intention to create an offence with an objective *mens rea* (paras. 53-58).

15 Fenlon J.A., concurring in the result, found that s. 145(3) required subjective fault. In her view, this was not a duty-based offence and neither the words nor the scheme nor purpose of the offence supported a clear legislative intent to displace the presumptive subjective fault element. Fenlon J.A. nevertheless dismissed the appeal as she concluded that the Crown had established subjective fault by showing that Mr. Zora was reckless since he knew that there were parts of his house where he would not hear the doorbell and yet he made no effort to address the situation (paras. 95-96).

III. Legislative Background and the Context of Section 145(3)

16 Section 145(3) is a hybrid offence that applies to breaches of conditions imposed on an accused by a court order prior to trial, while awaiting sentencing, or during an appeal. The offence falls under Part IV of the *Code*, which deals with offences against the administration of law and justice. There are similarly worded offences for accused persons who fail to attend court when required (s. 145(2), (4), and (5)) or fail to comply with conditions of undertakings issued by peace officers (s. 145(5.1)). Given these offences are substantively similar in text and context, I see no reason why these offences should carry a different fault standard from s. 145(3).

17 The predecessor to s. 145(3), s. 133(3), was introduced in 1972 through the *Bail Reform Act*, S.C. 1970-71-72, c. 37. It created an offence where a person bound by conditions of an undertaking or recognizance on bail "fails, without lawful excuse, the proof of which lies upon him, to comply with that condition" (R.S.C. 1970, c. 2 (2nd Supp.), s. 4). Prior to this, there was no offence for failure to comply with bail conditions and the *Code* provided no guidance for imposing bail conditions (*Antic*, at para. 23).

18 Section 145(3) was amended in 2018 to remove the reverse onus on the accused to prove lawful excuse (S.C. 2018, c. 29, s. 9(7)). On December 18, 2019, as part of larger amendments to the bail scheme, the offence under s. 145(3) was split into two subsections to separately address the failure to comply with an undertaking under s. 145(4) and a release order or a no-communication order under s. 145(5) (S.C. 2019, c. 25, s. 47(1)). While these changes do not really alter the failure to comply offence, Parliament also made significant changes to address mounting concerns about the imposition of excessive and unfair bail terms and the overuse of criminal sanctions for the failure to comply with conditions of bail (see *House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at pp. 19603 and 19606, Hon. Jody Wilson-Raybould, Minister of Justice and Attorney General).

19 The parties and intervenors recognize that the particular question before the Court needs to be situated within the complex legal and factual context in which bail operates in Canada. Not only does the fault element under s. 145(3) have far-reaching implications for civil liberties and the fair and efficient functioning of bail in this country, there is a direct link between what conditions may be imposed in a bail order and Parliament's intent in criminalizing their breach under s. 145(3). Before looking to how s. 145(3) should be interpreted, it is necessary to provide a brief overview of the factors and framework which structure how bail conditions are established. The release conditions to which s. 145(3) applies are imposed in a bail system bounded by the *Charter*, governed by the *Code*, and informed by the jurisprudence.

20 From a constitutional perspective, most bail conditions restrict the liberty of persons who are presumed innocent and impose a risk of further criminal liability on those persons because of the failure to comply offence under s. 145(3). Therefore, the setting of bail conditions must be consistent with the presumption of innocence and the right not to be denied reasonable bail without just cause under s. 11(*e*) of the *Charter* (see *Antic*, at para. 67; *R. v. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221, at para. 36). Section 11(*e*) protects both the right not to be denied bail without "just cause" and the right to bail on reasonable terms and conditions (*R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 689; *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 735; *Antic*, at paras. 36-41). The s. 11(*e*) right is "an essential element of an enlightened criminal justice system" that "entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons" (*Antic*, at para. 1).[6] The presumption of innocence is "a hallowed principle lying at the very heart of criminal law... . [that] confirms our faith in humankind" (*Antic*, at paras. 66-67(a), quoting *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 119-20; see also *R. v. Myers*, 2019 SCC 18, at para. 1). The presumption of innocence is only satisfied in the bail process when the requirements of s. 11(*e*) are met (*Pearson*, at pp. 688-89; *Morales*, at p. 748). As described by Andrew Ashworth and Lucia Zedner, the presumption of innocence and the protection of liberty rights mean that "the state should presume each person to be harmless ... therefore it is in principle wrong to take coercive measures against people for preventive reasons unless there are very strong justifications for doing so" (*Preventive Justice* (2014), at p. 53). The *Charter* therefore protects accused persons from unreasonable terms and conditions of bail.

21 Section 515 of the *Code* governs how judicial officials are to exercise their discretion to grant bail, establishes the legal forms of bail, and requires that the conditions of bail are only as onerous as necessary to address the risks listed in s. 515(10): being, the risk of the accused not attending court, harm to public protection and safety, and loss of confidence in the administration of justice. Subsections 515(1) to (3) codify the "ladder principle", a principle premised on restraint, which "requires that the form of release imposed on an accused be no more onerous than necessary" (*Antic*, at para. 44). A judicial official is only permitted to impose a more onerous form of release "if the Crown shows why a less onerous form of release is inappropriate" (*Antic*, at para. 47). Therefore, the default form of release for an accused charged with an offence, other than the very serious offences listed in s. 469, is release on an undertaking *without conditions* (s. 515(1)). Under s. 515(2)(a), if the Crown shows that an accused should not

be released on an undertaking without conditions, the judicial official should consider releasing the accused on an undertaking with conditions.

22 The *Code* provides for enumerated and non-enumerated conditions of bail. The enumerated conditions in s. 515(4) to (4.2) provide guidance regarding the individualized nature of conditions and the expected degree of connection between the condition and the risks listed in s. 515(10). Most discretionary conditions enumerated in s. 515(4) address an individual accused's flight risk or risk of not attending their court date: reporting to a peace officer (s. 515(4)(a)), remaining within a territorial jurisdiction (s. 515(4)(b)), notifying a peace officer of a change in address and employment (s. 515(4)(c)), and depositing a passport (s. 515(4)(e)) (see G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 6-27 to 6-32). Enumerated conditions related to no-communication orders (ss. 515(4)(d) and 515(4.2)), geographical restrictions (s. 515(4)(d)), and mandatory weapons prohibitions for specific offences (s. 515(4.1)) are directly linked to the second ground of detention: public safety and security. In fact, even mandatory weapons prohibitions give the judicial official some leeway to not impose the weapons prohibition if they consider that the condition is not necessary to protect the safety of the accused, or the safety and security of a victim or any other person (s. 515(4.1)).

23 Under s. 515(4)(f),[7] judicial officials are also given flexibility to impose non-enumerated conditions, defined as: "such other reasonable conditions ... as the justice considers desirable". As shown by Mr. Zora's twelve, and then thirteen, release conditions, non-enumerated bail conditions often cover a broad range of activities. It is common for conditions to range from requiring an accused to keep the peace and be of good behaviour, prohibiting cellphone use and internet access, controlling alcohol and drug consumption, imposing a curfew, limiting where an accused can go over large areas of a city, requiring compliance with random searches, and even restricting the accused's ability to exercise their rights to freedom of expression and peaceful assembly (see, e.g., Trotter, at p. 6-44.1).

24 The jurisprudence mandates that judicial officials respect the ladder principle, meaning that they must consider release with fewer and less onerous conditions before release on more onerous ones (see *R. v. Schab*, *2016 YKTC 69*, *35 C.R. (7th) 48*, at para. 29; *R. v. Prychitko*, *2010 ABQB 563*, *618 A.R. 146*, at para. 14). The case law is clear that non-enumerated conditions imposed under s. 515(4)(f), like enumerated conditions, must be minimal, necessary, reasonable, the least onerous in the circumstances, and sufficiently connected to a risk listed in s. 515(10) (*Antic*, at para. 67(j); see also *R. v. Penunsi*, *2019 SCC 39*, at paras. 78-80). The ladder principle applies to conditions of release just as it applies to forms of release. There is a link between the ladder principle and the number and content of bail conditions. Without a restrained approach to bail conditions, a less onerous form of bail, such as an undertaking with conditions, can become just as or more onerous than other steps up the bail ladder or, in some cases, even more restrictive than conditional sentence and probation orders issued after conviction (*R. v. McCormack*, *2014 ONSC 7123*, at para. 23 (CanLII); *R. v. Burdon*, *2010 ABCA 171*, *487 A.R. 220*, at para. 8).

25 Only conditions that are specifically tailored to the individual circumstances of the accused can meet these criteria. Bail conditions are thus intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person. They are to be imposed with restraint not only because they limit the liberty of someone who is presumed innocent of the underlying offence, but because the effect of s. 145(3) is often to criminalize behaviour that would otherwise be lawful. In effect, each imposed bail condition creates a new source of potential criminal liability personal to that individual accused.

26 Many intervenors drew attention to the widespread problems which continue to exist, even after this Court's decision in *Antic*, with the ongoing imposition of bail conditions which are unnecessary, unreasonable, unduly restrictive, too numerous, or which effectively set the accused up to fail. Any such practice offends the principle of restraint which has always been at the core of the law governing the setting of bail conditions. Restraint has a constitutional dimension, a legislative footing, and is not only recognized in case law, but was also recently expressly reinforced by the amendments that came into force on December 18, 2019. Section 493.1 now explicitly sets out a "principle of restraint" for any interim release decisions, requiring a peace officer or judicial official to "give primary consideration" to imposing release on the "least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with." Section 493.2 requires judicial officials making bail decisions to give particular attention to the circumstances of accused persons

who are Indigenous or who belong to a vulnerable population that is overrepresented in the criminal justice system and disadvantaged in obtaining release.

27 Parliament also acted to address concerns regarding the over-criminalization of bail breaches, which is in part explained by the initial imposition of numerous and onerous bail conditions. Besides changes to bail revocation under s. 524, Parliament has enacted a new procedure for managing failure to comply charges under s. 145(3), called a "judicial referral hearing" (s. 523.1). If an accused has failed to comply with their conditions of release, and has not caused harm to a victim, property damage, or economic loss, the Crown can opt to direct the accused to a judicial referral hearing. If satisfied that the accused failed to comply with their court order or failed to attend court, a judicial official must review the accused's conditions of bail while taking special note of the accused's particular circumstances. The judicial official can then decide to take no action, release the accused on new conditions, or detain the accused. If the accused was charged with a failure to comply offence, the judicial official must dismiss the charge after making their decision (s. 523.1; *R. v. Rowan*, *2018 ABPC 208*, at paras. 39-40 (CanLII)).

28 Although these amendments occurred after Mr. Zora was charged, I note that my interpretation of the *mens rea* in s. 145(3), based on the relevant statutory context of the bail scheme, is consistent with the concerns acknowledged and addressed in Parliament's recent amendments.

IV. Interpretation of the *Mens Rea* of Section 145(3)

A. *Subjective and Objective Mens Rea*

29 The main issue in this appeal is whether the *mens rea* for s. 145(3) is subjective or objective. A subjective fault standard would focus on what was in the accused's mind at the time they breached their bail condition. It directs a court to consider whether the accused "actually intended, knew or foresaw the consequence and/or circumstance as the case may be. Whether [they] 'could', 'ought' or 'should' have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability" (*R. v. Hundal*, *[1993] 1 S.C.R. 867*, at pp. 882-883, quoting D. Stuart, *Canadian Criminal Law* (2nd ed. 1987), at pp. 123-24). In applying a subjective *mens rea*, courts can consider personal circumstances and challenges of the accused in a manner which mirrors the individualized manner in which bail conditions are to be imposed.

30 Under objective *mens rea*, the question would be whether the accused's behaviour was a marked departure from the behaviour of a reasonable person subject to the accused's bail conditions (C.A. Reasons, at para. 68). The standard is based on what the reasonable person would know or do or have foreseen in the circumstances and it does not matter if the accused does not know they were breaching their condition. Objective fault is premised on uniform societal standards of behavior and therefore does not permit consideration of the inexperience, lack of education, youth, cultural experience, or any other circumstance of the accused, short of an incapacity or virtual inability to comply (C.A. Reasons, at para. 87 (Fenlon J.A. concurring), citing *R. v. Creighton*, *[1993] 3 S.C.R. 3*, at pp. 58-74 (per McLachlin J.) and pp. 38-39 (per La Forest J.); *R. v. Naglik*, *[1993] 3 S.C.R. 122*, at p. 148 (per McLachlin J.) and p. 149 (per L'Heureux-Dubé J.)).

31 This is the first time this Court has been asked to consider the *mens rea* for this offence. Courts across the country have divided on whether the mental element for the crime of breaching a bail condition, or similar offences under s. 145(2), (4), (5) and (5.1), are to be assessed subjectively or objectively. Courts in Manitoba, Ontario, Quebec, Saskatchewan, New Brunswick, and the territories usually require subjective *mens rea* for these offences (see, e.g., *R. v. Custance*, *2005 MBCA 23*, *194 C.C.C. (3d) 225*; *R. v. Legere* *(1995), 22 O.R. (3d) 89* (C.A.); *R. v. Lemay*, *2018 QCCS 1956*; *R. v. J.A.D.*, *1999 SKQB 262*, *187 Sask. R. 95*; *R. v. Howe*, *2014 NBQB 259*, *430 N.B.R. (2d) 202*; *R. v. Mullin*, *2003 YKTC 26*, *13 C.R. (6th) 54*; *R. v. Selamio*, *2002 NWTSC 15*; *R. v. Josephie*, *2010 NUCJ 7*). In contrast, as shown by this case, British Columbia appellate courts have adopted an objective *mens rea* (see also *Ludlow*). Courts in Alberta, Nova Scotia, and Newfoundland and Labrador have adopted varying and modified approaches to the *mens rea* for these offences (subjective: e.g., *R. v. Ritter*, *2007 ABCA 395*, *422 A.R. 1*; *R. v. Loutitt*, *2011 ABQB 545*, *527 A.R. 212*; *R. v. Lofstrom*, *2016 ABPC 197*, *39 Alta. L.R. (6th) 367*; *R. v. Al Khatib*, *2014 NSPC 62*, *350 N.S.R. (2d) 133*; *R. v. A.M.Y.*, *2017 NSSC 99*; *R. v. L.T.W.*, *2004 CanLII 2897* (N.L.

Prov. Ct.); *R. v. Companion*, 2019 CanLII 119787 (N.L. Prov. Ct.); objective: e.g., *R. v. Hammoud*, 2012 ABQB 110, 534 A.R. 80; *R. v. Qadir*, 2016 ABPC 27; *R. v. Osmond*, 2006 NSPC 52, 248 N.S.R. (2d) 221; *R. v. Brown*, 2012 NSPC 64, 319 N.S.R. (2d) 128; *R. v. Foote*, 2018 CanLII 38297 (N.L. Prov. Ct.)).

B. *Statutory Interpretation and the Presumption of Subjective Fault*

32 Determining the *mens rea* of s. 145(3) involves an exercise in statutory interpretation to discern the fault standard intended by Parliament. A key part of the context in interpreting s. 145(3) is the long-standing presumption that Parliament intends crimes to have a subjective fault element (*R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, at para. 23, citing *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at pp. 1303 and 1309-10, per Dickson J.).

33 As described by this Court in *A.D.H.*, this presumption of subjective fault reflects the underlying value in criminal law that the "morally innocent should not be punished" (*A.D.H.*, at para. 27). This starting point is not an absolute rule, but rather captures what was assumed to be present in the mind of Parliament when enacting the provision (para. 26). The presumption of subjective fault will only be overridden by "clear expressions of a different legislative intent" (paras. 27-29). Courts must read the words of the statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme and objects of the statute to discern whether there is a clear legislative intention to overturn the presumption of subjective fault (at paras. 19-21, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41 (quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)). If a criminal offence in the *Code* is ambiguous as to the *mens rea*, then the presumption of subjective fault has not been displaced.

34 Subsection 145(3) is a criminal offence, as indicated by its enactment in the *Code*, its purposes of deterrence and punishment (as is further described below), and the serious criminal consequences that flow from conviction, including up to two years' imprisonment (see D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 202; *Hammoud*, at paras. 11-15). Accordingly, the presumption is that s. 145(3) requires subjective fault. The question then becomes whether the text, context, scheme and purpose of s. 145(3) evince a clear intention of Parliament to enact an objective *mens rea* standard.

35 In my view, they do not. Not only is there no reason in the text or context of the offence to suggest that Parliament intended to depart from requiring subjective fault, I conclude that Parliament intended for subjective fault to apply to s. 145(3). The wording in s. 145(3) is neutral and does not create a duty-based offence with objective *mens rea* as defined in *A.D.H.* All the other relevant factors support a subjective fault element. This Court has previously decided that subjective intent is required for the similar offence of breach of probation. Further, the legislative history, context, and purpose of s. 145(3) within the larger legislative scheme, as well as the significant consequences associated with a charge or conviction under s. 145(3), call for a subjective *mens rea* element. The realities of the bail system further support Parliament's intention to require subjective fault to ensure that the individual characteristics of the accused are considered throughout the bail process. Considering this social and practical context affirms that the consequences that would flow from requiring only an objective *mens rea* for the failure to comply offence would not uphold the intention of Parliament (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 643 and 648).

C. *The Text of Section 145(3) Is Neutral and Does Not Create a Duty-Based Offence*

36 The text of s. 145(3) is neutral insofar as it does not show a clear intention on the part of Parliament with regard to either subjective or objective *mens rea*. When Mr. Zora was charged in 2015, the failure to comply offence read:

> 145 (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

37 I start by noting that the inclusion of the statutory defence of a "lawful excuse" in s. 145(3) plays no role in the interpretation of the *mens rea* of the offence. Lawful excuse provides an additional defence that would not otherwise be available to the accused (see *R. v. Holmes*, [1988] 1 S.C.R. 914, at pp. 948-49, see also interpretations of "reasonable excuse" in *R. v. Moser* (1992), 7 O.R. (3d) 737 (C.A.), at pp. 748-50, per Doherty J.A., concurring; *R. v. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, aff'd 2015 SCC 6, [2015] 1 S.C.R. 399). It should not be confused with *mens rea* (M. Manning and P. Sankoff, *Manning*, *Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 805; Trotter, at p. 12-16). The availability of the defence does not change the burden on the Crown to prove all elements of the offence, including *mens rea*, beyond a reasonable doubt (*Legere*, at pp. 99-100, citing *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35 (Ont. C.A.), at p. 44; *Custance*, at para. 24; *Josephie*, at para. 28 (CanLII)). Therefore, it is not material to the issue of whether the *mens rea* element of the offence is subjective or objective.

38 In evaluating whether there is an expression of legislative intent that displaces the presumption of subjective fault, courts look both to the words included in the provision as well as the words that were not (*A.D.H.*, at para. 42). It is true that s. 145(3) does not contain express words indicating a subjective intent, like "wilful" or "knowing". However, this absence cannot, on its own, displace the presumption. In fact, it is precisely when the words and context are neutral that the presumption of subjective *mens rea* operates with full effect.

39 The majority of the Court of Appeal emphasized that the words "undertaking", "recognizance", "[b]ound to comply", and "[f]ails" indicate that the accused has a binding legal obligation to meet an objectively determined standard of conduct (para. 53). They looked to the five categories of objective *mens rea* offences outlined by this Court in *A.D.H.*, at paras. 57-63: dangerous conduct offences; careless conduct offences; predicate offences; criminal negligence offences; and duty-based offences. The majority, at para. 54, found that this language meant that s. 145(3) fell within the last category, namely duty-based offences. Duty-based offences, such as failing to provide the necessaries of life under s. 215, are offences based on a failure to perform specific "legal duties arising out of defined relationships" (*A.D.H.*, at para. 67, citing *Naglik*, at p. 141).

40 The Crown also argues that the legislative history of s. 145(3) supports this interpretation, since when it was enacted, the then Minister of Justice referred to the "responsibility" or "duty" of a person on bail to attend court and comply with conditions to ensure that the bail system can rely on voluntary appearance rather than pre-trial custody (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, vol. 1, No. 8, 3rd Sess., 28th Parl., February 23, 1971, at pp. 12 and 29; *House of Commons Debates*, vol. 3, 3rd Sess., 28th Parl., February 5, 1971, at p. 3117 (Hon. John Turner)).

41 With respect, I disagree that either the text of s. 145(3) or the Minister's comments establish a clear intention to create a duty-based offence which calls for the uniform normative standard associated with objective *mens rea*. First, the text of s. 145(3) does not contain any of the language typically used by Parliament when it intends to create an offence involving objective fault (see *A.D.H.*, at para. 73). Unlike the duties in ss. 215, 216, 217 and 217.1 of the *Code*, s. 145(3) does not expressly include the word "duty", a word which may suggest objective fault (*A.D.H.*, at para. 71; *Naglik*, at p. 141). I agree with Fenlon J.A. that "the omission is a significant one" (C.A. Reasons, at para. 80) when we are looking for a clear intention of Parliament to rebut the presumption of subjective fault. I also accept that the word "fails" in this context is neutral:

> "Fails" can connote neglect, but as my colleague notes, also means acting contrary to the agreed legal duty or obligation and being unable to meet set standards or expectations: *The Oxford English Dictionary*, 11th ed, *sub verbo* "fail". That definition is equally compatible with intentional conduct or inadvertence.
>
> (C.A. Reasons, at para. 78)

Similarly, the word "omet" in the French version of s. 145(3) can refer to neglecting, but also refraining, from acting

in accordance with a duty (H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015)), at pp. 446-47, "*omission*"). Neither the words "fails" or "*omet*" demonstrate a clear intention of Parliament to establish objective fault.

42 Second, there is a danger in putting too much weight on the word choice of one Minister, especially when his statement does not clearly evince an intention of Parliament to create an objective *mens rea* offence. For example, contemporaneous commentary described that the aim of these offences were to "ensure an accused [did] not disregard the new system with impunity", which seems to suggest a subjective *mens rea* (J. Scollin, Q.C., *The Bail Reform Act: An Analysis of Amendments to the Criminal Code Related to Bail and Arrest* (1972), at p. 19). There is no clear indication from the legislative history that Parliament intended to create an objective *mens rea* offence.

43 The Minister saying that a provision that establishes a criminal offence imposes a responsibility or duty in a general sense does not make it the type of duty-based offence at issue in *Naglik*. The wording in s. 145(3) speaks only of being bound to comply and failing to do so. This wording does not displace the presumption of subjective intent. All criminal prohibitions impose obligations to act or not in particular ways and inflict sanctions when people fail to comply. If accepted, the Crown's argument and the Court of Appeal's conclusion would make all compliance obligations into "duties" and all crimes into duty-based offences. However, the duty-based offences discussed in *A.D.H.* are a far more limited category and are directed at legal duties very different from the obligation of an accused to comply with the conditions of a judicial order.

44 Section 145(3) simply does not share the defining characteristics of those duty-based offences requiring objective fault that were at issue in *Naglik* and discussed in *A.D.H*. The points of distinction include the different nature of the relationships to which these legal duties attach, the varying levels of risk to the public when duties are not met, whether the duty must be defined according to a uniform, societal standard of conduct, and whether applying such a uniform standard is possible and appropriate in the circumstances.

45 Legal duties, like those in ss. 215 to 217.1, tend to impose a positive obligation to act in certain identifiable relationships, address a duty of a more powerful party towards a weaker party, and involve a direct risk to life or health if a uniform community standard of behaviour is not met (*A.D.H.*, at para. 67). An obligation to not breach a bail condition is not comparable to the power imbalance and risks to public health and safety addressed by the duties imposed by ss. 215 to 217.1: providing the necessaries of life to certain defined persons (s. 215), undertaking medical procedures that may endanger the life of another person (s. 216), or undertaking to do an act or direct work where there is a danger to life or risk of bodily harm (ss. 217 and 217.1).

46 Further, the duty-based offence in *Naglik* and other types of objective *mens rea* offences involve legal standards that would be "meaningless if every individual defined its content for [themselves] according to [their] subjective beliefs and priorities" (p. 141). The majority of the Court of Appeal thought that bail conditions impose just such "a minimum uniform standard of conduct having regard to societal interests rather than personal standards of conduct" (para. 57). With respect, I disagree. Although societal interests can be at play when bail conditions are set, there is no uniform standard of care for abiding by bail conditions, as there is for driving a car, storing a firearm, or providing the necessaries of life to a dependant. Parliament legislated a bail system based upon an individualized process, which only permits conditions which address risks specific to the accused to ensure their attendance in court, protect public safety, or maintain confidence in the administration of justice. The bail order is expected to list personalized and precise standards of behavior. As a result, there is no need to resort to a uniform societal standard to make sense of what standard of care is expected of an accused in fulfilling their bail conditions and no need to consider what a reasonable person would have done in the circumstances to understand the obligation imposed by s. 145(3).

47 In addition, the lack of a uniform standard from which to assess the breach of these conditions means that it is also not obvious what degree of breach would attract criminal liability if an objective standard applied to s. 145(3). Only a marked departure from the conduct of a reasonable person would draw criminal liability under an objective standard of *mens rea*. However, unlike an activity like driving where there is a spectrum of conduct ranging from prudent to careless to criminal based on the foreseeable risks of the conduct to a reasonable person, the highly

individualized nature of bail conditions excludes the possibility of a uniform societal standard of conduct applicable to all potential failure to comply offences. Bail conditions may restrict normal activities like travelling and communicating with other people and are specifically tailored to address the *individual* risks posed by each accused. Bail conditions and the risks they address vary dramatically among individuals on release, so that it is not intelligible to refer to the concepts of a "marked" or "mere" departure from the standard of a reasonable person. In the absence of a bail condition, the regulated conduct would usually not be a departure from any uniform societal standard of behaviour. Without this ability to distinguish a marked departure from a mere departure, there is a risk that the objective fault standard slips into absolute liability for s. 145(3).

48 Similarly, the offence in s. 145(3) is not comparable to other objective fault offences listed in *A.D.H.* Although a risk assessment is involved in the setting of bail conditions, this individualized risk will rarely be the same as the broad societal risks posed by objective fault offences like dangerous driving or careless firearms storage. As stated by the Standing Senate Committee on Legal and Constitutional Affairs, failure to comply offences, like many offences against the administration of justice, differ from other criminal offences because they rarely involve harm to a victim, they usually do not involve behaviour that would otherwise be considered criminal without a court order, and they are secondary offences that only arise after someone has been charged with an underlying offence (*Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (June 2017) (online), at p. 139 ("Senate Committee Report")). A departure from many bail conditions would not automatically lead to a threat to public health and safety.

49 Finally, reasonable bail is a right under s. 11(*e*) of the *Charter* and cannot be compared to a regulated activity that is voluntarily entered into like driving or firearm ownership where an objective fault standard for related offences is further justified (*Hundal*, at p. 884). An accused person who is presumed innocent has a right to regain their liberty following their arrest subject to the least onerous measures to address their individual risk of not attending their court date, risk to public protection and safety, and risk to the administration of justice. The fact that accused persons consent to bail conditions in order to be released does not mean that they have chosen to enter into a regulated activity comparable to driving or owning firearms.

D. *Subjective Mens Rea Is Required for Breaches of Probation*

50 This Court's jurisprudence requiring subjective *mens rea* for the breach of probation offence further supports a subjective *mens rea* for the failure to comply offence. The offences of breach of probation (s. 733.1) and failure to comply with bail conditions (s. 145(3)) are similar offences, which both arise from an accused's breach of conditions set out in a court order. In *R. v. Docherty*, *[1989] 2 S.C.R. 941*, the Court determined that a subjective *mens rea* was required for the breach of probation offence. That offence used the words "wilfully" and "refuses", which reinforced the presumption of subjective fault, and are not in s. 145(3). However, even after the word "wilfully" was removed from the current breach of probation offence, most courts continue to interpret the offence to require subjective *mens rea*, based on this Court's reasoning in *Docherty* and the fact that the removal of the word "wilfully" does not on its own indicate an intent to create an objective *mens rea* offence (see, e.g., *R. v. Eby*, *2007 ABPC 81*, *77 Alta. L.R. (4th) 149*; *R. v. Bingley*, *2008 BCPC 245*, at para. 18 (CanLII); *R. v. Laferrière*, *2013 QCCA 944*, at paras. 82-83; *R. v. John*, *2015 ONSC 2040*, at para. 16 (CanLII); *contra*, *R. v. Bremmer*, *2006 ABPC 93*, at paras. 3-7 (CanLII)).

51 Beyond the text of s. 733.1, the Court in *Docherty* found that subjective *mens rea* was supported by the presumption of subjective fault, the possibility of imprisonment if an accused was convicted, and the purpose of the provision to deter people from breaching their probation orders (pp. 950-52). These factors similarly favour a subjective *mens rea* for s. 145(3). And the point of differentiation, that a probation order governs the behaviour of someone who has already been convicted of a crime while bail conditions primarily restrict the civil liberties of those who are presumed innocent of the underlying offence, further supports a subjective fault element for s. 145(3) (see, e.g., M. Manikis and J. De Santi, "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences" *(2019), 60 C. de D. 873*, at pp. 879-80).

E. *Section 145(3) in the Legislative Scheme*

52 A subjective fault requirement for s. 145(3) is consistent with: (1) the penalties and consequences which flow from conviction under s. 145(3); (2) the role of s. 145(3) within the legislative framework for reviewing and enforcing bail conditions; and (3) the restrained and individualized approach to granting bail and imposing bail conditions.

(1) The Consequences of Charges and Conviction of Failure to Comply

53 While in general the "range of punishments says little about the required fault element" for most offences (*A.D.H.*, at para. 72), s. 145(3) is different from other offences as it may criminalize otherwise lawful conduct, charges can accumulate quickly, and convictions, and even charges, impact the accused's ability to obtain bail in the future. Therefore, the multiple serious consequences which flow from a conviction, or even a charge under s. 145(3), demonstrate Parliament's acceptance of subjective fault for this crime.

54 A conviction under s. 145(3) has profound implications for the liberty interests of the offender. Parliament has imposed up to a two-year term of imprisonment for conduct, which in many cases was not otherwise criminal, was without violence or a victim, and not only occurred when the accused was presumed innocent of the underlying offence, but may result in criminal liability even if the accused is acquitted of that underlying charge. In addition to possible imprisonment for up to two years for each offence, there is the real prospect of further conditions being imposed as part of the sentence. A conviction under s. 145(3) creates or adds to that person's criminal record, with the associated stigma and difficulties this can bring in respect of employment, housing, and family responsibilities.

55 A charge under s. 145(3) also has serious negative consequences for the legal position of a person on further bail hearings prior to conviction. The mere fact of being charged under s. 145(3) places a reverse onus on accused persons to show why they should be released on bail again, whether prior to their hearing for their s. 145(3) charge or the underlying charge (s. 515(6)(c)). As a result, the accused who fails to discharge the reverse onus may not receive bail on the breach charge, may lose their freedom, and await their trial(s) in detention.

56 Previous convictions under s. 145 may also inform bail hearings for any future offences (see s. 518(1)(c)(iii)). Convictions for failure to comply under s. 145(3) are treated by Parliament and the courts as often indicating that an accused has a history of intentionally disobeying court orders, and therefore is more likely to breach their court orders again. A failure to comply conviction can result in assumptions that an accused has a "lack of respect ... for court orders and for the law", which may affect future sentencing and release decisions (*R. v. Lacasse*, *2015 SCC 64*, *[2015] 3 S.C.R. 1089*, at para. 118; see also *Schab*, at para. 24; *R. v. Omeasoo*, *2013 ABPC 328*, *94 Alta. L.R. (5th) 244*, at para. 47). A Department of Justice study of closed cases from 2008 found that 43.9 percent of accused persons with a prior history of convictions for s. 145 offences were denied bail, which is a remand rate significantly higher than accused persons with no such history, and even slightly higher than the remand rate for accused persons who were previously convicted of violent offences (39.9 percent) or sexual offences (39.5 percent): K. Beattie, A. Solecki and K. E. Morton Bourgon, *Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study* (2013), at pp. 17-18). Thus, conviction under s. 145(3) may lead to the denial of bail or the increased likelihood of more stringent bail conditions for future unrelated offences.

57 This is problematic because breach charges often accumulate quickly: Mr. Zora's failure to answer a door twice on one weekend resulted in four separate charges under s. 145(3). People with addictions, disabilities, or insecure housing may have criminal records with breach convictions in the double digits. Convictions for failure to comply offences can therefore lead to a vicious cycle where increasingly numerous and onerous conditions of bail are imposed upon conviction, which will be harder to comply with, leading to the accused accumulating more breach charges, and ever more restrictive conditions of bail or, eventually, pre-trial detention (C.M. Webster, *"Broken Bail" in Canada: How We Might Go About Fixing It* (June 2015), at p. 8 ("Webster Report"); Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by A. Deshman and N. Myers (2014) (online), at pp. 49 and 66 ("CCLA Report"); M.E. Sylvestre, N. K. Blomley and C. Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (2019), at p. 132; Pivot Legal Society,

Project Inclusion: Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia, by D. Bennett and D.J. Larkin (2019) (online), at p. 101 ("Pivot Report")).

58 The significant and long-lasting legal consequences of a charge or conviction under s. 145(3) support the existence of a subjective *mens rea* requirement. If a subjectively guilty mind was not required for a conviction under s. 145(3), there would be considerably less logic in Parliament's choice to deem someone who failed to comply with certain bail conditions as having "a lack of respect ... for court orders and the law" and as being less likely to comply again with different bail conditions (*Lacasse*, at para. 118; *Code*, s. 518(1)(c)(iii)). The fact that a charge of breach of bail creates serious consequences for the accused by reversing the onus of proof on release and making bail for other offences more difficult to obtain presupposes that the person knowingly, rather than inadvertently, breached their bail condition.

(2) The Role of Section 145(3) Within the Legislative Framework

59 Parliament's intention to require subjective fault for s. 145(3) is further demonstrated by examining the role of this offence in the *Code.* Parliament understood that bail takes place as part of an expedited process and is often based on limited information and so it created many mechanisms to review and enforce bail conditions once imposed. When it appears that an accused should not be bound by a condition or is not complying with a bail condition, there may be applications by the Crown or the accused to review or vacate the bail order, or a decision by the Crown to seek bail revocation or lay a criminal charge under s. 145(3). Considering the availability of these other mechanisms that manage risk from an accused's inability or failure to comply with conditions of bail, it is clear that s. 145(3) serves a distinct purpose: to punish and deter those who knowingly or recklessly breach their bail conditions.

60 The respondent argued that s. 145(3) has become "a prime means of enforcing release conditions in order to mitigate the risks and concerns that would otherwise have justified detaining a person" (R.F., at paras. 63-67). Criminal charges under s. 145(3) are common, increasing, and often result in the loss of liberty. Statistics Canada reports that the charging and prosecuting of breaches of court orders, including bail conditions, has risen since 2004, and in 2008/2009 it was estimated that one in five people in pre-trial detention were there because they failed to comply with conditions in a court order or probation order (*Trends in the Use of Remand in Canada* (May 2011); *Trends in offences against administration of justice* (October 2015), at p. 13 ("Statistics Canada Report"); *Table 35-10-0177-01 Incident-based crime statistics, by detailed violations, Canada, provinces, territories and Census Metropolitan Areas* (online)).

61 Offences relating to the administration of justice represented about 1 in 10 police reported crimes in 2014 (Statistics Canada Report, at p. 6). Offences for failure to comply with a court order, including the offence under s. 145(3),[8] represented 57 percent of those administration of justice offences reported in 2014 (Statistics Canada Report, at p. 7). In 2016/2017, failure to comply with an order was the most serious offence charged in 9 percent of all completed adult criminal cases (Statistics Canada, *Adult criminal and youth court statistics in Canada, 2016/2017* (January 2019)). The rate of all persons charged for failure to comply with an order continued to increase between 2017 and 2018 (*Table 35-10-0177-01*).While rates of failure to comply charges also vary across the country, between 2005/2006 and 2013/2014, most provinces reported an increase in the proportion of completed adult criminal cases that included at least one offence against the administration of justice (Statistics Canada Report, at pp. 13-14).

62 Professor Friedland, whose study *Detention Before Trial* contributed to significant reform of the bail system in the 1970s, has suggested that the growth in failure to comply charges has likely contributed to the increase in people held in pre-trial custody (M. L. Friedland, "Reflections on Criminal Justice Reform in Canada" (2017), 64 *Crim. L.Q.* 274; M. L. Friedland, "The Bail Reform Act Revisited" (2012), 16 *Can. Crim. L.R.* 315, at p. 321; M. L. Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965)). Pre-trial detention can result in negative impacts on accused persons' employment and income, housing, health and access to medication, relationships, personal possessions, and ability to fulfill parental obligations (Canadian

Committee on Corrections, *Report of the Canadian Committee on Corrections* (1969), at pp. 101-2 ("Ouimet Report"); CCLA Report, at pp. 8-10; Pivot Report, at p. 81). The Standing Senate Committee on Legal and Constitutional Affairs also found that failure to comply offences were clogging the courts despite being offences that are not "strictly indictable" and "involve no harm to a victim" (Senate Committee Report, at pp. 138-40).

63 In my view, despite high rates of criminal charges for failure to comply, Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions. The scheme of the *Code* illustrates that such concerns are to be managed through the setting of conditions that are minimal, reasonable, necessary, least onerous, and sufficiently linked to the accused's risk; variations to those conditions when necessary through bail reviews and vacating bail orders; and bail revocation when bail conditions are breached, which may result in release on the same conditions with altered behaviour expected of the accused, changed conditions, or detention. Charges under s. 145(3) are not, and should not be, the principal means of mitigating risk.

64 A bail review under ss. 520 and 521 is the primary way to challenge or change bail conditions which are not, or which are no longer, minimal, reasonable, necessary, least onerous, and sufficiently linked to risks posed by the accused (except for accused charged with very serious offences under s. 469).[9] Conditions set in the bustle of a busy bail court with limited information can, and when necessary should, be fine-tuned through bail review. A bail review involves a hybrid process, rather than a *de novo* proceeding (*St-Cloud*, at paras. 92 and 118). A reviewing judge may intervene if the judicial official has erred in law, if the impugned decision was clearly inappropriate, or if new evidence shows a material and relevant change in the circumstances (para. 121). In addition, s. 523(2) allows for the judicial official, in certain circumstances, to vacate a previous release order and make a different order, including when the accused and the Crown consent to vacating the order (s. 523(2)(c)).

65 Parliament also enacted two tools to address breaches of bail conditions: bail revocation under s. 524 and criminal charges under s. 145(3). These two provisions work together to promote compliance with conditions of bail, along with forfeiture provisions for monetary amounts set out in a recognizance (see Part XXV of the *Code*). However, these two mechanisms serve distinct and different legislative purposes. Whereas revocation under s. 524 fulfills a risk management role, criminal liability under s. 145(3) exists to punish and deter.

66 Revocation of bail occurs under s. 524. An accused may be arrested where there are reasonable grounds to believe that the accused has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking, or recognizance issued to them or has committed an indictable offence after being released (s. 524(1) and (2)). The Crown can then decide whether to proceed with a revocation hearing before a judicial official (Trotter, at pp. 11-9 to 11-10). Where the judicial official finds, on a balance of probabilities, that the accused contravened or was about to contravene the relevant order or that there are reasonable grounds to believe that the accused committed another indictable offence while on bail, the judicial official must cancel the order and detain the accused (s. 524(4) and (8); see *R. v. Parsons* *(1997), 161 Nfld. & P.E.I.R. 145* (N.L.C.A.), at para. 21; *R. v. Morris*, *2013 ONCA 223*, *305 O.A.C. 47*, at para. 18). The accused then has the onus to show why their detention is not justified. If the accused establishes that the detention is not justified, the judicial official can order release with any of the options available under s. 515, including changing the conditions of the undertaking or recognizance (s. 524(4) to (9)). This means that the judicial official has the ability to consider the appropriateness of the original release order and may remove or narrow conditions from the release order where the accused shows that they are no longer necessary, reasonable, least onerous, or sufficiently linked to the statutory criteria in s. 515(10) (Trotter, at p. 11-1).

67 Revocation under s. 524 ensures that those who do not follow bail conditions can be arrested to re-assess whether, and on what conditions, they should be released into the community, where it becomes apparent that the accused will not or cannot abide by the conditions originally set. Revocation provides the court with greater flexibility in determining whether, despite a contravention of bail, the accused has shown cause that they should be released again either on the same conditions or different conditions (see, e.g., *R. v. Badgerow*, *2010 ONCA 236*, *260 O.A.C. 273*, at para. 36; *R. v. T.J.J.*, *2011 BCPC 155*, at paras. 57-59 (CanLII); *R. v. Mehan*, *2016 BCCA 129*, *386*

B.C.A.C. 1). Conditions can be revised to address the risk of further breach while ensuring the accused can reasonably comply.

68 If detention is the proportionate result for the accused's breach of bail then revocation under s. 524 is the appropriate avenue. Bail revocation was the process designed for determining whether a person's risk factors are such that their failure to abide by bail conditions means they ought to be detained rather than released on different conditions. Revocation can therefore address negligent and careless breaches of bail conditions without creating additional criminal liability. While revocation carries the threat of detention and should be sought only when the negative impacts that can arise from detention are justified, it can address risks arising from breaches of bail conditions without adding offences against the administration of justice to the criminal record of the accused.

69 In addition to revocation, Parliament enacted s. 145(3) of the *Code*, making it a separate crime against the administration of justice to breach bail conditions, which carries a maximum penalty of two years' imprisonment and has other important consequences for the accused (as discussed above). It is a criminal offence which requires the Crown to prove all constituent elements of the offence beyond a reasonable doubt. Charges for breach of bail conditions under s. 145(3) can be brought in addition to an application for bail revocation (*Parsons*, at paras. 28 and 37). Section 145(3) adds criminal liability on top of the possibility of an accused losing their ability to be out on bail prior to trial. Therefore criminal charges are intended as a means of last resort to punish harmful behaviors when other risk management tools have not served their purposes.

70 This legislative framework indicates that Parliament intended for the Crown to primarily use bail review and revocation, rather than criminal charges, to manage accused persons who cannot or will not comply with their bail conditions, especially when those bail conditions address conduct that would not otherwise be criminal. Of course, different considerations apply for a breach of condition that involves conduct that is otherwise criminal or which harms or threatens people, for example, where an accused breaches a no-communication condition by threatening or intimidating a victim. In those circumstances, criminal charges may be justified. Parliament has now created a judicial referral hearing process under s. 523.1 to allow prosecutors to divert charges under s. 145(3) that involve no physical or emotional harm to a victim, property damage, or economic loss. This further emphasizes that prosecutions and conviction under s. 145(3) should be a last resort measure to primarily address harmful intentional breaches of bail conditions where the remedies available through bail review and revocation would not be sufficient.

71 Even with this new process, a bail variation or revocation application should be among the responses seriously considered by the Crown when faced with certain types of alleged breaches in an effort to reduce the number of criminal breach charges burdening the courts. Where the accused's failure to comply with a condition might justify detention, revocation may be appropriate. The benefits of this option can be seen by examining Mr. Zora's charges for allegedly breaching his curfew and failing to answer his door -- charges that resulted in no harm to anyone else and relate to conduct that would not have been criminal but for his bail conditions. If the Crown had sought bail revocation instead of bringing charges, Mr. Zora would have been arrested and he would have had to show cause why he should be released again despite his breach. (He was in a comparable position to show cause why he should be released when he was charged under s. 145(3).) The bail revocation procedure, however, expressly permits the judicial official to release him on modified conditions. These modified conditions might have managed the same risk in a more focussed and feasible way, without Mr. Zora facing the serious consequences of additional criminal convictions for failing to answer his door.

72 Given this, the primary purpose of s. 145(3) is not to manage future risk, but to sanction past behaviour and deter further breaches. As noted by Wilson J. in *Docherty*, at pp. 951-52, regarding breach of probation conditions, specific deterrence has little or no effect if an accused does not know they were doing anything wrong. An accused must know what standard of behaviour to meet and that their conduct is failing to meet that standard in order to be deterred from engaging in prohibited conduct. If the purpose of s. 145(3) is to deter and punish those who breach bail conditions, the same logic in *Docherty* supports a subjective *mens rea* element for s. 145(3).

(3) Setting Bail Conditions and Their Breach Under Section 145(3)

73 There is a strong, indeed inexorable, connection between the setting of bail conditions and the operation of s. 145(3), including its *mens rea* element. In this section, I address the argument that because bail conditions are tailored to the individual, Parliament intended an objective *mens rea* for breaches under s. 145(3). In my view, this argument lacks a sound conceptual basis and fails to take into account the manner in which bail conditions continue to be imposed despite the principles articulated in the *Charter*, the *Code*, and by this Court in *Antic*. I conclude that the opposite is true: the requirement that bail conditions must be tailored to the accused points to a subjective *mens rea* so that the individual characteristics of the accused are considered both when bail is set and if bail is breached.

74 The respondent and the intervener Attorney General of British Columbia ("AGBC") submit that the *mens rea* for s. 145(3) can be satisfied on proof of an objective fault standard. They argue that bail conditions, set at the beginning of the bail process, are carefully tailored to the accused and would lead to only minimal criminal liability for the accused. The AGBC links the various phases of the bail system, but claims that the "[l]egitimate concern about marginalized people whose breach of bail pose an attenuated risk is effectively tackled at the front-end of the process" (I.F. (AGBC), at para. 3). In other words, concerns about the treatment of marginalized individuals are factored into the conditions themselves, which obviates the need for a subjective fault standard if those conditions are breached.

75 I do not accept this line of reasoning. This proposition is premised on a false dichotomy which assumes that a focus on the individual accused may occur only at one stage or the other. Conceptually, there is no reason why the rights and interests of the accused should be bargained away in an either/or formulation. Nothing prevents an individualized focus both at the time when the conditions are imposed and at the time of breach. The ethos of *Antic* favours a consistent and complementary approach under which the relevant rights in the *Charter* and the salient protections in the *Code* animate all aspects of the bail system: from imposition to breach. Requiring a subjective *mens rea* reinforces, mirrors, and respects the individualized approach mandated for the impositions of any bail conditions.

76 I would also reject the position put forward by the AGBC because of the prevalence of bail conditions that fail to reflect the requirements for bail under the *Charter*, the *Code*, and this Court's principles in *Antic*. In practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, undercut the claim that there is sufficient individualization of bail conditions. Many intervenors described how, despite the fact that the default form of release should be an undertaking without conditions under s. 515(1), studies across the country have shown that the majority of bail orders include numerous conditions of release, which often do not clearly address an individual accused's risks in relation to failing to attend their court date, public safety, or confidence in the administration of justice (see Sylvestre, Blomley and Bellot, at pp. 67-68; N. M. Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017), 57 *Brit. J. Criminol.* 664, at p. 677; Webster Report, at p. 7; John Howard Society of Ontario, *Reasonable Bail?* (September 2013) (online), at p. 11; CCLA Report, at pp. 48-49; Department of Justice, Research and Statistics Division, *Research in Brief: Assessments and Analyses of Canada's Bail System* (2018)). Research into bail conditions in Vancouver and Montreal suggests that the likelihood of an accused person being charged with breaching their bail conditions increases when they are subject to a greater number of conditions and a longer court order (Sylvestre, Blomley and Bellot, at pp. 67-68).

77 Several factors contribute to the imposition of numerous and onerous bail conditions. Courts and commentators have consistently described a culture of risk aversion that contributes to courts applying excessive conditions (*Tunney*, at para. 29; see also pp. 223-24 (Comment by T. Quigley); *Schab*, at para. 15; Friedland (2017); B. L. Berger and J. Stribopoulos, "Risk and the Role of the Judge: Lessons from Bail", in B. L. Berger, E. Cunliffe and J. Stribopolous, eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (2017), at pp. 308 and 323-24). In *Tunney*, Di Luca J. emphasized that this culture continues despite the directions of *Antic.* He rightly noted, in my view, that "the culture of risk aversion must be tempered by the constitutional principles that animate the right to reasonable bail" (para. 29).

78 The expeditious nature of bail hearings also generates a culture of consent, which aggravates the lack of

restraint in imposing excessive bail conditions. This is the practical reality of bail courts, which must work efficiently to minimize the time accused persons spend unnecessarily in pre-trial detention. As this Court has previously recognized, the timing and speed of bail hearings impacts accused persons by making it difficult to find counsel, resulting in many accused who are self-represented or reliant on duty counsel who are often given little time to prepare (*St-Cloud*, at para. 109). This process encourages accused persons to agree to onerous terms of release rather than run the risk of detention both before and after a contested bail hearing (see CCLA Report, at pp. 46-47; Pivot Report, at p. 79; Myers, at pp. 667 and 676-77; Sylvestre, Blomley and Bellot, at p. 118; Berger and Stribopolous, at p. 319; *R. v. Birtchnell*, *2019 ONCJ 198*, *[2019] O.J. No. 1757*, at para. 29 (QL)). Where joint submissions are made, some observers have gone so far as to suggest that the Crown is rarely asked to justify the proposed conditions of release, which is "arguably a key contributing factor to the higher number of conditions imposed in consent release cases than would be expected based on the law" (C. Yule and R. Schumann, "Negotiating Release? Analysing Decision Making in Bail Court" (2019), 61 *Can. J. Crimin. & Crim. Just*. 45, at pp. 57-60).

79 A third reality of bail is that onerous conditions disproportionately impact vulnerable and marginalized populations (CCLA Report at pp. 72-79). Those living in poverty or with addictions or mental illnesses often struggle to meet conditions by which they cannot reasonably abide (see, e.g., *Schab*, at paras. 24-5; *Omeasoo*, at paras. 33 and 37; *R. v. Coombs*, *2004 ABQB 621*, *369 A.R. 215*, at para. 8; M. B. Rankin, "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach" (2018), 65 *C.L.Q.* 280). Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges (see, e.g., *R. v. Murphy*, *2017 YKSC 34*, at paras. 31-34 (CanLII); *Omeasoo*, at para. 44; CCLA Report, at pp. 75-79; J. Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017), 95 *Can. Bar. Rev.* 325; *Ewert v. Canada*, *2018 SCC 30*, *[2018] 2 S.C.R. 165*, at paras. 57-60; also s. 493.2, as of December 18, 2019). The oft-cited CCLA Report provides the following trenchant summary:

> Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life. Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail -- and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime. [p. 1]

80 The presence of too many unnecessary conditions and the prevalence of breach charges resulting from the imposition of excessive and onerous conditions is part of the relevant legislative context in interpreting s. 145(3) (Sullivan, at pp. 648-49). It is the same context to which Parliament has recently responded by amending the bail scheme. Bail conditions cannot be assumed to be sufficiently individualized and the Court will not pretend that the bail scheme is functioning perfectly, when it clearly is not. There is no basis in theory or practice to accept that an individualized imposition of bail conditions at the front end shows a clear intent to displace the presumed subjective fault standard. Indeed, the consistent and convincing studies presented to the Court illustrate the need to articulate, with greater precision and increased urgency, how Parliament's intent to punish those who intentionally breach their bail conditions under s. 145(3), while ensuring their right to reasonable bail on the least onerous terms necessary, requires those in the bail system to exercise restraint and carefully review conditions for compliance with the *Charter*, the *Code*, and *Antic*. It is to that task that I now turn.

V. Restraint and Review: Necessary and Reasonable Bail Conditions and Section 145(3)

81 In *Antic*, this Court set out the proper approach to the *Code*'s bail provisions when it addressed the overuse of cash bail and sureties. As issues concerning bail are particularly evasive of review (see *Penunsi*, at para. 11), it has become necessary to build upon the *Antic* framework and provide guidance on non-monetary conditions of bail and the serious consequences which flow from their breach.

82 We can learn a great deal about how to set bail conditions upon seeing how they become criminal offences under s. 145(3). Each condition added onto a release order not only limits the freedom of someone presumed to be innocent, it creates a new risk of criminal liability, particular to the accused, and may result in the loss of liberty, whether through bail revocation or imprisonment. The direct connection between the behaviour addressed in bail conditions and the conduct which is criminalized under s. 145(3) flows both ways. The individualized process of setting bail conditions moves forward into and informs the subjective fault standard for breach. Conversely, understanding how s. 145(3) gives rise to potential criminal liability reinforces that the principles of restraint and review must guide the initial decision to impose bail conditions in practice. Section 145(3) therefore provides an essential perspective through which we can consider the general bail principles; concerns over specific conditions; and how all those involved in the bail system have responsibilities in respect of restraint and review.

A. *General Principles Governing Bail Conditions*

83 All those involved in setting bail terms must turn their minds to the general principles for setting bail, which restrain how bail conditions are set. As the default position in the *Code* is bail without conditions, the first issue is whether a need for any condition has been demonstrated. Restraint and the ladder principle require anyone proposing to add bail conditions to consider if any of the risks in s. 515(10) are at issue and understand which specific risks might arise if the accused is released without conditions: is this person a flight risk, will their release pose a risk to public protection and safety, or is their release likely to result in a public loss of confidence in the administration of justice?

84 Only conditions which target those specific s. 515(10) risk(s) are necessary. If an accused is a flight risk, but poses no other risks, only those conditions that minimize their risk of absconding should be imposed. Similarly, if an accused poses a risk to public safety and protection, only the least onerous conditions to address that specific threat should be imposed (*R. v. S.K.*, *1998 CanLII 13344* (Sask. Prov. Ct.), at paras. 16-19). Further, such conditions will not be necessary for public protection and safety merely because an accused poses a risk of committing another offence while on bail, unless they pose a "substantial likelihood" of committing an offence that endangers public protection and safety (*Morales*, at pp. 736-37; s. 515(10)(b)). Any condition imposed to maintain confidence in the administration of justice must be based on a consideration of the combined effect of all the relevant circumstances from the perspective of a reasonable member of the public, especially the four factors set out in s. 515(10)(c): the apparent strength of the prosecution's case, the gravity of the offence, the circumstances surrounding the commission of the offence, and whether the accused is liable for a potential lengthy term of imprisonment (*St-Cloud*, at paras. 55-71 and 79).

85 The requirement of necessity also means that the particular condition must attenuate risks that would otherwise prevent the accused's release without that condition. Conditions cannot be imposed for gratuitous or punitive purposes (*Antic*, at para. 67(j); *Birtchnell*, at paras. 27-28; *R. v. McDonald*, *2010 ABQB 770*, at paras. 34-36 (CanLII)). A condition that may be suitable for a sentencing purpose, like rehabilitation, will not be appropriate unless it is directed towards the risks in s. 515(10) (*Omeasoo*, at para. 31). Conditions should not be behaviourally-based (*R. v. K. (R.)*, *2014 ONCJ 566*, at paras. 14-19; *J.A.D.*, at paras. 9 and 11 (CanLII)). A condition that merely seems "good to have", but is not necessary for the accused's release, is not appropriate (*Birtchnell*, at para. 40). Even if some condition is thought to be therapeutic, intended to help, or "couldn't hurt," the prospect of additional criminal liability under s. 145(3) means any such limits on otherwise lawful behavior may also attract criminal penalties. Restraint was emphasized by the Court in *Antic*, at para. 67(j):

> Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person's behaviour or to punish an accused person. [Footnote omitted.]

86 Moreover, bail conditions must be sufficiently linked to the defined statutory risks. They should be as narrowly

defined as possible to meet their objective of addressing the risks under s. 515(10) (*R. v. D.A.*, *2014 ONSC 2166*, *[2014] O.J. No. 2059*, at paras. 14-17 (QL); *R. v. Pammett*, *2014 ONSC 5597*, at paras. 10-12 (CanLII); *R. v. Clarke*, *[2000] O.J. No. 5738* (Sup. Ct.), at paras. 9 and 12 (QL); *K. (R.)*, at paras. 14-19; *J.A.D.*, at paras. 9 and 11). As with the setting of probation conditions, the level of connection between a non-enumerated condition and a risk under s. 515(10) should be comparable to the clear linkages between the enumerated conditions in s. 515(4) and the risks under s. 515(10) (*R. v. Shoker*, *2006 SCC 44*, *[2006] 2 S.C.R. 399*, at paras. 13-14). This Court in *Penunsi* recently emphasized this in relation to conditions on peace bonds:

> Where the condition is not demonstrably connected to the alleged fear, it may merely set the defendant up for breach ... Any condition should not be so onerous as effectively to constitute a detention order by setting the defendant up to fail. [Citations omitted; para. 80.]

87 A bail condition must be reasonable. As with probation conditions, bail conditions cannot contravene federal or provincial legislation or the *Charter* (*Shoker*, at para. 14). The enumerated bail conditions in s. 515(4) to (4.2) help inform the extent of discretion a judicial official has in imposing other reasonable non-enumerated bail conditions (*Shoker*, at para. 14). Conditions must be clear, minimally intrusive, and proportionate to any risk. Conditions will also only be reasonable if they realistically can and will be met by the accused, as "[r]equiring the accused to perform the impossible is simply another means of denying judicial interim release" by setting them up to fail, as well as adding the risk that the accused will be criminally charged for failing to comply (*Omeasoo*, at paras. 33 and 37-38; see also *Penunsi*, at para. 80). As noted by Rosborough J. in *Omeasoo*, removing an unreasonable condition will not cause any more risk to the community than imposing a condition that is impossible for the accused to respect (para. 39). Reasonable conditions also must not limit the *Charter* rights of an accused, such as their freedom of expression or association, unless that condition is reasonably connected and necessary to address the accused's risk of absconding, harming public safety, or causing loss of confidence in the administration of justice (*R. v. Manseau*, [1997] AZ-51286266 (Que. Sup. Ct.); *Clarke*).

88 Bail conditions are to be tailored to the individual risks posed by the accused. There should not be a list of conditions inserted by rote. The only bail condition that should be routinely added is the condition to attend court (*Birtchnell*, at para. 6), as well as those conditions that must be considered for certain offences under s. 515(4.1) to (4.3). There is no problem with referring to checklists to canvass available conditions. The problem arises if conditions are simply added, not because they are strictly necessary, but merely out of habit, because the accused agreed to it, or because some behavior modification is viewed as desirable. Bail conditions may be easy to list, but hard to live.

89 In summary, to ensure the principles of restraint and review are firmly grounded in how people think about appropriate bail conditions, these questions may help structure the analysis:

> * If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice?
>
> * Is this condition necessary? If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions?
>
> * Is this condition reasonable? Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition?
>
> * Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)? Is it narrowly focussed on addressing that specific risk posed by the accused's release?
>
> * What is the cumulative effect of all the conditions? Taken together, are they the fewest and least onerous conditions required in the circumstances?

These questions are inter-related and they do not have to be addressed in any particular order, nor do they have to be asked and answered about every condition in every case. The practicalities of a busy bail court do not make it realistic or desirable to require that the judicial official inquire into conditions which do not raise red flags. What is important is that all those involved in the setting of bail use these types of organizing questions to guide policy and to assess which bail conditions should be sought and imposed.

90 When considering the appropriateness of bail conditions, the criminal offence created by s. 145(3) not only counsels restraint and review, but provides an additional frame of reference which incorporates considerations of proportionality into the assessment. Given the direct relationship between imposition and breach, the assessments of necessity and reasonableness discussed in *Antic* should also take into account that failures to comply with imposed conditions become separate crimes against the administration of justice. Accordingly, the question becomes: is it necessary and reasonable to impose this condition as a personal source of potential criminal liability knowing that a breach may result in a deprivation of liberty because of a charge or conviction under s. 145(3)? In short, when considering whether a proposed condition meets a demonstrated and specific risk, is it proportionate that a breach of this condition would be a criminal offence or become a reason to revoke the bail?

B. *Specific Conditions*

91 I now address some specific non-enumerated conditions commonly included in release orders. Many of these types of conditions were in Mr. Zora's release order. As stated above, the criminalization of non-compliance with conditions under s. 145(3) means the principles of restraint and review call for increased scrutiny to determine if a particular type of condition is necessary, reasonable, least onerous, and sufficiently linked to a risk listed in s. 515(10). The discussion of specific conditions below demonstrates how these common types of conditions must be scrutinized.

92 First, judicial officials should be wary of conditions that may be directed to symptoms of mental illness. This includes alcohol and drug abstinence conditions for an accused with an alcohol or drug addiction. If an accused cannot possibly abide by such a condition, then it will not be reasonable (*Penunsi*, at para. 80; *Omeasoo*, at para. 37-38). In addition, rehabilitating or treating an accused's addiction or other illness is not an appropriate purpose for a bail condition -- a condition will only be appropriate if it is necessary to address the accused's specific risks. Subjecting individuals who are presumed innocent to abstention conditions may effectively punish them for what are recognized health concerns, "if that individual is suffering from an alcohol addiction, an absolute abstention may present substantial risk to the health and well-being of that person" and even "give rise to potentially lethal withdrawal effects" (*R. v. Denny*, *2015 NSPC 49*, *364 N.S.R. (2d) 121*, at paras. 14-15; see also John Howard Society of Ontario, at pp. 12-13). If an abstinence condition is necessary, the condition must be fine-tuned to target the actual risk to public safety, for example, by prohibiting the accused from drinking alcohol outside of their home if their alleged offences occurred when they were drunk outside of their house (*Omeasoo*, at para. 42). Those seeking and imposing bail conditions should also be aware that an accused's substance use disorder, or any other mental illness, may yet be undiagnosed. And, where necessary, liberal use should be made of the bail review and variation provisions under ss. 520, 521 and 523 to accommodate these circumstances. Bail is a dynamic, ongoing assessment, a joint enterprise among all parties involved to craft the most reasonable and least onerous set of conditions, even as circumstances evolve.

93 Second, other behavioural conditions that are intended to rehabilitate or help an accused person will not be appropriate unless the conditions are necessary to address the risks posed by the accused. As described by Cheryl Webster in her report for the Department of Justice, "conditions such as 'attend school' or 'attend counselling/treatment' may serve broader social welfare objectives but are [usually] unrelated to the actual offence alleged to have been committed" (Webster Report, at p. 7). There may be exceptions, such as in *S.K.*, where the judge found that an "attend school" condition was sufficiently linked to the accused's risks. However, even if a condition seems sufficiently linked to an accused's risks, the question is also whether the condition is proportional:

imposing such conditions means that the accused could be convicted of a criminal offence for skipping a day of school.

94 Third, the condition to "keep the peace and be of good behaviour" is a required condition in probation orders, conditional sentence orders, and peace bonds, but is not a required condition for bail (*S.K.*, at para. 39). It should be rigorously reviewed when proposed as a condition of bail. This generic condition is usually understood as prohibiting the accused from breaching the peace or violating any federal, provincial, or municipal statute (*R. v. Grey* (1993), 19 C.R. (4th) 363 (Ont. C.J.); *R. v. D.R.* (1999), 178 Nfld. & P.E.I.R. 200 (Nfld. C.A.); *R. v. Gosai*, [2002] O.J. No. 359 (Sup. Ct.), at paras. 18-28 (QL)). Because a breach of a bail condition is a criminal offence, this condition "adds a new layer of sanction, not just to criminal behavior, but to everything from violation of speed limit regulations on federal lands, such as airports, to violation of dog leashing by-laws of a municipality" and "is not in harmony with the presumption of innocence" that usually applies when an accused is on bail (*R. v. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331, at paras. 16-17; see also *R. v. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134, at paras. 17 and 20; Trotter at pp. 6-41 to 6-44). Given the breadth of the condition, it is difficult to see how imposing an additional prohibition on the accused for violating any substantive law, whether a traffic ticket or failure to licence a dog, could be reasonable, necessary, least onerous, and sufficiently linked to an accused's flight risk, risk to public safety and protection, or risk to maintaining confidence in the administration of justice (see *S.K.*, at para. 39).

95 Fourth, broad conditions requiring an accused to follow or be amenable to the rules of the house or follow the lawful instructions of staff at a residence may be problematic, especially for accused youth. In *J.A.D.*, the Court of Queen's Bench for Saskatchewan found that such a condition was void for vagueness and an improper delegation of the judicial function (para. 11). These types of conditions prevent the accused from understanding what they must do to avoid violating their condition, as the rules of the house can change based on the whims of the person who sets them (*K. (R.)*, at paras. 19-22). Imposing a condition that delegates the creation of bail rules to a surety or anyone else bypasses the judicial official's obligation to uphold the principles of restraint and review and assess whether the rules of the house truly address any of the risks posed by the accused.

96 Fifth, certain conditions may cause perverse consequences or unintended negative impacts on the safety of the accused or the public. These unintended effects underscore the need for careful and rigorous review of each bail condition. For example, a condition that prevents an accused person from using a cellphone may prevent them from calling for help in the event of an emergency or inhibit their ability to work or care for dependents (*Prychitko*, at paras. 19-25; Trotter, at pp. 6-44 to 6-45). Other conditions may hinder the administration of justice by punishing accused persons who are otherwise the victims of crime. In *Omeasoo*, police responded to a complaint of domestic assault where Ms. Omeasoo was the victim. However, she was arrested and charged for failure to comply because she had consumed alcohol contrary to her bail condition (para. 6). She was therefore charged for the offence of being intoxicated while being the victim of an assault. While one hopes that prosecutorial discretion would help prevent these types of unintended consequences, such conditions may become a disincentive to reporting serious crime and significantly increase the vulnerability of certain people.

97 Further examples of conditions with perverse consequences include "red zone" conditions which prevent an accused from entering a certain geographical area and "no drug paraphernalia" conditions. These conditions may have especially significant impacts on marginalized accused persons. "Red zone" conditions can isolate people from essential services and their support systems (Sylvestre, Blomley and Bellot). Paraphernalia prohibitions can encourage the sharing of needles if accused persons are not able to carry their own clean needles (Pivot Report, at pp. 89-95). In fact, a guideline for bail conditions for accused persons with substance use disorders released in 2019 by the Public Prosecution Service of Canada has acknowledged that these types of conditions "should generally not be imposed" (*Public Prosecution Service of Canada Deskbook*, Part. III, c. 19, "Bail Conditions to Address Opioid Overdoses" (updated April 1, 2019) (online)). Overall, the impacts of these conditions emphasize that any proposed bail condition needs to be carefully considered and limited to addressing flight risk, public safety, or confidence in the administration of justice, otherwise the condition may have negative unintended consequences on the accused and the public.

98 Finally, I note that some bail conditions may impact additional *Charter* rights of the accused, beyond their right

to be presumed innocent, liberty rights (s. 7), and right to reasonable bail (s. 11(*e*)). Principles of restraint and review require that judicial officials rigorously examine these conditions and determine whether they do infringe the *Charter*. For example, some accused are subject to bail conditions that require them to submit to searches of their person, vehicle, phone, or residence on demand without a warrant (see, e.g., *R. v. Delacruz*, 2015 MBQB 32; *R. v. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299, at para. 14 (QL); *R. v. Sabados*, 2015 SKCA 74, 327 C.C.C. (3d) 107). As noted by this Court in *Shoker*, in the context of probation conditions, a judge does not have jurisdiction to impose a condition that subjects an accused to a lower standard for a search than would otherwise be required, unless Parliament creates a *Charter*-compliant statutory scheme for the search or the accused consents to the search (paras. 22 and 25; see also *R. v. Goddard*, 2019 BCCA 164, 377 C.C.C. (3d) 44, at para. 53; *R. v. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389, at para. 128). These types of conditions are effectively enforcement mechanisms that "facilitate the gathering of evidence", "do not simply monitor the [accused's] behaviour", and are not linked to an accused's risk under s. 515(10) (*Shoker*, at para. 22). As such conditions are not supported by the enumerated conditions for bail in s. 515, nor is there a scheme set by Parliament for the searches, they are constitutionally suspect.

99 Other conditions can also affect an accused's freedom of expression or freedom of association (see, e.g., *R. v. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389, at paras. 41-47 (QL); see *Manseau*, at p. 10; *Clarke*). Such conditions that restrict additional *Charter* rights must be rigorously assessed to determine whether such a restriction is justified and proportional to the risk posed by the accused. It must always be remembered that by making such a condition on bail, the judicial official is criminalizing the accused's exercise of their *Charter* rights at a time when they are presumed innocent prior to trial.

C. *Responsibilities*

100 All persons involved in the bail system are required to act with restraint and to carefully review what bail conditions they either propose or impose. Restraint is required by law, is at the core of the ladder principle, and is reinforced by the requirement that any bail condition must be necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the specific statutory risk factors under s. 515(10) of risk of failing to attend a court date, risk to public protection and safety, or risk of loss of confidence in the administration of justice (Trotter, at p. 1-59; *Antic*, at para. 67(j); see also s. 493.1 of the *Code* as of December 18, 2019). The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether the bail is contested or is the product of consent. The principle of review means everyone involved in the crafting of conditions of bail should stop to consider whether the relevant condition meets all constitutional, legislative, and jurisprudential requirements.

101 All participants in the bail system also have a duty to uphold the presumption of innocence and the right to reasonable bail (see Berger and Stribopolous, at pp. 323-24). This is because the "automatic imposition of bail conditions that cannot be connected rationally to a bail-related need is not in harmony with the presumption of innocence" (*R. v. A.D.M.*, 2017 NSPC 77, at para. 29 (CanLII), citing *Antic*). The Crown, defence, and the court all have obligations to respect the principles of restraint and review. Other than in reverse onus situations, the Crown should understand, and if asked, be able to explain why proposed bail conditions are necessary, reasonable, least onerous, and sufficiently linked to the risks in s. 515(10). This prosecutorial responsibility of restraint when considering bail conditions is reflected in both Crown counsel policy documents put before us by interveners (Ontario, Ministry of the Attorney General, *Ontario Prosecution Directive*, "Judicial Interim Release (Bail)" (November 2017) (online); and British Columbia, Prosecution Service, *Crown Counsel Policy Manual*, "Bail -- Adult" (April 2019) (online)). Defence counsel also should be alive to bail conditions that are not minimal, necessary, reasonable, least onerous, and sufficiently linked to an accused's risk for both contested and consent release, especially when a client may simply be prepared to agree to excessive and overbroad conditions to gain release. That said, it is not uncommon for counsel to agree to a condition that may seem somewhat onerous but does not warrant turning the matter into a contested hearing, which could result in the accused having to stay in custody for a few more days. In such cases, counsel can also seek a review of the condition after a reasonable length of time and ask that it be altered.

102 Ultimately, the obligation to ensure that accused persons are released on appropriate bail orders lies with the judicial official. As with the setting of cash deposits in *Antic*, if a judicial official does not understand how a condition is appropriate, "a justice or a judge setting bail is under a positive obligation" to make inquiries into whether the suspect bail condition is necessary, reasonable, least onerous, and sufficiently linked to the accused's risks (paras. 56 and 67(i)). Before transforming bail conditions into personal sources of potential criminal liability, judicial officials are asked to use their discretion with care and review the proposed conditions to make sure they are focussed, narrow, and tightly-framed to address the accused's risks.

103 Judicial officials have adequate tools to ensure that bail orders are generally appropriate while conserving judicial resources. They can and should question conditions that seem unusual or excessive. They should also be alert for any pattern that might suggest that conditions are being imposed routinely or unduly.

104 These obligations carry over to consent releases, where special considerations apply. There are many compelling reasons a person in custody would "accept" suggested restrictions to secure release, even if such restrictions were overbroad. In addition to the universal human impulse towards freedom, individuals are concerned with the effects continued detention would have on their families, their income, their employment, their ability to keep their home, and their ability to access medication and necessary services, as described above. When presented with a promise of release on what may appear to be "take it or leave it conditions" many accused simply acquiesce to avoid continued detention and/or a contested bail hearing. This is why alcohol-addicted persons would agree to a bail term which prohibits them from drinking alcohol, knowing full well that they have previously been unable to overcome their addiction. These factors, and others, exert pressure and have contributed to a culture of consent in which accused persons, who often represent themselves at bail hearings, frequently agree to be bound by conditions which are unnecessary, unreasonable, and even potentially unconstitutional.

105 The ladder principle and the rigorous assessment of bail conditions will be more strictly applicable when bail is contested, but joint proposals must still be premised on the criteria for bail conditions established by the guarantees in the *Charter*, the provisions of the *Code*, and this Court's jurisprudence (*Antic*, at para. 44). Judicial officials "should not routinely second-guess joint proposals" given that consent release remains an efficient method of release in busy bail courts (*Antic*, at para. 68). However, everyone should also be aware that judicial officials have the discretion to reject overbroad proposals, and judicial officials must keep top of mind the identified concerns with consent releases. In *R. v. Singh*, *2018 ONSC 5336*, *[2018] O.J. No. 4757*, Hill J. noted that, even post-*Antic*, counsel sometimes do not appear aware of this judicial discretion:

> Too often, as is evident from some transcripts of show cause hearings coming before this court, counsel conduct themselves as though a "consent" bail governs the release/detention result with all that is required of the court is a signature. At times, outright hostility is exhibited toward a presiding justice of the peace who dares to make inquiries, to require more information, or to reasonably challenge the soundness of the submission. This is fundamentally wrong. [para. 24 (QL)]

106 I agree. Although bail courts are busy places, where consent releases can encourage efficiency, little efficiency is achieved if an accused person is released on conditions by which they cannot realistically abide, which will inevitably lead to greater use of court time and resources through applications for bail review, bail revocation, or breach charges. Judicial officials must therefore act with caution, with their eyes wide open to the consequences of imposing bail conditions, when reviewing and approving consent release orders.

D. *Conclusion on How Section 145(3) Informs the Imposition of Bail Conditions*

107 In conclusion, the s. 145(3) offence requires subjective *mens rea*. Not only is this conclusion consistent with the presumption of subjective fault for crimes like s. 145(3), it is supported by its place and purpose in the overall bail system, the serious consequences which flow from its breach, and how the consideration of individual circumstances is the proper focus both for setting conditions and determining the mental element for their breach.

Understanding that s. 145(3) is designed to criminalize the risk-based conduct proscribed in bail conditions provides guidance on how much the fair and efficient functioning of our bail system depends upon restraint and review to ensure that only suitable conditions are imposed and only intentional failures to comply are prosecuted.

VI. Components of Subjective *Mens Rea* for Section 145(3)

108 Having concluded that subjective *mens rea* is required for the failure to comply offence, I now describe what the Crown must establish to prove the subjective *mens rea* for s. 145(3).

109 Subjective *mens rea* generally must be proven with respect to all circumstances and consequences that form part of the *actus reus* of the offence (*Sault Ste. Marie*, at pp. 1309-10; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 139, per Dickson J., dissenting, but not on this point). Therefore, subjective *mens rea* under s. 145(3) can be satisfied where the following elements are proven by the Crown:

1.The accused had knowledge of the conditions of their bail order, or they were wilfully blind to those conditions; and

2.The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were wilfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or

The accused recklessly failed to act according to their bail conditions, meaning that the accused perceived a substantial and unjustified risk that their conduct would likely fail to comply with their bail conditions and persisted in this conduct.

110 These elements accord with the *mens rea* required in jurisdictions recognizing a subjective *mens rea* for failure to comply offences by requiring that the Crown show beyond a reasonable doubt that the accused knowingly or recklessly breached the condition (*Legere*, at para. 100; *Custance*, at para. 10).

111 However, the jurisprudence divides somewhat on the first element: the extent to which the accused must know the terms of their bail conditions, and therefore know that they are breaching a condition. Some cases follow the Manitoba Court of Appeal in *Custance*, which simply required that the accused "knowingly and voluntarily performed or failed to perform the act or omission which constitutes the [*actus reus*] of the offence", which appears to mean the Crown only needs to prove that the accused intentionally committed the act or omission, but does not need to show that the accused knew their conditions while committing that act or omission (paras. 10 and 12; see, e.g., *Al Khatib*, at para. 27; *Companion*, at para. 48; *R. v. Edgar*, *2019 QCCQ 1328*, at para. 109 (CanLII); *L.T.W.*, at para. 22).

112 I prefer the alternative approach. An accused must know or be wilfully blind to their conditions in order to be convicted, although the accused does not need to know the legal consequences or the scope of the condition: see, e.g., *R. v. Smith*, 2008 ONCA 101, 233 O.A.C. 145 (Doherty, Borins, Lang JJ.A., per curiam); *R. v. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. v. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181, at para. 36; *Ritter*, at para. 11; *R. v. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160, at paras. 13 and 16; *R. v. Syblis*, 2015 ONCJ 73, at paras. 18 and 25 (CanLII)). A number of failure to appear cases also require that the accused know of their court date such that an accused's genuine forgetfulness can negate *mens rea* (*Josephie*, at paras. 30-31; *Loutitt*, at paras. 15 and 22-23; *R. v. Blazevic* (1997), 31 O.T.C. 10 (Ont. C.J.); *Mullin*, at para. 6; *R. v. Hutchinson* (1994), 160 A.R. 58; *R. v. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361, at para. 62). I accept the position of the Court of Appeal for Ontario in *Smith*, which held that the fact that the accused misheard the terms of his recognizance and failed to review those terms meant that he did not knowingly breach his condition, nor was he wilfully blind. The accused must know the conditions of their release in order to possess the *mens rea* for the failure to comply offence.

113 Wilful blindness is a substitute for the accused's knowledge of the facts whenever knowledge is a component of *mens rea* and where the accused is deliberately ignorant (*R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 21 and 24). For a court to find that an accused was wilfully blind in the context of a failure to comply offence,

the accused has to know there was a need for inquiry, and deliberately decline to make the inquiries necessary to confirm their exact bail condition (*Smith*, at para. 5; *Withworth*, at para. 13).

114 Requiring that an accused person has knowledge of, or is wilfully blind to, their conditions of bail does not mean that the accused must have knowledge of the law, which would be contrary to the rule that ignorance of the law is no excuse (s. 19 of the *Code*). While subjective *mens rea* for s. 145(3) means that an accused person who has an honest but mistaken belief about the conditions of their bail order cannot be found liable, this does not mean that an accused must know and understand their legal obligations to fulfill those conditions. Genuinely forgetting a condition could be a mistake of fact and would negate *mens rea*, whereas a mistake regarding the legal scope or effect of a condition is a mistake of law and would not be an excuse for non-compliance with the condition (see *Withworth*, at paras. 16-19, per Trotter J.). In *Custance*, for example, the accused knew he had to stay at a certain apartment, but when he could not get into that apartment he chose to sleep in his car as he thought this would meet his condition. The accused was aware of his bail condition, but made a mistake as to what the law required to meet that condition. This was a mistake of law that did not negate *mens rea.*

115 The conclusion that an accused must have knowledge of their conditions of bail, or be wilfully blind to their conditions, in order to have the requisite *mens rea* under s. 145(3), also accords with Wilson J.'s reasoning in *Docherty*, which emphasized the importance of knowledge in finding that an accused breached a condition. In that case, she found that proof of breach of a probation order requires evidence that an accused knew they were bound by the probation order, knew there was a term that would be breached by their proposed conduct, and went ahead and engaged in the conduct anyway (pp. 957-58). The reasoning is still helpful even though the condition breached in *Docherty* required that the accused knew he was committing a criminal offence, which meant the accused had to know of the legal consequences of his actions (pp. 960-61). In contrast, s. 145(3) does not require that the accused must have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. The purpose of s. 145(3), like the breach of probation offence, is to punish and deter failures to comply with bail conditions. As previously mentioned, knowledge and deterrence are linked: an accused will only be deterred from breaching their conditions if they know they are doing something wrong, meaning they must know that they are bound by a particular bail condition (*Docherty*, at pp. 951-52).

116 The second component of the *mens rea* for s. 145(3) can be met by showing that the accused acted knowingly or recklessly in breaching their condition. Knowledge in this second component means that the accused must be aware of, or be wilfully blind to, the factual circumstances requiring them to act (or refrain from acting) to comply with their conditions at the time of breach (e.g., in Mr. Zora's case, knowing that the police were at his door).

117 This second component can also be met by showing that the accused was reckless. Where, as here, a higher requirement of "wilfulness" or "intent" is not indicated by the text or nature of an offence, recklessness is generally included in subjective *mens rea* (see *Sault Ste. Marie*, at pp. 1309-10; *R. v. Buzzanga* *(1979), 25 O.R. (2d) 705* (C.A.), at p. 71). Recklessness requires that accused persons be aware of the risk of not complying with their condition and proceed in the face of that risk (*Josephie*, at para. 30; *Sansregret v. The Queen*, *[1985] 1 S.C.R. 570*, at p. 584). Knowledge of risk is key to recklessness. Therefore, the accused must still know of their bail conditions in order to be aware of any risk of non-compliance. The accused must also be aware of the risk that the factual circumstances requiring them to act (or refrain from acting) to comply with their bail conditions could arise and continue with their course of conduct despite the risk. Recklessness is not, and should not through misapplication, become the same as negligence. Recklessness has nothing to do with whether the accused *ought* to have seen the risk in question, but whether they subjectively saw the risk and continued to act with disregard to the risk.

118 Given that s. 145(3) can operate to criminalize otherwise lawful day-to-day behaviour, I would conclude that knowledge of *any* risk of non-compliance is not sufficient to establish that an accused was reckless. Instead, the accused must be aware that their continued conduct creates a *substantial and unjustified risk* of non-compliance with their bail conditions. This Court has previously adopted this standard of risk in describing recklessness for certain offences (see *R. v. Hamilton*, *2005 SCC 47*, *[2005] 2 S.C.R. 432*, at paras. 27-29; *Leary v. The Queen*, *[1978] 1 S.C.R. 29*, at p. 35 (per Dickson J. dissenting, but not on this point)). The risk cannot be far-fetched, trivial, or *de minimis*. The extent of the risk, as well as the nature of harm, the social value in the risk, and the ease with

which the risk could be avoided, are all relevant considerations (Manning and Sankoff, at p. 229). Although the trial judge will assess whether a risk is unjustified based on the above considerations, because recklessness is a subjective standard, the focus must be on whether the accused was aware of the substantial risk they took and any of the factors that contribute to the risk being unjustified.

119 Requiring this standard of risk for recklessness is warranted because the offence may criminalize everyday activities and have unforeseen consequences on people's everyday lives. For example, in the context of a condition requiring an accused to answer the door to police during their curfew, an accused would not be reckless if they took the minimal and justified risk of taking a short shower during their curfew whereas they could be reckless if they disconnected their doorbell or wore earplugs around their house. As with this Court's decision in *Hamilton*, at paras. 32-33, these reasons should not be interpreted as changing the general principles of recklessness as a fault element set out in *Sansregret*, as my description of recklessness is specific to the offence under s. 145(3).

120 Finally, I do not accept that a subjective fault requirement would make it too difficult for the Crown to prove an accused's knowing or reckless failure to comply with bail conditions. If the Crown chooses to lay a criminal charge under s. 145(3), when the possibility of a bail variation and bail revocation also exist, it will do so only when it has a reasonable prospect of conviction based on a full appreciation of all constituent elements of the offence. Many crimes have a subjective fault standard and there are recognized ways to marshal sufficient evidence to convince a judge beyond a reasonable doubt that the accused acted knowingly or recklessly. Courts may infer subjective fault for failure to comply charges, whether or not the accused decides to testify. After considering all the evidence, the trier of fact may be able to conclude beyond a reasonable doubt that the accused had the state of mind required for conviction based on the common sense inference that individuals "intend the natural and probable consequences of their actions" (*R. v. Seymour*, *[1996] 2 S.C.R. 252*, at paras. 19 and 23; *Docherty*, at p. 958; *Loutitt*, at para. 18). As noted by the intervener Attorney General of Ontario a subjective fault requirement has not prevented convictions on s. 145(3) charges in Ontario.

121 The Crown's concern that accused persons may simply say they forgot about their bail conditions to escape criminal liability for breaching their bail is addressed because judges "will no doubt act sensibly in assessing the authenticity of claims of forgotten court dates and overlooked bail conditions. Effect need not be given to forgetfulness merely because it has been asserted" (*Withworth*, at para. 14).

122 In conclusion, as accepted by the respondent and the AGBC, "[t]he sky will not fall if the Crown has to prove a mental element" (*Loutitt*, at para. 17; Transcript, at p. 64; I.F. (AGBC), at para. 23".

VII. A New Trial Should Be Ordered

123 I agree with Mr. Zora that a new trial should be ordered in light of the error in law by the courts below in applying an objective rather than a subjective standard of fault for s. 145(3).

124 This is not a case where the curative proviso allows this Court to dismiss an appeal under s. 686(1)(b)(iii) because there was "no substantial wrong or miscarriage of justice" despite an error of law. The curative proviso is only appropriate where the "error is harmless or trivial" or "where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict" (*R. v. Sekhon*, *2014 SCC 15*, *[2014] 1 S.C.R. 272*, at para. 53). *Mens rea* is an essential element of a criminal offence and identifying the wrong fault standard is not a "harmless or trivial" error. A subjective *mens rea* would have required the trial judge to consider Mr. Zora's state of mind, which clearly could have had an impact on the verdict.

125 The evidence is also not so overwhelming that a conviction is inevitable. As the trial judge was focussed on what a reasonable person would do in the circumstances, he did not need to make clear factual findings or definitive findings of credibility that would allow this Court to assess or infer Mr. Zora's knowledge and state of mind. If established at trial, Mr. Zora's personal circumstances, including whether he was sleeping deeply due to heroin withdrawal and methadone treatment, would be relevant to determining his state of mind. As described above,

recklessness requires knowledge of the substantial and unjustified risk of circumstances leading to a prohibited breach. Without a clear finding that Mr. Zora was aware of the risk that he could not hear the police at his door, as well as other findings of fact necessary to determine whether that risk was substantial and unjustified, the Court cannot find that he was reckless in failing to answer the door.

126 The trial judge's negative statements concerning the credibility of the defence witnesses mean that an acquittal would also not be appropriate. A new trial is needed to address whether Mr. Zora knowingly or recklessly breached his conditions.

VIII. Conclusion

127 Therefore, subjective fault is required for a conviction under s. 145(3) of the *Code*. I would allow this appeal, quash Mr. Zora's convictions, and order a new trial on the two counts of failing to attend at his door.

Appeal allowed.

Solicitors:

Solicitors for the appellant: Marion & Runyon, Criminal Lawyers, Campbell River; Michael Sobkin, Ottawa.

Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Henein Hutchison, Toronto.

Solicitors for the intervener the Vancouver Area Network of Drug Users: Gratl & Company, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the Independent Criminal Defence Advocacy Society: Peck and Company, Vancouver.

Solicitors for the intervener the Pivot Legal Society: David N. Fai, Law Corporation, North Vancouver; Pivot Legal Society, Vancouver.

Solicitors for the intervener Association québécoise des avocats et avocates de la défense: Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

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1 My use of the word "bail" encompasses all forms of judicial interim release or pre-trial release in the *Code*.

2 I use "judicial official" to refer to both a justice and a judge. A "justice" in the *Code* refers to justices of the peace or provincial court judges (s. 2). A "judge" refers to a judge of a superior court in the jurisdiction, except in Nunavut where it refers to a judge of the unified Nunavut Court of Justice (s. 493).

3 I will refer to the offence created by s. 145(3) as the "failure to comply" offence and will refer to "bail conditions" to include all conditions arising from the undertakings, recognizances, directions, and orders listed in s. 145(3), although I

note that someone can also be subject to conditions arising from release from custody by the police. An accused can also be charged under s. 145(3) for breaching no-communication conditions in directions and orders imposed if the accused is detained prior to trial; however, for the sake of simplicity, I will refer to all of these conditions as "bail conditions" as they still refer to conditions imposed prior to conviction to manage the accused's risks. For the purposes of these reasons, I will refer to the relevant sections of the *Code* as they were when Mr. Zora was charged in October 2015, unless otherwise stated. The bail provisions of the *Code* were significantly revised as of December 18, 2019, and I will address the significance of these changes after reviewing the bail structure as it stood when Mr. Zora was charged and sentenced.

4 As defined in *Antic*, a recognizance "is the 'formal record of an acknowledgement of indebtedness to the Crown' that is usually nullified when the accused attends in court for trial" (fn 2).

5 As also described in *Antic*, a "surety is an individual who supervises the accused and ensures that the accused remains faithful to his or her pledge to the court to appear for trial" (fn 1).

6 With the exception of bail conditions for bail following conviction, as is the case for bail between conviction and sentencing or bail on appeal (see *R. v. St-Cloud*, *2015 SCC 27*, *[2015] 2 S.C.R. 328*, at para. 117; *R. v. Oland*, *2017 SCC 17*, *[2017] 1 S.C.R. 250*, at para. 35).

7 This is now s. 515(4)(h) as of December 18, 2019. Although the other enumerated conditions have been numbered differently, their content has not changed.

8 Failure to comply offences in the Statistics Canada Report include s. 145(3) to (5.1), but also offences related to failure to comply with conditional sentences or probation orders (s. 161(1) to (4)), or peace bonds (s. 811(a) and (b)).

9 Offences listed under s. 469 have a different mechanism of bail review under ss. 522(4) and 680 of the *Code*.

End of Document

TAB 4

R. v. Arsenault-Lewis

Ontario Judgments

Ontario Court of Justice

M.S.V. Felix J.

April 14, 2020.

[2020] O.J. No. 1879 | 2020 ONCJ 181

Between Her Majesty the Queen, and Kenneth Arsenault-Lewis

(70 paras.)

Counsel

E. Evans, Counsel for the Crown.

D. Reeve, Counsel for the Defendant.

Table of Contents:

3. Circumstances of the Offence
4. The potential for lengthy imprisonment
5. COVID-19 Pandemic
6. Evidentiary Record in support of the COVID-19 Pandemic
7. Conclusion -- Tertiary Grounds

WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 517(1) of the *Criminal Code*. This subsection and subsection 517(2) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection (1), read as follows:

> **517. ORDER DIRECTING MATTERS NOT TO BE PUBLISHED FOR SPECIFIED PERIOD** -- (1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as
>
> (*a*) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or
>
> (*b*) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.
>
> (2) **FAILURE TO COMPLY** -- Everyone who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

> **486.4 Order restricting publication -- sexual offences**. -- (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (*a*) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1,172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in sub-paragraph (i) if it occurred on or after that day; or
>
> (*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph *(a)*.
>
> (2) **MANDATORY ORDER ON APPLICATION** -- In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall

> (*a*) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and
>
> (*b*) on application made by the complainant, the prosecutor or any such witness, make the order.
>
> **. . .**
>
> **486.6 OFFENCE** -- (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(3) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(3), read as follows:

> **486.4(3) CHILD PORNOGRAPHY** -- (1) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.
>
> **. . .**
>
> **486.6 OFFENCE** -- (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

Ruling: Judicial Interim Release

M.S.V. FELIX J.

I. Introduction

1 The defendant is charged with the following criminal allegations:

1. Luring for the purpose of invitation to sexual touching (s.172.1(1)(b);
2. Luring for the purpose of make child pornography (s.172.2(1)(a);
3. Extortion (s.346(1);
4. Possession of child pornography (s.163.1(4);
5. Access child pornography (s.163.1(4.1);
6. Possession of child pornography (s.163.1(4); and,
7. Access child pornography (s. 163.1(4.1).

2 The matter proceeded before me on April 9, 2020 by way of audio teleconference for the purpose of a full-day judicial interim release hearing. At the conclusion of the day, I provided an oral ruling indicating that the Crown had not met the onus for detention on either secondary or tertiary grounds. I ordered the defendant released on terms. Given the time of day (approximately 4:30 PM), the logistics around producing relevant court documents, and the steps needed to facilitate the release of the defendant, I provided only brief oral reasons. I indicated that written supplementary reasons would be provided as soon as possible to the parties. These written reasons, produced over the Easter weekend, explain why the Crown did not meet the onus concerning detention.

3 The parties litigated the circumstances surrounding the COVID-19 pandemic. For the reasons that follow, I find that I may take judicial notice of the general circumstances surrounding the unprecedented pandemic. Further, during this hearing, the defendant provided testimony concerning conditions in the jail. I find that I may consider the

evidence of the defendant, the supplementary information filed by the defence (e.g., news reports), and the information filed by the Crown sourced directly from the authorities responsible for the jail.

4 I find that the defendant is not particularly susceptible to COVID-19 due to his age or medical circumstances. I find, on the record placed before me, that there is no ability to practise "social distancing" in the detention centre as it pertains to housing or lining up for meals, telephones, or showering.

5 Notwithstanding these circumstances, I want to make it clear that I did not (and would not) release the defendant simply because of the COVID-19 pandemic. Further, I did not release the defendant because of an overemphasis on COVID-19. The current pandemic is simply one factor to consider in all of the circumstances.

6 I considered the secondary and tertiary grounds and determined that the Crown had not met the onus for detention. Had I concluded that the Crown had demonstrated a basis for detention on either ground -- I would have detained the defendant because of his demonstrated risk to the public, notwithstanding the circumstances of a pandemic.

II. Procedural Considerations

7 This proceeding occurred during the COVID-19 pandemic. The Regional Senior Justice of the Ontario Court of Justice assigned judges to assist with "special bail hearings" -- bail hearings scheduled to take several hours or more -- as a direct response to the pressures caused by limited court availability.

8 Defence counsel in the Crown communicated with the trial coordinator and the trial coordinator secured time for the bail hearing. Defence counsel received instructions from his client seeking an audio conference bail hearing.

9 In advance it was understood that witnesses would be called. Both the Crown and defence consented to conducting the bail hearing by way of audio conference per s.515(2.3) of the *Criminal Code*. I was satisfied with the arrangements made by the trial coordinator: ss. 502.1(1) and 515(2.2.) of the *Criminal Code*.

10 Defence counsel sent a comprehensive electronical brief including surety declarations, the defendant's affidavit, documentary evidence, and caselaw. In a practise that should be emulated, the PDF caselaw was bookmarked with the appropriate passages. The Crown Attorney also sent a comprehensive electronical brief. Thanks to the professionalism of counsel, all documentary evidence was admitted without the need for cross-examination. Further, I had the opportunity to consume the filed material, several hundred pages, in advance of the hearing.

11 On April 9, 2020, I found that the Crown had not shown that the defendant's detention was required on secondary or tertiary grounds. I ordered the defendant's release on a Release Order with three named sureties and a number of restrictive conditions. The defendant is essentially on total house arrest with no unsupervised access to connect to the internet.

12 These brief reasons are being provided electronically to counsel and the clerk of the court on April 14, 2020. There will be no appearance in court so that there is no impact on precious audioconference and videoconference time at the institution. These written reasons may easily facilitate any review of this decision in the Superior Court given such reviews are likely being conducted in writing and a reviewing court might encounter difficulties obtaining transcripts at this time.

13 The entire electronical record filed by both parties is filed as an exhibit on this proceeding. Counsel took care to identify any portion of the electronical record filed but it was understood that counsel was relying on the entire record. To eliminate the need to file a paper record of approximately 400 pages I undertook to the parties that the Ontario Court of Justice would maintain the record and provide it to the Superior Court if required.

III. The Allegations

14 The allegations are comprehensively detailed in the synopsis for a show cause hearing. By way of high-level summary, it is alleged that in 2017 the defendant communicated with a 13-year-old girl in the United States and coerced her into sending nude intimate images to him. It is also alleged that the complainant masturbated for the defendant over a video chat on approximately four or five occasions. On January 29, 2020, the police executed a search warrant and found the defendant inside a residence. The police also seized evidence during the search warrant including a USB drive with over 9000 images of child exploitation. The defendant's phone was forensically examined, and the name used by the person communicating with the child in the United States in 2017 was discovered. The phone number used by the person communicating with the child was linked to the defendant via production order results. The name used by the person communicating with the child was found in the child's email notifications and the person had joined the same Google+ circle. This information was found on a phone seized from the defendant during his arrest. The defendant's phone showed evidence of searching for child exploitation material. The investigation into the contents of the material seized from the defendant is ongoing.

IV. The Decision

A. Judicial Interim Release -- The Framework

15 The parties did not litigate the framework applicable to judicial interim release hearings. As such, I will only briefly address four, central, harmonizing, considerations. First, the defendant is presumed innocent unless his guilt is established beyond a reasonable doubt: *Charter of Rights and Freedoms*, s. 11(d). Second, the defendant is entitled to reasonable bail: *Charter*, s. 11(e). Third, the Supreme Court of Canada has recently emphasized the "ladder principle" approach to bail in *R. v. Antic*, 2017 SCC 27 [*Antic*], and *R. v. Myers*, 2019 SCC 18. The Court in *Antic* set out the important applicable principles at paragraph 67:

> 67 Therefore, the following principles and guidelines should be adhered to when applying the bail provisions in a contested hearing:
>
> (a) Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail.
>
> (b) Section 11(e) guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms.
>
> (c) Save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1).
>
> (d) The ladder principle articulates the manner in which alternative forms of release are to be imposed. According to it, "release is favoured at the earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds": Anoussis, at para. 23. This principle must be adhered to strictly.
>
> (e) If the Crown proposes an alternative form of release, it must show why this form is necessary. The more restrictive the form of release, the greater the burden on the accused. Thus, a justice of the peace or a judge cannot impose a more restrictive form of release unless the Crown has shown it to be necessary having regard to the statutory criteria for detention.
>
> (f) Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms.
>
> (g) A recognizance with sureties is one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate.

(h) It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court to justify their release. A recognizance is functionally equivalent to cash bail and has the same coercive effect. Thus, under s. 515(2)(d) or 515(2)(e), cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.

(i) When such exceptional circumstances exist and cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should not be beyond the readily available means of the accused and his or her sureties. As a corollary to this, the justice or judge is under a positive obligation, when setting the amount, to inquire into the ability of the accused to pay. The amount of cash bail must be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case.

(j) Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released.[5] They must not be imposed to change an accused person's behaviour or to punish an accused person.

16 Fourth, the approach of the Court in *Antic* has been codified through the C-75 amendments to the *Criminal Code*. The default approach to the latter of release is to order a release without conditions: s.515(1) of the *Criminal Code*. Thereafter, the least onerous and reasonable bail conditions must be imposed in accordance with the ladder principle described in *Antic:* ss.493.1 and 515(2.01) of the *Criminal Code*. The Court should carefully evaluate the need for a cash deposit and should exercise restraint in requiring sureties: s.515(2.03) of the *Criminal Code*.

17 The tenor of these four considerations is to re-emphasize that judicial interim release on reasonable conditions is the norm.

B. The Plan

18 The plan presented by the defence involved a release order with three supervisory sureties -- the defendant's mother, father, and stepfather. The mother of the defendant was proposed as a surety in the amount of $1000.00. The stepfather of the defendant was proposed as a surety with no monetary amount. He gained employment seven days prior to the bail hearing and he did not have any savings or assets. The father of the defendant was proposed as a surety in the amount of $1000-$1500.00.

19 The plan involved the defendant living with his mother and stepfather under house arrest. All devices in the residence capable of connecting with the Internet were specifically identified by the sureties and these devices would be password -protected.

20 I did not find the initial plan presented by the defence to be sufficient to address the secondary or tertiary grounds. However, during the preceding, the plan evolved. The central issue concerned a gap of unsupervised time where the defendant's mother and stepfather would be at work and he would be home alone. This gap was addressed by the additional supervision proposed by the defendant's father, grandmother, and other family members who live nearby. These relatives would be available to supervise the defendant for the few hours when his mother and stepfather were at work. I ultimately found that these sureties understood their obligations and would honour the conditions of a release order.

1. Mother

21 The defendant's mother is currently employed. She strikes me as a hard-working individual. She takes the TTC back and forth to work. Her work involves a higher risk group of individuals given the pandemic. I did not find that it was necessary for her to give up her employment for the purpose of supervising her son.

22 This witness struck me as blunt and straightforward. I am convinced that she will uphold the release conditions. I am satisfied that she will perform as a surety.

23 The defendant's family is not of great monetary means. The amount of money pledged by his mother is the total amount of her savings to date. It is a significant amount of money for her.

24 This witness explained the number of items in the residence capable of accessing the Internet and the fact that they would be password protected and the defendant would not have access to these items.

25 The cross-examination theme around the lack of discussion in the family as it pertains to the defendant's conviction in the United States did not cause me to find the defendant's mother to be unable to supervise. The defendant's conviction in the United States is something that common-sense straightforward people should be ashamed of. It is not surprising to me that family members did not probe the circumstances in great detail. This would not be unusual for many families. I've also considered that the defendant was presenting as someone who had moved on with his life. He was living with a family friend and both going to school and working.

26 The most impressive feature of this witness's testimony was revealed during the hearing when it came out that she had presented herself as a surety in February 2020. During that proceeding, having heard the allegations for the first time, this witness withdrew her support as a surety and the bail hearing was "struck" by the presiding Justice of the Peace. The defendant remained in detention from February until this hearing.

27 This witness explained that she was shocked by the allegations, she had a mental breakdown, and she needed time to process everything. Thereafter she went and secured further support from the defendant's father and stepfather and had discussions with his cousins and his grandmother before deciding that she had the support necessary to present herself as a surety once again. I was impressed by this witness. It was plainly apparent that she took her obligations as a surety very seriously.

2. Stepfather

28 The defendant's stepfather was not an impressive witness. He held a vague recollection of the circumstances of the defendant in 2010. He lacked attention to detail. I find that he lacked a significant connection to the defendant. It is quite apparent that he has not held any serious discussions with the defendant about his conviction in the United States and has not been instrumental in the defendant's life. Finally, it was difficult for this witness to answer simple questions posed to him by the Crown Attorney. He was mildly evasive, and I suspect untruthful to a degree.

29 But in the end, I balanced these negative observations against the fact that he is the defendant's stepfather and perhaps his closer relationship is with the defendant's mother. Further, the defendant is not a child requiring the daily guidance of this witness as a stepfather. At the time of arrest, he was living with a family friend on his own. Finally, I am satisfied that this witness will support the defendant's mother, his partner, in supervising the defendant.

30 This witness was not clear about his criminal record. His surety declaration appears to minimize his criminal record. During the preceding he expanded and acknowledged his greater criminal record. I would not automatically bar a surety based on the simple fact of a criminal record. The circumstances have to be assessed and suitability of the surety considered. I accept that to some degree there might have been some confusion about the surety declaration particularly given these times of remote contact. I further find that the record is old and not relevant to this witness's ability to supervise as a surety. Finally, I have disabused my mind of any evidence related to un-charged conduct or conduct for which no criminal conviction resulted.

31 The simple fact is this witness is going to assist his spouse with supervising the defendant because he's living in his residence. I'm satisfied that his loyalty to his spouse is sufficient to give me confidence in his ability.

3. Father

32 At the outset, I asked defence counsel if he was seriously proposing this witness as a surety given the criminal record filed by the Crown in advance of the hearing. It is fortunate for the defendant that his lawyer ignored my concern and persisted in calling this witness because he was an impressive and convincing surety.

33 This witness had a two-page criminal record going back to 1987. Of immediate concern for the court was a conviction for obstruction in 2010, a conviction for failed to comply with the recognizance in 2002, and a trafficking conviction in 1991. I am satisfied that this witness is suitable to be a surety notwithstanding my initial concerns based on his criminal record. The obstruction conviction involves providing a false name to the police while driving to obscure other culpability. The breach of recognizance speaks for itself as does the trafficking conviction. But the reality is the last conviction for this gentleman was in 2010. This witness explained his societal circumstances and the challenges he faced during this time. I'm satisfied with this explanation.

34 Most impressive was the fact that this witness made it crystal clear that he viewed the defendant as guilty and as someone who needs serious help. He agreed with the proposed plan involving the defendant residing with his mother primarily because he has a 16-year-old daughter who lives with him and he told the court that it would be inappropriate for the defendant to be in the same household.

35 This witness spoke with the defendant in the aftermath of his conviction and sentence in the United States and demonstrated interest in trying to help the defendant.

36 This witness explained that the defendant needs mental health treatment and the family has made recent efforts by contacting medical facilities but is unable to get an appointment at this time given the current pandemic.

37 This witness openly acknowledged that the defendant led him to believe that he was doing better. It is clear that this witness perceived the defendant as making some gains and "turning the corner" so to speak on his past. He had no inkling that these allegations would surface. Now that they have, he is committed to getting the defendant assistance.

38 Notwithstanding my initial concerns, this witness was a powerful and persuasive surety. His eyes are wide open. He was clear and deliberate in his answers to the court. And I am absolutely convinced that he will do everything he can to make sure the defendant abides by the release conditions.

39 This witness has a car and will escort the defendant wherever he needs to go, and he is also part of the plan to be supervising the defendant while his mother and stepfather are at work. It is fortunate that the defendant's mother, stepfather, and father all appear to get along. The defendant stepfather took pains to make it very clear that there was no bar to them working together cooperatively

C. Primary Grounds

40 The primary grounds were not litigated by the parties in this judicial interim release hearing. I agree that there are no primary grounds concerns given the plan present by the defence.

D. Secondary Grounds

41 Secondary ground considerations were untouched by Parliament in the recent amendments. The secondary ground concern is focused on the substantial likelihood that the defendant will commit another criminal defence or interfere with the administration of justice. In addition, I must consider whether detention is necessary for the protection or safety of the public including any victim, witness to the offence, or persons under the age of 18.

42 The prosecution has not established that detention is necessary based on the criteria in s.515(10)(b) of the *Criminal Code*. In particular, given the plan presented by the Defence, the prosecution has not established that it is

"significantly likely" that the defendant will commit a criminal offence -- a probability, rather than a possibility: *R. v. Manasseri*, *2017 ONCA 226*, at para. 87.

43 The allegations involve the defendant communicating for a sexual purpose with a child. In 2012 the defendant was charged with "Travelling into the United States for Purposes of Engaging in Illicit Sexual Conduct with Another Person". He pled guilty. He was sentenced to 24 months of incarceration and five years of supervised release with conditions. In December 2013 the defendant was released from prison and deported back to Canada.

44 The full facts surrounding the defendant's arrest and imprisonment are contained in Exhibit 1 -- Synopsis for Show Cause Hearing. That record discloses that the defendant was detained at the US border by American border officials. He was in possession of a laptop computer and the computer had images of a female child engaged in sexually explicit conduct. The defendant identified the female child as his girlfriend who he knew to be under the age of 16. The defendant explained that he was having a cyber sexual relationship with his girlfriend which involved penetration digitally and with foreign objects via Skype. The defendant also admitted that he and his girlfriend made the arrangements via Skype to have him attend United States for the purpose of engaging in sexual intercourse with her. The defendant admitted that he had previously crossed the border and engaged in sexual intercourse with her.

45 This conduct is extremely serious on its own but is particularly serious given that in January 2010 the Toronto police cautioned the defendant about engaging in a relationship with a child -- the same child described has his girlfriend in 2012. In 2010, the defendant admitted that he had been chatting with this child but denied receiving any images of child exploitation. Images of child exploitation were found on the child's video camera by US investigators no images were found on the defendant's computer which had been reformatted three times during the preceding week deleting everything from his computer.

46 The facts in support of the defendant's plea of guilt in 2012 make it clear that he continued to have contact with the child notwithstanding the caution by the Toronto police.

47 In my view, the plan ultimately presented by the defence is adequately directed at the secondary ground concerns. Pursuant to my Order, the defendant will not leave Ontario and his travel documents will be deposited with the officer in charge of the case. He does not currently have a passport and pursuant to my order will not apply for a new one. This mitigates the risk associated with the defendant travelling to the United States to have contact with the complainant or her family when and if the current order restrictions are relaxed.

48 The allegations are three years old. There is no evidence that the defendant has contacted the complainant since the timeframe of the effects. Pursuant to my Order the defendant will not use any Internet-capable electronic device except pursuant to admittedly very strict conditions including the direct supervision of a surety. In such circumstances it is extremely unlikely that he will have contact with the complainant in the United States. Further, I have placed strict conditions on his contact with any child under the age of 16 period.

49 The defendant's criminal conviction in the United States dates back to 2012 and involves travelling for illicit purposes. There will be no unsupervised or unescorted travelling by the defendant.

E. Tertiary Grounds

50 In *R. v. A.A.C.*, *2015 ONCA 483*, at paragraphs 46 to 52 the Court of Appeal concisely summarized the proper approach to the tertiary ground:

> **46** In my view, four important considerations concerning the application of s. 515(10)(c) emerge from *St-Cloud*.
>
> **47** First, *St-Cloud* clarifies the ambit of s. 515(10)(c). In *St-Cloud*, the Supreme Court rejects an unduly restrictive interpretation of the section's scope and holds that the tertiary ground for detention is not to be

interpreted narrowly or applied sparingly. As the court puts it, the section is not necessarily limited to exceptional circumstances, to unexplainable crimes, to the most heinous of crimes involving circumstances similar to those in *Hall*, or to certain classes of crimes: at paras. 5, 47, 50, 53 - 54, and 87.

48 Rather, the Crown may rely on s. 515(10)(c) to support detention for any type of crime, so long as the Crown proves -- except in the cases provided for in s. 515(6) of the *Criminal Code*, of which this is not one -- "that the detention of the accused is justified to maintain confidence in the administration of justice": at para. 54. In this context, the fact that detention may be justified on the tertiary ground only in rare cases is but a consequence of the application of s. 515(10)(c); it is neither a precondition to its application nor a criterion the court must consider or the purpose of the section: at para. 50.

49 Second, *St-Cloud* reiterates the holding in *Hall* that each of the four listed factors in s. 515(10)(c) and their combined effect must be considered, together with all other relevant circumstances, when detention is sought to be justified under the tertiary ground: at para. 68.

50 Consequently, "[a] court must not order detention automatically, even where the four listed circumstances [in s. 515(10)(c)] support such a result": at para. 87. The s. 515(10)(c) inquiry requires a balancing of the listed factors, together with any other relevant factors, in order to answer the ultimate question: whether detention of the accused is necessary to achieve the purpose of maintaining confidence in the administration of justice: at paras. 69 and 87.

51 Third, *St-Cloud* addresses the bail review authority under ss. 520 and 521 of the *Criminal Code*. With respect to those sections, *St-Cloud* instructs that it will be appropriate for a bail review judge to interfere with a bail justice's decision in one of three circumstances: i) if the bail justice erred in law; ii) if the impugned decision was "clearly inappropriate"; or iii) where new evidence submitted by the accused or the prosecutor shows a material and relevant change in the circumstances of the case: at paras. 121 and 139.

52 Fourth, where bail is sought on a review under ss. 520 or 521 of the *Criminal Code* based on new evidence that is said to constitute a material change in circumstances, the admissibility of that new evidence is to be evaluated in accordance with a modified version of the four-part test for the admission of fresh evidence set out in *Palmer v. The Queen*, *[1980] 1 S.C.R. 759*: *St-Cloud*, at paras. 128 - 29. However, "[g]iven the generally expeditious nature of the interim release process and the risks of violating the rights of the accused, and since the release hearing takes place at the very start of criminal proceedings and not at the end", and in view of the relaxed approach to the rules of evidence at bail hearings mandated by s. 518 of the *Criminal Code*, the four *Palmer* criteria are to be applied in a flexible fashion: at para. 129.

51 The analysis required under the tertiary ground involves consideration of the four factors outlined in s.515(10)(c) along with all of the circumstances and relevant factors in order to determine whether detention is required in order to maintain confidence in the administration of justice.

1. Apparent Strength of the Prosecution's Case

52 The apparent strength of the prosecution's case is relatively strong. It would appear based on the record produced on this hearing that identification issues will dissolve if the circumstantial record produced on this hearing is admitted.

53 While I recognize that a search warrant signed by a judicial officer is presumptively valid, I also recognize that based on the record produced on this hearing there is a significant gap of time between the investigation and the United States in the search warrant and arrest here in Canada.

54 Notwithstanding the investigation dates back to 2017, the ITO remains sealed so neither party is able to opine on *Charter* issues. The prosecution was not able to advise whether or not the search warrant was augmented by the provision of NCMEC information by the American authorities.

2. Gravity of the Offence

55 The specter of adult persons engaging in child abuse and child exploitation activities is of obvious concern. This is of particular concern where someone who has been previously convicted of such conduct is before the court on new allegations.

3. Circumstances of the Offence

56 The allegations involve coercive child exploitation behaviour on the part of the defendant. This is a very serious allegation and frankly exhibits a predatory element not always present in cases of luring.

4. The potential for lengthy imprisonment

57 There is no question that if this defendant is found guilty, he will serve a lengthy prison sentence.

5. COVID-19 Pandemic

58 A focus of the bail hearing involved the parties litigating the impact of COVID-19 on the court's assessment of secondary and tertiary grounds. The parties filed all the relevant bail reviews from the Superior Court dealing with these issues. I have read all of the court decisions filed and a few additional decisions including: *R. v. J.S.*, *2020 ONSC 1710*, at paras 10,18-19; *R. v. T.L.*, *2020 ONSC 1885*, at paras 34-36; *R. v. C.J.*, *2020 ONSC 1933*, at para. 9; *R. v. King*, *2020 ONSC 1935*, at paras. 58-59; *R. v. Cain*, *2020 ONSC 2018*, at paras. 6-9,11,25; *R. v. Hastings*, *2020 ONSC 2083*, at paras. 49-54; *R. v. Rajan*, *2020 ONSC 2118*, at paras 68-70; *R. v. Cahill*, *2020 ONSC 2171*, at paras. 27-30; *R. v. Kazman*, *2020 ONCA 251*.

59 The Defence submits that the circumstances surrounding the COVID-19 pandemic are relevant to both secondary and tertiary grounds. I found the circumstances to be relevant to tertiary grounds only.

6. Evidentiary Record in support of the COVID-19 Pandemic

60 The defendant presented an affidavit and through that affidavit testified to the following:

1. He has been in the Toronto South detention Centre from January 30, 2020 to April 9, 2020.

2. He suffers from PTSD, anxiety, and depression and is currently taking Clozapine and Prozac to manage symptoms. He was only permitted to obtain a prescription from a doctor to receive the medications on March 10, 2020.

3. He has been subject to lockdown on several days during his time in remand

4. Between March 20 and March 25, 2020, he was not permitted to leave his cell at all and therefore did not shower or use the telephone.

5. Jail guards are wearing gloves and masks but not consistently.

6. There was no noticeable immediate action taken in response to the COVID -19 pandemic inside the institution.

7. He is unable to engage in social distancing isolation as he is within two metres of his cellmate.

8. He has heard hearsay information that both inmates and guards have come down with COVID-19 including news reports.

9. There has been no attempt to address social distancing measures on the range, in cells, during recreation, when lining up for meals, when lining up for telephones, or when lining up for showers.

10. There are only two showers provided on the range for approximately 35 inmates. There is only one shower currently working. Showers appear to be cleaned in the morning but there does not appear to be any sanitization of the shower area in between inmates.

11. Given his very large stature he was not provided with a change of clothes for approximately the first month of his time in remand. Since then he has received clean shirts and underwear but often the outer garments are unavailable once again due to his large stature.

12. He used the same bedding from January 30, 2020 until the end of March 2020.

13. He has contracted a rash on his back and shoulders and has been provided with the cream to treat it but unfortunately cannot reach the area given his large stature.

14. Incarceration has negatively impacted his mental health circumstances.

15. He will abide by any release conditions ordered by the court.

61 The Defence also filed numerous media reports, information from the provincial government, and an open letter from medical professionals titled *"Release Prisoners to Protect Public Health: Open Letter from Medical Professionals to Canadian Federal, Provincial and Territorial Governments*" dated April 6, 2020.

62 The Crown filed a document titled "*Response to COVID -19 INFORMATION NOTE*" authored by the Assistant Deputy Minister's Office of the Ministry of the Solicitor General dated April 7, 2020.

63 I find that there is credible or trustworthy evidence (s.518(1)(e) of the *Criminal Code*) that a serious pandemic is occurring. As a Judge of the Ontario Court of Justice I am not required to live like a hermit on the top of some distant mountain descending each day to adjudicate. Each day the Prime Minister of Canada, the premier of Ontario, and a number of other authorities present updates on the progression of the pandemic and the measures that must be taken to mitigate serious consequences.

64 I find that there is credible or trustworthy evidence that the health-related safety measures are difficult to practice within the confines of a jail. I am aware that jails are locations where prisoners are in close proximately. I am also aware of the findings of P.A. Schreck J.'s in *R. v. Persad*, *2020 ONSC 188*. That there is a risk to the defendant in Metro South is within the realm of judicial notice and experience in the criminal justice system. In addition, I have the unchallenged affidavit evidence of the defendant in this bail hearing documenting the current situation.

65 Finally, notwithstanding the evidentiary record presented by the defence I am not convinced that the circumstances surrounding COVID-19 present any greater risk to the defendant because of his peculiar medical circumstances.

66 This is not a release premised on the COVID-19 pandemic. It is a release premised on the statutory obligation to consider the relevant secondary and tertiary ground factors. The current pandemic is simply one relevant factor. It should not, and was not, over weighted in my decision.

67 In my view, aligning the evidence for and against the risks of COVID-19 should not become the core focus function of a bail hearing. To be explicit, if the defendant was not releasable on the secondary and tertiary grounds, I would not have treated the current pandemic as a lynchpin promoting release.

7. Conclusion -- Tertiary Grounds

68 I am cognizant that the tertiary grounds are not reserved for stark horror criminal allegations or any particular category of offence (e.g. murder). That being said, the prosecution has not demonstrated the basis for detention on the tertiary ground.

69 Put another way, while reasonably informed members of the public should have some cause to be concerned about the defendant's behaviour, the circumstances of the allegations in the background of the offender simply do not meet the test for detention on the tertiary grounds.

70 The allegations involve serious criminal conduct committed by way of an electronic means. While I accept that the harm allegedly done by this accused to a child is not yet fully ascertainable, allowing him to remain under the supervision of his parents under strict house arrest terms would not do violence to the public's perception of the criminal justice system.

M.S.V. FELIX J.

End of Document

TAB 5

R. v. Singh

Ontario Judgments

Ontario Superior Court of Justice

C. Hill J.

Heard: September 11, 2018.

Judgment: September 11, 2018.

Court File: DR(P) 1226/18

[2018] O.J. No. 4757 | 2018 ONSC 5336

Between Her Majesty the Queen, Respondent, and Kasmir Singh, Applicant

(43 paras.)

Case Summary

Appeal From:

On appeal from Review of a Detention Order of Justice of the Peace M. Hudson made July 12, 2018.

Counsel

T. Sarantis, for the Respondent.

J. Mencel, for the Applicant.

BAIL REVIEW JUDGMENT

C. HILL J.

INTRODUCTION

1 Kasmir Singh was arrested on July 12, 2018 and detained in custody in a judicial hearing later that day. The applicant seeks review of his pretrial detention status.

2 On account of outstanding charges upon which the applicant was on bail, the July 12, 2018 show cause hearing of the applicant was a reverse onus proceeding (s. 515(6)(a)(i) of the *Criminal Code*).

THE JUDICIAL INTERIM RELEASE HEARING

3 At the outset of the hearing, when asked by the court whether he had counsel, Mr. Singh replied that he did not. The presiding justice of the peace pointed out a "lady in the red jacket", presumably duty counsel, saying "she will assist you".

4 Crown counsel, not Mr. Sarantis, then indicated to the court that Mr. Singh:

(1) had "a number of outstanding matters"

(2) had a lengthy record

(3) had been interviewed by the John Howard Society of Peel who were "not in position to offer supervision".

5 Crown counsel then stated:

> Your Worship, the Crown is prepared to recommend this gentleman's release in the form of his own recognizance with appropriate conditions to satisfy those grounds.

6 When the court asked to hear the allegations, the prosecutor introduced the prior criminal record, outlined the outstanding charges faced and the forms of release thereon, and then detailed the facts of the allegations relating to Mr. Singh's most recent arrest.

7 In summary, on July 12, 2018, at about 12:20 a.m., the complainant, R.S., was walking through the parking lot of the Khalsa School on Airport Road in Malton when he observed the applicant asleep in the parking lot. When R.S. informed Mr. Singh that this was not a place to sleep, the applicant became enraged, picked up an eight-foot long metal rod while threatening to kill R.S., and swung the rod at the complainant. With a security guard intervening, the complainant was not hit. The applicant was arrested and, in addition to criminal charges of assault with a weapon and threatening, was charged with being intoxicated in a public place.

8 Once the narrative of allegations was complete, Crown counsel:

(1) repeated that the John Howard Society could not offer the applicant "support or supervision in the community"

(2) the complainant, who was unknown to Mr. Singh, received no injuries

(3) having regard to the philosophy and spirit animating the subject of bail as canvassed in *R. v. Antic*, *[2017] 1 S.C.R. 509*, and despite the allegations being "serious in nature", the applicant was "releasable"

(4) "with appropriate conditions, the safety concerns with respect to the victim can be minimized" without the need for a surety.

9 At this point, duty counsel informed the court that:

> I have discussed this matter with my friend. We are in agreement, so this is a joint submission for your consideration.

10 Mr. Singh's date of birth is December 6, 1969. He is currently 48 years of age. The applicant has a prior criminal history in the 13-year period stretching from 2005 to 2017 -- from ages 35 to 47. There are 58 entries in the applicant's prior criminal record.

11 Given the nature of the outstanding charges, the applicant's prior criminal record is not without significance. In terms of the yet-to-be resolved theft charges, the applicant has 11 prior theft convictions (2006, 2007, 2010, 2011, 2012, 2013 (x2), 2014 (x2), 2016, 2017). As to bail-related convictions -- fail to comply in 2005 and 2007. Turning to the applicant's history of compliance with other court orders, he has 25 prior convictions for breach of probation (2010, 2011 (x6), 2012 (x4), 2013 (x5), 2014 (7), 2016, 2017).

12 The charges upon which the applicant now stands detained and seeks release, assault with a weapon and uttering a death threat, fall to be considered within the context of this prior criminal record: uttering threats to cause death or bodily harm (2012), and, 9 assault convictions (2005, 2007, 2010, 2011, 2012 (x2), 2013 (x2), 2017), and, assault with intent to resist arrest (2014), and, assault with a weapon (2015). Relevant to the applicant's apparent public intoxication on July 12, 2018 are prior drinking/driving-related convictions in 2005, 2006 and 2014.

13 At the point of the s. 515 show cause hearing, the applicant was facing a number of criminal charges and was subject to various forms of release under Part XVI of the *Criminal Code* for which the Crown sought no bail revocation pursuant to section 524.

Outstanding Charges

	Alleged Offence	Date	Form of Release
(1)	assault	June 11/17	Promise to Appear
(1)	assault	June 11/17	Promise to Appear
(2)	fail to appear	July 5/17	s. 515(2)(b) Recognizance
(3)	fail to comply with Appearance Notice	July 6/17	s. 515(2)(b) Recognizance
(4)	theft under	Sept 1/17	Appearance Notice
(5)	theft under	April 21/18	Undertaking to Officer in Charge
(6)	assault	June 28/18	Undertaking to Officer in Charge
(7)	Assault	July 3/18	Undertaking to Officer in Charge

Current Charges

	Alleged Offence	Date	Form of Release
(8)	assault with a weapon	July 12, 2018	detained
(8)	utter death threat	July 12, 2018	detained

REASONS FOR DETENTION

14 Once the bail court was informed that a "joint submission" for release existed, the court immediately began its oral reasons for decision. The court referred to the applicant's prior criminal record, and the history of non-compliance with court orders concluding that, "[i]n all of those cases, the majority of those are failing to comply, not following the rules". The presiding justice of the peace then summarized the allegations relating to the July 12 charges before stating:

> I understand and abide by the direction of the higher courts and, in terms of *Antic*, it does indicate that bail should be granted, but I think there has to be room for this court to make a decision in the interests of the safety of the public.

> When I look at the record and the number of entries for failing to comply with court orders, the number of outstanding matters, which include[ed] failing to comply with court orders, and the number of assaults that are outstanding, including those for which you have been convicted, to release you without a proper plan of supervision I think would be a disservice to the public. Notwithstanding the Crown is recommending your release, this court is not going to release you based on your record, the outstanding matters, and the allegations before the court today. If there is no plan in place to supervise him, this court is going to order his detention on the secondary grounds.

15 Once these reasons were delivered, the court set a video remand date for the applicant's next court appearance.

THE BAIL REVIEW RECORD

16 In addition to the transcript of the s. 515 show cause hearing, the applicant has filed his own affidavit dated September 7, 2018. The affidavit in part deposes that:

> ...
>
> 6. If this Honourable Court does release me, I will be residing with my friend Gopal Khera in his residence on Homeside Gardens, in Mississauga.
> 7. At the time of my arrest, I was living with a friend at 42 Sledman Street, Mississauga for a couple [of] months. Prior to this I lived in a basement by myself at Homeside Gardens, Mississauga. Prior to this I lived with my girlfriend and daughter at 7296 Cambret Drive, Mississauga, for four years.
> 8. My most recent long-term employment was in 2017 when I worked for a temp agency. This employment ended when I was charged criminally. I recently got my forklift licence and if released, I intend to find a forklift job so I can work towards getting my own place.
> 9. I have two daughters. My first born is Raynuka Arjoon, born in 1998, who lives with my wife who I am separated from. I see Raynuka often. I have a good relationship with her mother, Kiranjeed Singh. My second daughter is Simranpreet Singh, born in 2005, who lives with my girlfriend, Ramanbeep Gill. I am also involved in Simranpreet's life.

No affidavit was filed by Gopal Khera.

THE GROUNDS FOR REVIEW

17 In seeking to have this court review the detention orders, the applicant does not seek to rely on changed circumstances. It is submitted that the justice of the peace erred:

> (1) in failing to afford the applicant "an opportunity to make submissions" thereby denying him "a full bail hearing"
>
> (2) in failing to adhere to the "ladder principle" in not providing reasons "why a lesser form of release was not acceptable" which did not require a surety
>
> (3) in failing to accept the joint submission for a "consent release" of the applicant on his own recognizance without a surety requirement given that the joint submission would not have brought the administration of justice into disrepute.

ANALYSIS

18 The parties before this court accept that:

(1) the onus was upon the applicant in the s. 515 show cause hearing to displace the s. 515(6) presumption of custody by demonstrating, on balance, entitlement to release from detention on a form of release as described in ss. 515(1)(2)

(2) the joint submission, often described as a "consent release", was that the applicant be released on a s. 515(2)(b) recognizance without sureties or other supervision

(3) the justice of the peace detained the applicant because no plan was advanced, by surety or John Howard Society or otherwise, to "supervise" the applicant in the community

(4) the onus is upon the applicant in this s. 520 bail review to demonstrate error on the part of the detaining justice beyond harmless error in terms of its impact upon the decision to detain on the secondary grounds described in s. 515(10)(b)

(5) should such error be established, the applicant must demonstrate, including on any relevant enhanced record, that he is releasable on a particular form of judicial interim release order.

19 The applicant is presumed innocent of the charges arising from the July 12, 2018 incident.

20 The s. 526(6)(a)(i) reverse onus provision concerns itself with the arrest of a person for an indictable offence while at large after being released in respect of another indictable offence on what remains an outstanding bail restraint. It is recognized that "s. 515(6) requires the accused to demonstrate that bail is justified, thereby denying the basic entitlement to be granted bail unless pre-trial detention is justified by the prosecution": *Regina v. Morales*, *[1992] 3 S.C.R. 711*, at paras. 57 to 64.

21 As noted at para. 41 of *Morales*, "the bail system does not function properly if individuals commit crimes while on bail". Accordingly, "if there is a substantial likelihood that the accused will engage in criminal activity pending trial, it furthers the objectives of the bail system to deny bail": *Morales*, at para. 41; *R. v. St-Cloud*, *[2015] 2 S.C.R. 328*, at para. 1.

22 "The decision concerning the interim release of an accused is often described as "discretionary"" in the sense of a judicial balancing of factors implicated by the s. 515(10) primary, secondary and tertiary grounds requiring that the court "make findings of fact and assess the weight of those findings" of fact and assess the weight of those findings" within the relevant legal context: *St-Cloud*, at paras. 113-114; *Antic*, at para. 42. "[T]he existence of a discretion" is "indispensable to the balancing of interests" -- this is inconsistent with a judicial officer carrying out a "rubber stamp role": *Baron v. Canada*, *[1993] 1 S.C.R. 416*, at para. 29.

23 In the *Antic* decision, Wagner J. (as he then was) stated at para. 68:

> Of course, it often happens that the Crown and the accused negotiate a plan of release and present it on consent. Consent release is an efficient method of achieving the release of an accused, and the principles and guidelines outlined above do not apply strictly to consent release plans. Although a justice or a judge should not routinely second-guess joint proposals by counsel, he or she does have the discretion to reject one. Joint proposals must be premised on the statutory criteria for detention and the legal framework for release.

24 Too often, as is evident from some transcripts of show cause hearings coming before this court, counsel conduct themselves as though a "consent" bail governs the release/detention result with all that is required of the court is a signature. At times, outright hostility is exhibited toward a presiding justice of the peace who dares to make inquiries, to require more information, or to reasonably challenge the soundness of the submission. This is fundamentally wrong.

25 Exercise of the judicial function of deciding the issue of bail requires an independent and impartial judicial determination. The show cause judge is not a rubber stamp. Put differently, consent or agreement of the detainee's counsel and the prosecution does not constitute a judicial adjudication. The court maintains a residual discretion to

discharge the important obligation of balancing liberty and public safety considerations: *Regina v. Hilderman*, [2005 ABCA 249](), at para. 17.

26 Undoubtedly in an era of active case management by courts, and sensitivity to contribution to the collaborative effort of all system participants to reduce delay, agreements between the parties that an arrestee is releasable furthers these objectives. That said, narration of a cryptic summary of the relevant criminal allegation, the tendering of a bald statement of consent, and dictation of conditions of release by counsel to the court for sign-off, without more, does not generally found a judicially-considered determination of bail. Indeed, this approach risks abdication of judicial responsibility.

27 While reference to application of the rule relating to joint submissions in sentencing hearings is not a perfect analogy to the bail context for reasons described below, I nevertheless adopt the following observations in *Regina v. Anthony-Cook*, [2016] 2 S.C.R. 204, at para. 54, as properly applicable to joint submissions in s. 515 bail hearings, insofar as a show cause court undoubtedly wanting to know the circumstances leading to the joint submission:

> Counsel should, of course, provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge. As trial judges are obliged to depart only rarely from joint submissions, there is a "corollary obligation upon counsel" to ensure that they "amply justify their position on the facts of the case as presented in open court" (Martin Committee Report, at p. 329). Sentencing -- including sentencing based on a joint submission -- cannot be done in the dark. The Crown and the defence must "provide the trial judge not only with the proposed sentence, but with a full description of the facts relevant to the offender and the offence", in order to give the judge "a proper basis upon which to determine whether [the joint submission] should be accepted" (*DeSousa*, [2012] O.J. No. 1709 at para. 15; see also *Sinclair*, [2004] M.J. No. 144 at para. 14).

28 Stopping for a moment, what happened in the present case? Counsel indicated agreement for release on a recognizance with conditions and no surety, relating to an individual the court knew to be subject to a probation order requiring that he keep the peace and be of good behaviour when the July 12, 2018 crimes were alleged to have been committed, to have an extensive prior criminal record with convictions in every year from 2005 to 2017, and to be the subject of 7 outstanding bail dispositions. A context for the newly laid assault charge was a criminal record of 11 assault convictions and existing bail releases relating to 4 outstanding assault charges.

29 On any reasonable view of the matter, the information provided to the court fell woefully short of that necessary for a judicial determination of the propriety of the joint submission. This was a rush to bail only hours after arrest without provision of the necessary foundation for the meaningful exercise of a judicial discretion. These circumstances required more from counsel and the court. The court, effectively left in the dark, was invited to rubberstamp the proffered joint submission. How old was the applicant? Was he a Canadian citizen? Did he have a partner and children? Was he employed? What was his education level? Did the applicant have assets or roots in the community? Was he homeless and of no-fixed address or did he have a residence to go to? Was there alcohol or documented anger management problems or evidence of mental illness? What were relevant conditions of the outstanding release documents? Were reasons provided by the John Howard Society for declining to be involved in the case? How, given the applicant's history, could release on his own recognizance, without third-party supervision, realistically satisfy secondary ground concerns?

30 Unlike the degree to which there may exist a "considered agreement of counsel" in sentencing hearings (*Anthony-Cook*, at paras. 44, 63), the applicant was in a busy bail court in perhaps Canada's busiest courthouse only hours after arrest with the limited assistance of duty counsel -- a lawyer the applicant had not met before the brief bail hearing was underway.

31 While it is not strictly necessary to decide in this case, I would be cautious about applying the test for departure from a joint submission in sentencing applied by some to the bail context (whether "the proposed sentence would bring the administration of justice into disrepute" or would be "otherwise contrary to the public interest"). In a

sentencing hearing, the court has an extensive record with trial evidence or facts narrated and accepted or proven in a guilty plea proceeding, a presentence report and/or defence evidence and submissions, and jurisprudential guidelines and relevant precedent respecting range of sentence. The show cause hearing record is ordinarily sparse. A joint submission in a bail hearing is an important consideration for the exercise of judicial discretion but rejection of the submission can occur on a principled and reasonable application of the law to the facts without the court asking itself whether the joint submission is unhinged or whether it would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the bail system.

32 I do agree, however, that when the judicial officer presiding at a show cause hearing is inclined to reject a consent bail recommendation, the court should alert the parties so that counsel can decide what further information, explanation, evidence or submissions might meet the expressed concerns of the court. This may necessitate an adjournment before the court provides a final decision.

33 This did not happen in the present case. The justice of the peace provided no notice or warning that he would detain on the s. 515(10)(b) secondary ground for want of a supervision plan. Counsel were given no opportunity to tender suggested conditions of release, to explain how those conditions would be adequate to a tolerable level of public safety protection, or to secure further information or evidence, or for the applicant to make efforts to secure a surety or reinterview by the John Howard Society of Peel.

34 In light of the error of the show cause justice acting upon a record inadequate to a judicial exercise of discretion under s. 515 of the *Code*, and, the failure to provide notice to the parties of its real concerns with the consent bail submission before deciding the issue of bail, this court must review the matter without deference to the original bail determination. Mr. Sarantis acknowledged these errors on the part of the show cause court.

35 Mr. Mencel submitted that release of the applicant upon his own recognizance is an appropriate remedy equal to meeting any secondary ground concerns particularly in light of the Crown's position, the applicant's affidavit indicating he will have a place to live upon release, and the fact that by the point of the applicant's trial in January 2019 he will have served about 6 months in custody said to clearly outstrip any sentence properly imposable should he be convicted.

36 While Mr. Sarantis does not seek to resile from the Crown position that the applicant is releasable on his own recognizance, counsel submitted that the rationale of the show cause justice for detention cannot be said to be patently unreasonable considering the applicant's prior criminal record and successive outstanding bail releases as of July 12, 2018.

37 There is apparent strength to the prosecution case in the context of available evidence from the complainant and the security guard.

38 While this court now has some biographical information about the applicant which was not in the record of the show cause hearing, nothing is known of a number of relevant matters including any underlying causes of his pattern of assaultive behaviour, the presence or absence of an alcohol problem, the existence of mental illness, the depth and length of the friendship with Khera with whom the applicant purposes to reside if released, etc.

39 There is no doubt that greater use of undertakings and own-recognizance releases is justified -- more than has historically been the case. This is not such a case. While a prior criminal record, poverty, untreated addiction or mental illness are not themselves reasons for detention, manifest risk to the public is written all over this case. The prior record of violence, and pattern of re-arrest in 2017 and 2018 while subject to bail releases, evidences a profile of incorrigibility. There is a substantial likelihood of the commission of further criminal offences threatening public safety should the applicant be released. On the record here, the applicant has failed to discharge the onus of demonstrating that he can be released on any order within s. 515(2) which would provide a tolerable level of protection to the community.

40 The fact that the presumptively innocent applicant has now been in custody for 60 days and is 4 months from

trial does not amount to a new or changed circumstance. While delay-to-trial can be a relevant factor in a judicial interim release hearing, this measure of presentence custody, even with the prospect of acquittal, cannot overcome the very real public safety concerns here. I note that in 2015 the applicant served the equivalent of a 6-month term of imprisonment for assault with a weapon.

41 Remaining sensitive to the distinction between being releasable from detention on assessment of the s. 515(10) criteria, and, the precise contours of a particular release plan (*R. v. Wynter*, *2015 ONSC 2426*), at this time, on the record here, the applicant is not releasable.

CONCLUSION

42 The application is dismissed without prejudice to the applicant reapplying for review after 30 days pursuant to s. 520(8) should there be a material change in circumstances.

43 Pursuant to s. 520(12), the applicant is ordered not to communicate, directly or indirectly, with Rajvinder Singh.

C. HILL J.

End of Document

TAB 6

R. v. Brissett

Ontario Judgments

Ontario Superior Court of Justice

M.A. Code J.

Heard: January 10, 2017.

Judgment: January 20, 2017.

Court File No.: CR-17-90000041-0000

[2017] O.J. No. 298 | 2017 ONSC 401

Between Her Majesty the Queen, and Everald Brissett, Courtney Benjamin and Gary Morris

(55 paras.)

Counsel

Eric Gilman and *Kiran Gill*, counsel for the Crown Respondent.

Chris Morris, counsel for the Applicant Brissett.

Susan Pennypacker, counsel for the Applicant Benjamin.

Reid Rusonik, counsel for the co-accused Morris.

REASONS FOR JUDGMENT:

SECTION 11(B) *CHARTER* APPLICATION

M.A. CODE J.

A. INTRODUCTION

1 The three accused, Everald Brissett, Courtney Benjamin and Gary Morris (hereinafter, Brissett, Benjamin and Morris), are charged in a five count Indictment with possession of cocaine for the purpose of trafficking and possession of proceeds of crime. They elected trial by judge alone and the trial is presently proceeding before me.

2 At the beginning of the trial, on January 9, 2017, two of the accused (Brissett and Benjamin) brought an Application alleging a violation of s. 11(b) of the *Charter of Rights*. That provision guarantees the right to trial within a reasonable time. The third accused (Morris) did not join in the Application. I heard the s. 11(b) Application on the next day, January 10, 2017, on short notice. A substantial documentary Application Record was filed by the parties. There was no *viva voce* evidence. At the end of a full day of submissions, I dismissed the Application with Reasons to follow. These are my Reasons.

B. OVERVIEW AND HISTORY OF THE PROCEEDINGS

3 In my brief oral Reasons for dismissing the Application, I held that the total delay in the case was 36 months. The Information charging the accused was laid on January 25, 2014 and it is anticipated that the trial will conclude by no later than January 27, 2017. Accordingly, the presumptive 30 month ceiling for s. 11(b) delay, recently established in *R. v. Jordan* *(2016), 335 C.C.C. (3d) 403* (S.C.C.), will have been exceeded.

4 I also held that there was a certain amount of "defence delay," as that term is defined in *Jordan*, which would reduce the relevant period of delay to something close to the 30 month ceiling. In addition, I held that there was a further period of delay that could be characterized as an "exceptional" discrete event, in the *Jordan* sense. This would further reduce the relevant period of delay to something below the 30 month ceiling. Finally, I held that the case would not have been in s. 11(b) *Charter* jeopardy under the pre-existing framework for analysis, set out in *R. v. Morin* *(1992), 71 C.C.C. (3d) 1* (S.C.C.). As this is a transitional case, where most of the delay occurred prior to the release of *Jordan* on July 8, 2016, I held that the "transitional exceptional circumstance" discussed in *Jordan*, was also applicable. For all these reasons, I dismissed the s. 11(b) Application.

5 It can be seen that the issues on the present Application require some analysis of the history of the proceedings, in order to determine whether there were any periods of "defence delay," whether there were any discrete events that amount to "exceptional circumstances," and whether there was "reasonable reliance on the law as it previously existed" and, therefore, the "transitional exceptional circumstance" applies. All of these terms are explained in *Jordan*.

6 I will briefly set out the history of the proceedings in summary form and address the less contentious periods of delay. The more contentious periods of delay will then be analyzed in greater detail under three subject headings: "defence delay"; discrete events that amount to "exceptional circumstances"; and the "transitional exceptional circumstance."

7 The history of the proceedings can be condensed into six major blocks of time. The broader context for these six time periods is the factual circumstances in this case that the Crown seeks to prove, which are serious and involve some complexity. The police seized a total of about 24 kilograms of cocaine, at three different but connected locations. The cocaine was packaged in large amounts, generally in one kilo packages, and it was associated with suitcases and with industrial buckets of cutting agent. In other words, the accused are alleged to be high-level cocaine traffickers, situated close to the importers. The police investigation, including arrests and search warrants, depended on a confidential informant, on physical surveillance evidence, and on an oral statement allegedly made by one accused at the time of arrest. There were a number of co-accused, as five persons were initially arrested and charged. In other words, the case is serious, it raised some potentially complex s. 8, s. 9, and s. 10 *Charter* issues that had to be explored, and it required considerable case management skills to find relatively large blocks of court time and to schedule them into the calendars of six lawyers for the Crown and the defence.

8 The six periods of delay in the proceedings are as follows:

* January 25, 2014 to May 2, 2014. This initial period, from the laying of the charges until the judicial pre-trial in the Ontario Court of Justice, was three months and one week. The parties agree that under the old *Morin* framework, it would have been called "the intake period" and it would have carried neutral weight in the s. 11(b) balancing as "inherent delay." It is apparent to me that all parties worked efficiently and effectively during this period and they expedited the case. Bail hearings were held for the five accused, they were all released on bail, counsel were retained to some degree for all accused, disclosure was expedited by the Crown and was completed, the need for a Crown pre-trial was waived, and the judicial pre-trial was scheduled into the busy calendars of six lawyers. In short, this period was a model of fast and effective lawyering on all sides.
* May 2, 2014 to March 9, 2015. This period of ten months and one week was the time between the judicial pre-trial and the first of three consecutive days scheduled for the preliminary inquiry. The

earliest dates available to the Court for a three day preliminary inquiry were about two weeks prior to the scheduled dates and the hearing was delayed for this short period because of one lawyer's calendar. The five defence lawyers had earlier dates available in July 2014, which the Court could not accommodate. Finally, one lawyer was not yet fully retained but agreed to set a date "with or without counsel." In all these circumstances, the parties agree that there were almost two weeks of "defence delay," under the new *Jordan* framework, because of counsel's brief unavailability. Under the old *Morin* framework, there were at least two months of inherent delay, to allow counsel time in May and June of 2014 to clear their calendars and prepare, and there were the previously noted two weeks of defence delay. Accordingly, there were just under eight months of systemic delay, which is below the bottom end of the *Morin* guideline for systemic delay. See: *R. v. Morin*, *supra* at pp. 16-21 and 26-7; *R. v. Tran* (2012), 288 C.C.C. (3d) 177 at para. 32 (Ont. C.A.); *R. v. Lahiry* (2011), 283 C.C.C. (3d) 525 at paras. 25-37 (Ont. S.C.J.).

* March 11, 2015 to September 18, 2015. This is one of the more contentious periods of delay and the parties do not agree as to how it should be characterized, either under *Jordan* or *Morin*. I will discuss it in greater detail below, under the heading "exceptional circumstances." In brief summary, this period of six months and one week is the time that it took to complete the evidence at the preliminary inquiry. The parties had agreed, at the judicial pre-trial, that the preliminary inquiry could be completed in three days, and so three consecutive days in early March 2015 were scheduled. In my view, this was an accurate estimate of the time required for the contemplated hearing. For a variety of reasons, explained below, the preliminary inquiry expanded and three more days were required to complete the evidence (July 13 and 22 and September 18, 2015 became the three added dates). At most, the Applicants concede that there were about two weeks of "defence delay" in this period, because of counsel's unavailability. The Crown alleges a lengthier period of "defence delay." In my view, there were a number of contributing reasons for this period of delay, making it somewhat more difficult to characterize, as will be explained below.

* September 18, 2015 to October 6, 2015. This three week period is not contentious. It was the time needed to schedule closing submissions and the time needed by the preliminary inquiry judge to draft his Reasons, committing the final two accused for trial. The Crown had previously stayed the charges against one accused and the defence had previously conceded committal in the case of two other accused. The Court and the parties moved expeditiously to complete these final steps in the Ontario Court of Justice. It is agreed that this period would have been regarded as neutral or inherent delay under the old *Morin* framework.

* October 6, 2015 to December 9, 2015. This two month period is not contentious. It is the time between committal in the Ontario Court of Justice and the judicial pre-trial (JPT) in the Superior Court of Justice. The Crown drafted the Indictment quickly, the parties appeared in Assignment Court within three weeks of committal on October 28, 2015, and a JPT was scheduled into the calendars of five busy lawyers within five weeks. The parties agree that this time would have been characterized as neutral or inherent delay under the old *Morin* framework. See: *R. v. Khan* (2011), 270 C.C.C. (3d) 1 at paras. 44-55 (Ont. C.A.); *R. v. Nguyen* (2013), 2 C.R. (7th) 70 at paras. 53-60 (Ont. C.A.).

* December 9, 2015 to January 9, 2017. This final period of delay is contentious. It is the time from the JPT to the start of the trial. I will analyze these 13 months of delay below in greater detail, under the headings "defence delay" and "transitional exceptional circumstance." In brief summary, the parties attended at the Trial Coordinator's Office after the JPT and were advised that the earliest available date for a 17 day judge and jury trial, which is what was anticipated, would be in January 2017. Faced with this significant delay, the Crown proactively and responsibly asked the Trial Coordinator to free up earlier "in custody" trial dates, given the seriousness of the present case, even though all of the accused were out on bail. The Trial Coordinator then offered earlier "in custody" trial dates, in September 2016. All counsel were available on these earlier dates except for Mr. Rusonik, counsel for the accused Morris, who was apparently not available until January 2017. As a result, Clark J., who was presiding in Practice Court, set January 9, 2017 for trial. The

Crown submits that this final four months of delay, from September 2016 to January 2017, is "defence delay" within the *Jordan* framework. He also notes that there was no mention of s. 11(b) of the *Charter*, either in Practice Court or at the JPT. In fact, the Crown expressly stated on the record in Practice Court that "no 11(b) issues were raised at the judicial pre-trial." In addition, there was no suggestion that the three co-accused who were available on the earlier trial dates would seek severance from Morris, whose counsel was unavailable. What further complicates this final 13 month period of delay is that only Mr. Rusonik was properly retained and on the record. The other three accused wanted to retain their former counsel, who had acted at the preliminary inquiry, and these counsel all attended at the JPT and in Practice Court and provided their earliest available dates to the Court. However, counsel were not willing to go on the record and the trial date was set "with or without counsel." After the trial date was set on this basis, the Crown asked that the case be remanded until September 12, 2016 "for the purpose of confirming retainers." On that date, and on a further remand to October 12, 2016, these three accused (who included the two Applicants Brissett and Benjamin) advised the Court that they still "have not completed [a] retainer yet" and that their counsel were still "not prepared to go on the record yet." It appears that the retainers for the two Applicants were not completed until late October or early November 2016, that is, about two months before the trial date. At this point, their now retained counsel began preparing and filing *Charter* Applications, including the present s. 11(b) Application. These Applications were all filed late, in non-compliance with the relevant *Criminal Proceedings Rules* and *Practice Direction*. The Crown stayed the proceedings against the one other accused who had not yet retained counsel at some point in this history. As a result of these developments, the three accused presently on trial all had counsel on the record by early November 2016. One final point to note about this last 13 month period of delay is that the lawyers who had not yet been retained and who had not gone on the record, but who appeared in Practice Court on December 9, 2015, stated that their earliest available dates for trial were in April 2016. If this assertion is taken into consideration under the old *Morin* framework, it would mean that there were four months of neutral or inherent delay, to allow counsel time to prepare and make their calendars available. Thereafter, the only period of systemic delay would have been the five months from April until September 2016 when the Court offered its first available trial dates. This period of delay is below the six to eight month guideline for systemic delay set out in *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at 490 (S.C.C.) and affirmed in *R. v. Morin*, *supra* at pp. 19-21.

C. ANALYSIS

9 As explained above, I ruled that the total delay of 36 months in this case was reduced by a period of "defence delay" and by an "exceptional" discrete event. I also held that the "transitional exceptional circumstance" in *Jordan* applied in this case. I will analyze these three issues in the next sections of these Reasons.

(i) "Delay attributable to the defence"

10 The new *Jordan* framework for analysis of s. 11(b) delay requires that "delay attributable to the defence must be subtracted," in order to ensure that the defence does not "benefit from its own delay-causing conduct." See: *R. v. Jordan*, *supra* at paras. 60-66; *R. v. Gandhi* (2016), [2016] O.J. No. 4638, 133 W.C.B. (2d) 29 at paras. 17-24 (Ont. S.C.J.).

11 One form of "defence delay" that has consistently been recognized, both under the new *Jordan* framework and under the old *Morin* framework, is where counsel is unavailable on earlier dates offered by the court. As the majority put it in *R. v. Jordan*, *supra* at para. 64, "The period of delay resulting from that unavailability will be attributed to the defence." Also see: *R. v. Williamson* (2016), 336 C.C.C. (3d) 1 at paras. 21-2 (S.C.C.); *R. v. Gandhi*, *supra* at paras. 23 and 40-1.

12 The Applicants concede that one or more defence counsel was unavailable, when earlier dates were offered for

various proceedings in the Ontario Court of Justice, on three separate occasions. These periods of delay were all relatively minor and they total just under one month.

13 The more significant period of delay, where one of the defence counsel was unavailable, was the four months from September 2016 to January 2017, when the present trial date was being set in this Court. As summarized above, this appearance took place on December 9, 2015 and the Court offered "in custody" dates in September 2016, in order to expedite the trial, but counsel for the accused Morris was not available on these earlier dates. The Applicants made some argument before me concerning the adequacy of the factual record on this point, and concerning the adequacy of the Crown's and the Court's efforts to find earlier trial dates. For example, it was suggested that some other counsel from Mr. Rusonik's firm may have been available on the earlier dates and inquiries to this effect should have been made. However, the transcript of the December 9, 2015 appearance in Practice Court before Clark J. is clear, that Mr. Rusonik was not available on the earlier September 2016 dates. The trial verification form that was handed to Clark J. in Practice Court is also clear that Mr. Rusonik's "first available date" was "Jan. 2017." Mr. Rusonik had an agent appear for him in Practice Court, and an associate from his law firm was also present in Practice Court. Nothing was said to contradict or qualify these facts. Indeed, the Applicants' factum appears to concede (at paras. 58 and 68) that this "additional four months of delay were caused by the unavailability of counsel." Finally, no evidence has been filed on the s. 11(b) Application, suggesting that the accused Morris could have retained or wished to retain some counsel other than Mr. Rusonik who would have been available on the earlier trial dates. As previously noted, Mr. Rusonik continues to act for Morris at the present trial and he has not joined in the s. 11(b) Application.

14 For all these reasons, I am satisfied that there were four months of "defence delay" in the *Jordan* sense of that term, from September 2016 to January 2017. When added to the approximately one month of "defence delay" in the Ontario Court of Justice that is conceded by the Applicants, there was total "defence delay" of five months. This reduces the period of relevant delay from 36 months to 31 months, which remains above the 30 month presumptive ceiling in *Jordan*.

15 Before leaving this topic, I should note that the Crown submitted that there was a further period of "defence delay," when the preliminary inquiry expanded from three days to six days. I will address this period of delay in the next section of these Reasons, under the heading "exceptional circumstances."

(ii) Discrete events that amount to "exceptional circumstances"

16 In addition to "defence delay," the new *Jordan* framework for s. 11(b) analysis provides that a second category of delay should also be deducted from the total delay. This second category is referred to as a "discrete event" that amounts to an "exceptional circumstance."

17 There has been little analysis to date, in the post-*Jordan* jurisprudence, about this second category of deductible delay. However, in *Jordan* itself, there is a relatively thorough discussion of the topic, as follows (*R. v. Jordan*, *supra* at paras. 69-75):

> Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.
>
> It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful -- rather, just that it took reasonable steps in an attempt to avoid the delay.

> It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(*b*) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.
>
> Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.
>
> Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected -- even where the parties have made a good faith effort to establish realistic time estimates -- then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.
>
> Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.
>
> The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, *2016 SCC 26* (S.C.C.)). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e., it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events). [Italics in the original; underlining added.]

18 In my view, at least part of the six month and one week period of delay that occurred in the Ontario Court of Justice, when the evidence to be called at the preliminary inquiry expanded from three days to six days, satisfies the above definition of "exceptional circumstances." As noted previously, this period of delay is complex because there were a number of contributing factors. However, I am satisfied that at least some part of the delay was caused by an unforeseen event and that the Crown and the Court could not remedy that part of the delay. In other words, it was inevitable that some delay would flow from the unforeseen event.

19 There are two important factual circumstances that lead me to the above conclusion. First, it is clear from the record that the three day preliminary inquiry, from March 9 to 11, 2015, was scheduled on the basis that the Crown needed to call seven police witnesses in order to support committals, and that the defence wished to hear from one further police witness for discovery purposes. At some point during the preliminary inquiry, the defence abandoned its need to discover the one witness. As a result, it became a seven witness preliminary inquiry where all seven witnesses were required by the Crown to support committals. I am satisfied that this seven witness preliminary inquiry could have been completed in the three days scheduled.

20 The second important fact is that counsel for the Applicant Brissett first advised the Crown and the Court at the beginning of the preliminary inquiry (on March 9, 2015) that he was considering having two more police witnesses produced for discovery purposes. He stated, "I'm still reviewing my position on those two." He did not finalize his position, and insist that the two additional discovery witnesses be produced, until after the seven Crown witnesses had testified and after the three scheduled days had already been completed (on July 13, 2015).

21 Based on these two circumstances alone, some further delay was inevitable. The request to call the two additional police witnesses for discovery purposes was unforeseen, and the fact that the request did not crystallize until after completion of the three scheduled days, meant that the Crown and the Court could not remedy the problem until after some further delay had already occurred.

22 What complicates the analysis of this period of delay is that the anticipated seven witness preliminary inquiry was not completed in the three scheduled days, from March 9 to 11, 2015. Five police witnesses testified but the two final police witnesses, who were both brief, did not testify during these three scheduled days. The Applicants are critical of the way in which the preliminary inquiry was conducted, submitting that recesses were lengthy, that court sometimes started late, and that court sometimes adjourned early. There appears to be some basis for this criticism. In particular, the second and third days of the preliminary inquiry (on March 10 and 11, 2015) appeared to be short days where the court started at 11:00 a.m. on one day and adjourned early at 4:00 p.m. on both days. The two remaining Crown witnesses were both brief and they could have been accommodated, if the Court sat full days. Both witnesses were present at court and all counsel were ready to proceed.

23 In spite of this unfortunate contributing factor, I am of the view that some portion of the further delay would not have been remedied by a more appropriate sitting schedule during the first three days of the preliminary inquiry. As noted above, counsel for the Applicant Brissett had not yet committed to whether he, in fact, needed to hear from the two additional discovery witnesses. Furthermore, sitting three full court days from March 9 to 11, 2015 would simply have meant that the seven witness preliminary inquiry that was contemplated would have been completed. There would not have been time for the two additional discovery witnesses and so additional court time was still required.

24 A further complicating factor is that once it became apparent that more time was required to complete the preliminary inquiry, the availability of the two additional discovery witnesses, the availability of the five lawyers, and the availability of court time all became contributing factors. The last of these three contributing factors played only a minor role as the record shows that the Trial Coordinator offered continuation dates that were timely. For example, three consecutive days at the end of April 2015 were offered but two defence counsel and Crown counsel were all unavailable. Had the preliminary inquiry resumed on these April dates, it would have been completed with only six weeks of delay caused by the need to schedule additional dates. Three consecutive days were also offered in early June 2015 but one defence counsel was not available. As a result of these scheduling issues, the first dates offered for continuation of the preliminary inquiry, where all counsel were available, were July 13, 14 and 22, 2015.

25 On July 13, 2015, which was now the fourth day of the preliminary inquiry, the Crown called the last two of the seven scheduled Crown witnesses. They were both brief, occupying only seventeen pages and nine pages of transcript. It was at this point that counsel for the Applicant Benjamin consented to committal. Counsel for the co-accused Morris had previously consented to committal. Counsel for the Applicant Brissett advised the Court he had now decided that he did need to hear from the two additional discovery witnesses. These two officers were the most senior officers in the case and, by this point in the year, their schedules had been heavily booked with relatively senior Pan Am Games responsibilities. As counsel for the Applicant Brissett put it:

> I appreciate Your Honour, as an officer of the court, that police officers may have other important duties than this particular case, particularly at this time with the events that are on point in the City of Toronto, but I do really need to hear from these two officers ... It's not crucial for the Crown's case but there are a couple of important points that I'd like to explore.

26 The intervention of the Pan Am Games in Toronto, in the summer of 2015, became another contributing cause of delay. On the next day scheduled for the preliminary inquiry, July 14, 2015, one of these two officers needed for discovery was testifying in another court and the other officer was assigned to Pan Am Games duties. As a result, this next date was cancelled. The parties agreed that both officers would not be lengthy witnesses and that they could both testify on the afternoon of the next scheduled date, July 22, 2015. This became the fifth day of the preliminary inquiry. One of the two officers completed his testimony on this date. The other officer was present at

court but was unable to testify because the Court had become engaged in another preliminary inquiry on that same day and had little time left for the continuation of this case. Finding yet another date proved difficult. The Crown advised that the officers have "been working double shifts, 16 hour days, for the Pan Am Games, and they've been forced to put all their leave over to August." The one officer who had still not testified had two weeks in August when he was available to attend court but counsel for the Applicant Brissett was now involved in a murder preliminary inquiry and had only two days available in his calendar in August.

27 In the result, September 18, 2015 was scheduled and it became the sixth day of the preliminary inquiry. The last officer's testimony was taken on this date, bringing the evidence on the preliminary inquiry to a conclusion.

28 It should be noted that at one point, as these delays started to mount, counsel for the Applicant Brissett stated that one "option might be for me to examine those officers by way of discovery." This was a sensible suggestion and, unfortunately, it was not pursued by anyone. Once the Crown's committal evidence was complete, and the only remaining witnesses were defence discoveries in relation to *Charter* issues, there was no need to schedule court time. The witnesses could have been discovered out of court. However, I was told by counsel that there are still some institutional problems in setting up witness discoveries out of court in Toronto.

29 The above history of this six month and one week period of delay brings to mind what Doherty J.A. stated, over 20 years ago, in *R. v. Allen* (1996), 110 C.C.C. (3d) 331 at 348 (Ont. C.A.):

> No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case, but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.

Also see: *R. v. Lahiry*, *supra* at paras. 62-70.

30 In my view, there were two dominant or fundamental causes of this six month and one week period of delay. The other contributing causes were minor and made no significant difference. I would apportion these two main causes of delay as follows, bearing in mind the admonition in *R. v. Jordan*, *supra* at para. 75, that the Crown and the Court must "mitigate" the effects of a "discrete exceptional circumstance" and that "it may not be appropriate to deduct the entire period of delay occasioned by discrete exceptional events":

* The four month period of delay, from March 11 to July 13, 2015, should be attributed to an "exceptional circumstance," namely, the unanticipated need to find additional court dates to accommodate the Applicant Brissett's discovery of two additional police witnesses. The majority in *R. v. Jordan*, *supra* at para. 73, anticipated this kind of "unavoidable" delay and held that it could "amount to an exceptional circumstance." I have already explained above (at paras. 17-21) why it meets the *Jordan* definition for an "exceptional circumstance," on the facts of this particular case. To similar effect, see: *R. v. Live Nation Canada Inc. et al.*, 2016 ONCJ 735 at paras. 18-27 per Nakatsuru J.; *R. v. Dos Santos*, [2016] O.J. No. 6628 at paras. 14 and 27 per Greene J.;
* The remainder of the delay, from July 13 to September 18, 2015, should be attributed to the Court. This two month period of delay would have been completely unnecessary if the Court had adopted a more appropriate sitting schedule. The seven anticipated witnesses could all have testified on the three scheduled days, from March 9 to 11, 2015, and the two additional discovery witnesses could both have testified on the next scheduled date, July 13, 2015. In my view, it is not acceptable to adjourn court at 4:00 p.m. on two consecutive days when brief witnesses have been waiting out in the court hallways and are available to testify. The approach taken by the Court during this period of delay is emblematic of the "culture of complacency" described in *R. v. Jordan*, *supra*. It is also inconsistent with the recommendations made some 30 years ago by a highly regarded judge, to the effect that the normal court sitting day should be five hours. See: The Honourable T.G. Zuber, *Report of the Ontario Courts Inquiry*, Queen's Printer for Ontario, 1987, at pp. 169-173.

31 As I have found that four months of delay were due to an "exceptional circumstance," the new *Jordan* framework requires that it be deducted from the 31 month period of relevant delay. As a result, the total delay in this case is 27 months. The two months of delay caused by the Court should obviously not be deducted and it remains part of the 27 month period of relevant delay.

32 Before leaving this issue, I should briefly address the Crown's submission that some part of this period of preliminary inquiry delay should be treated as "defence delay" under the new *Jordan* framework, because it was caused by the unanticipated and untimely defence request to discover two additional witnesses. The majority in *R. v. Jordan*, *supra* at paras. 65-6, made it clear that "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay ... defence applications and requests that are not frivolous will also generally not count against the defence ... Defence actions legitimately taken to respond to the charges do not constitute defence delay."

33 I am satisfied that the Applicant Brissett's request to discover two additional police officers was entirely legitimate. The case raised a number of *Charter* issues that counsel was entitled to explore at a preliminary inquiry. See: *R. v. Cover* (1988), 44 C.C.C. (3d) 34 (Ont. H.C.J.); *R. v. Dawson* (1988), 123 C.C.C. (3d) 385 (Ont. C.A.). It would have been better if counsel had raised the issue in a more timely way and if he had pursued his proposal to discover the two witnesses out of court. However, there is no basis for any suggestion that the defence request to discover the two witnesses was other than *bona fide*. The record is clear that Mr. Morris, counsel for the Applicant Brissett, is a serious and responsible lawyer who has tried to expedite the case. In my view, he was simply doing his duty to his client when he requested two further discoveries.

34 For all these reasons, none of the delay at the preliminary inquiry should be characterized as "defence delay" except for the approximately one month conceded by the Applicants, due to counsel's brief unavailability on three occasions.

(iii) The "transitional exceptional circumstance"

35 For the reasons set out above, the relevant delay in this case is 27 months, which is below the 30 month presumptive ceiling. The majority in *R. v. Jordan*, *supra* at paras. 48 and 82-83 held that, in these circumstances, s. 11(b) violations should be "rare, and limited to clear cases." In particular, the burden is on the defence to show that the case "took markedly longer than it reasonably should have." I will return to this issue at the end of these Reasons where I conclude that the defence cannot satisfy this burden on the facts of this case.

36 However, the premise for this final shift in the burden is that the relevant period of delay is below 30 months. I wish to make it clear that, if the above analysis in the two previous sections of these Reasons is in error, and if the total period of relevant delay somehow remains above the 30 month presumptive ceiling, I am satisfied that the "transitional exceptional circumstance" described in *R. v. Jordan*, *supra* at paras. 92-104, applies in this case.

37 Once again, there is little post-*Jordan* jurisprudence to date analyzing the "transitional exceptional circumstance." The majority in *R. v. Jordan*, *supra* at paras. 96-7 and 103, described it as follows:

> First, for cases in which the delay *exceeds* the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if

the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.

Moreover, the delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent, and notorious institutional delays should account for this reality, as Crown counsel's behaviour is constrained by systemic delay issues. Parliament, the legislatures, and Crown counsel need time to respond to this decision, and stays of proceedings cannot be granted *en masse* simply because problems with institutional delay currently exist. As we have said, the administration of justice cannot countenance a recurrence of *Askov*. This transitional exceptional circumstance recognizes that change takes time, and institutional delay -- even if it is significant -- will not automatically result in a stay of proceedings.

...

We echo Lamer J.'s remarks. For cases already in the system, the presumptive ceiling still applies; however, "the behaviour of the accused and the authorities" -- which is an important consideration in the new framework -- "must be evaluated in its proper context" (*Mills*, *[1986] 1 S.C.R. 863* at p. 948). The reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances. Reliance on the law as it then stood is one such circumstance. [Italics in the original; underlining added.]

Also see: *R. v. Williamson*, *supra* at paras. 24-30; *R. v. Coulter*, *2016 ONCA 704* at paras. 88-9 and 105-7; *R. v. Manasseri and Kenny*, *2016 ONCA 703* at paras. 318-323 and 361-5.

38 For the following reasons, I am satisfied that the above description of the "transitional exceptional circumstance" applies to this case:

* First, and most importantly, this case was not in jeopardy of violating s. 11(b) under the old *Morin* framework. As explained above, in Section B of these Reasons, there was a total delay of just over 20 months in the Ontario Court of Justice (from January 25, 2014 to October 6, 2015). The Applicants concede that approximately six months of this period would have been characterized as "inherent delay" under the old *Morin* framework. In addition, the four months of delay caused by the unanticipated need to schedule additional dates for the preliminary inquiry (which I have characterized as an "exceptional circumstance" under the new *Jordan* framework) would have been treated as "inherent delay" under the *Morin* framework because the Court offered timely continuation dates and counsel were simply not available. See: *R. v. Allen*, *supra* at pp. 347-351; *R. v. Lahiry*, *supra* at paras. 62-70. In the result, the only periods of unjustified delay in the Ontario Court of Justice were just under eight months of systemic delay as well as two months of delay caused by the Court adopting an inappropriate sitting schedule. This total period of unjustified delay (just under 10 months) was within the eight to ten month *Morin* guideline for systemic delay in the Ontario Court of Justice;
* Second, and to similar effect, the total delay in the Superior Court of Justice was 15 months (from October 6, 2015 to January 9, 2017). The Applicants concede that six months of this period would have been characterized as "inherent delay" under the old *Morin* framework. In addition, the four months of delay caused by counsel for Morris being unavailable on earlier dates offered by the Court would have been treated as "inherent delay," given that systemic delay does not run until "the parties are ready for trial." See: *R. v. Morin*, *supra* at pp. 16-21 and 26-7; *R. v. Tran*, *supra* at para. 32; *R. v. Lahiry*, *supra* at paras. 25-37. On the most generous reading of the prior law, there were five months of systemic delay in the Superior Court of Justice, which is under the six to eight month *Askov* guideline for Superior Court systemic delay;
* Third, I am of the view that the above analysis is overly generous and that, in fact, none of the delay in this Court would have been characterized as systemic delay under the old *Morin* framework. The relevant facts, in this regard, are as follows: the two Applicants had not retained

counsel when the trial date was set in this Court; they clearly wished to retain counsel and they proceeded to make efforts to perfect counsel's retainers; finally, they needed the approximately eleven months from early December 2015 to early November 2016 in order to complete counsel's retainers and get counsel in a position to begin trial preparation. In these circumstances, all of this delay would have been characterized as necessary, beneficial, and inherent delay, as the Applicants were not "ready for trial." See: *R. v. Lahiry*, *supra* at paras. 46 and 60; *R. v. Faulkner*, *2013 ONSC 2373* at paras. 13-19; *R. v. Khan and Muellenbach*, *2014 ONSC 5664* at paras. 58-61. Furthermore, once counsel were retained and on the record, they began preparing for trial by drafting and filing their *Charter* Applications. In late December 2016, they were still preparing and filing supporting materials on the s. 11(b) Application, as well as a s. 8, s. 9 and s. 10 *Charter* Application. These steps were all out of time and they left the Crown with little or no time to respond to the *Charter* Applications. In other words, the Applicants and the Crown needed all of the time in November and December of 2016 to prepare for trial. I infer that no one was ready for trial until January 9, 2017, which is when the trial was scheduled to commence. Under the *Morin* framework, this would all have been characterized as "inherent delay" and there would have been no systemic delay. See: *R. v. Lahiry*, *supra* at para. 36; *R. v. Emanuel*, *2012 ONSC 1132* at paras. 22-4;

* Fourth, the only evidence of actual s. 11(b) prejudice in this case is the fact that one of the Applicants was on relatively strict "house arrest" terms of bail for just over a year, until the Crown consented to removal of this condition on a bail variation in April 2015. There would have been little or no inferred prejudice, given that the Applicants needed much of the delay to retain counsel and to prepare for trial, given that there were no periods of unjustified delay in the Superior Court, and given that the approximately ten month period of unjustified delay in the Ontario Court of Justice was within the *Morin* guidelines. See: *R. v. Boateng* *(2015), 329 C.C.C. (3d) 1* at para. 41 (Ont. C.A.); *R. v. Gandhi*, *supra* at para. 52; *R. v. Lahiry*, *supra* at para. 8;

* Fifth, the charges in this case are particularly serious. Kilo level cocaine trafficking is a grave offence that results in substantial penitentiary sentences. Under the old *Morin* framework, and as noted in *Jordan*, the final balancing of interests included a consideration of the gravity of the offence and society's interest in a trial on the merits in serious cases. Particularly where the unjustified periods of delay were not lengthy and where prejudice to s. 11(b) interests was not great, as in this case, the final balancing of societal interests became important. See: *R. v. Morin*, *supra* at pp. 12-13; *R. v. Seegmiller* *(2004), 191 C.C.C. (3d) 347* at paras. 21-5 (Ont. C.A.); *R. v. Qureshi* *(2004), 190 C.C.C. (3d) 453* at para. 41 (Ont. C.A.); *R. v. Lahiry*, *supra* at paras. 86-9;

* In all the above circumstances, a rational and informed participant in the criminal justice system would not have regarded the present case as one that was at risk of violating s. 11(b) of the *Charter*, prior to the release of *Jordan* on July 8, 2016. Consistent with this view, none of the experienced and capable lawyers in this case mentioned a possible s. 11(b) Application at the JPT or in Practice Court on December 9, 2015. Had such an Application been contemplated, it was counsel's duty to raise it. Indeed, the *Criminal Proceedings Rules* require that it be raised at the JPT. Arguably the best evidence of counsel's reliance on the prior state of the law is Crown counsel's statement in Practice Court, when the trial date was being set, to the effect that "no 11(b) issues were raised at the judicial pre-trial." None of the counsel present in court disagreed with or qualified this statement, even once the January 2017 trial date was known. After *Jordan* was released, this Court quickly issued a new *Practice Direction* on August 29, 2016. The Applicants did not comply with two important provisions in the *Practice Direction*, as follows (presumably because they had not yet perfected counsel's retainers and they needed additional delay):

1. Where the defence (*i.e.* an accused person or his/her counsel) intends to bring a s. 11(b) application but did not indicate this at the pre-trial conference, the defence must provide written notice of this change in position to the Crown, any other accused and the Superior Court trial coordinator, and arrange for a further pre-trial conference as soon as practicable, as required under rule 28.04(11).

...

4. Unless otherwise directed by a judge, all s. 11(b) applications must be scheduled to be heard at least 60 days before the first scheduled day of trial or, where pre-trial applications are scheduled to be heard separately in advance of the trial, at least 60 days before the first scheduled day of pre-trial applications.

39 Given the above six circumstances, I am satisfied that the parties were proceeding in "reasonable reliance on the law as it previously existed." Accordingly, even if the relevant total delay in this case had exceeded the 30 month presumptive ceiling, contrary to my previous analysis, that departure from the new law was justified by reasonable reliance on the old law. To similar effect, see: *R. v. Cristoferi-Paolucci*, *2016 ONSC 6923* at paras. 28-41 per Goldstein J.: *R. v. Live Nation Canada Inc. et al.*, *supra* at paras. 47 and 73-87 per Nakatsuru J.

40 In conclusion on this issue, I note that the majority in *R. v. Jordan*, *supra* at para. 98, warned that some departures from the new presumptive ceiling will not be justified, even where there has been reliance on the prior law, because of the extent of the departure and any repeated failures by the Crown to mitigate and prevent the delays. In this regard, the Court stated:

> On the other hand, the s. 11(*b*) rights of all accused persons cannot be held in abeyance while the system works to respond to this new framework. Section 11(*b*) breaches will still be found and stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case. [Emphasis added.]

41 The present case does not "vastly exceed the ceiling" and there were no "repeated mistakes or missteps by the Crown." At most, the delay in this case modestly exceeds the presumptive ceiling, if my previous analysis is somehow in error. Furthermore, Mr. Gilman's conduct throughout, as Crown counsel, has been exemplary. He edited the search warrant Informations and completed Crown disclosure in less than three months and prior to the JPT, he waived the need for a Crown pre-trial, he drafted the Indictment and filed it in this Court immediately after committal, he stayed charges against two co-accused where his case was weaker (even though he had secured a committal against one), he negotiated a large number of sensible admissions with defence counsel that shortened proceedings, and most importantly, when the Trial Coordinator in this Court offered trial dates that were 13 months away, he proactively secured earlier dates that had been reserved for "in custody" cases.

42 For all these reasons, I am satisfied that the "transitional exceptional circumstance" discussed in *Jordan* applies in this case.

(iv) Delay caused by one co-accused and whether it applies only to that accused

43 There is one final issue that I should address, and that is whether "defence delay" in cases with multiple accused is personal to the individual co-accused who causes it or whether it is attributed to the case as a whole. This issue was not raised in argument before me. However, after dismissing the s. 11(b) Application on January 10, 2017, in brief oral Reasons, I subsequently became aware of my colleague Fairburn J.'s judgment in *R. v. Ny and Phan*, *2016 ONSC 8031*, which had just been released on December 22, 2016.

44 In that judgment, Fairburn J. allowed a s. 11(b) Application brought by two co-accused who had been severed by the Crown from two other co-accused. The total delay in the two Applicants' case was just over 48 months. Very little delay had been caused by the two accused who brought the s. 11(b) Application. Fairburn J. found that they were individually responsible for only two weeks and four weeks of the total delay and that they had been actively asserting their s. 11(b) rights. On the other hand, the other two co-accused who were eventually severed by the Crown, had caused a great deal of delay. Furthermore, it was only after 42 months of total delay had already

occurred, with little or no contribution from the two Applicants, that the Crown finally severed the two accused who were causing the delays and who were now seeking a further adjournment that would cause even more delay. The severance allowed the Crown to preserve the existing trial date, set at the 48 month point, for the two non-delaying accused.

45 On these facts, Fairburn J. held that the delay caused by the two severed accused should not be attributed to the two Applicants as "defence delay," pursuant to the new *Jordan* framework. However, she held that delays caused by co-accused can make the case more complex and can amount to an "exceptional circumstance" within the *Jordan* framework. For these reasons, she held that "some period of delay above the ceiling would have been perfectly reasonable in this case, even a number of months." The delay of 18 months above the ceiling, however, was not reasonable as the Crown had "an obligation to better protect the applicants who were asserting their desire to move forward." Fairburn J. held that 48 months of delay for these two Applicants "would have been unreasonable under *Morin* and it is surely unreasonable under *Jordan*." See: *R. v. Ny and Phan*, *supra* at paras. 34-49, 91-2, 112-131.

46 It can be seen that *Ny and Phan* is a very different case from the present case. In this case, the total delay was 36 months, there were no lengthy periods of delay caused by some co-accused while the other co-accused vigourously asserted s. 11(b) rights, and there was no point reached where severance was requested or was required in order to mitigate delays being caused by one or more co-accused to the prejudice of other co-accused.

47 Nevertheless, I should refer to *Ny and Phan* because I have not adopted the approach in that case of treating "defence delay" as personal and applicable only to the individual co-accused who causes it. I agree that the approach taken by Fairburn J. is the appropriate one in a case like *Ny and Phan*, where a point had been reached requiring severance. On any set of facts where severance of delaying co-accused is required, there are in reality two separate cases and so it is appropriate to conduct two separate s. 11(b) analyses for the two separate groups of accused. To similar effect, see: *R. v. Manasseri and Kenny*, *supra* at paras. 327 -332, 341 and 379; *R. v. Schertzer et al.* *(2009), 248 C.C.C. (3d) 270* at paras. 7 and 145-7 (Ont. C.A.).

48 However, in a case like the present one, where the Applicants never suggested that severance was a realistic or necessary remedy (a position that I agree with), the short periods of "defence delay" should be attributed to the case as a whole. In *R. v. Ny and Phan*, *supra* at paras. 127-8, Fairburn J. reviewed the pre-*Jordan* s. 11(b) jurisprudence and noted that delay caused by a co-accused was generally treated as "inherent delay" because of the necessities involved in managing a number of accused at joint trial proceedings. It carried "neutral" weight until the point was reached where delays caused by one co-accused became excessive and severance was required in order to protect the rights of the other co-accused. See: *R. v. Koruz and Schiewe* *(1992), 72 C.C.C. (3d) 353* at 417-421 (Alta. C.A.), aff'd *(1993), 79 C.C.C. (3d) 574* (S.C.C.); *R. v. Whylie* *(2006), 207 C.C.C. (3d) 97* at paras. 24-5 (Ont. C.A.); *R. v. L.G.*, *2007 ONCA 654* at paras. 62-5 (Ont. C.A.); *R. v. Heaslip et al.* *(1983), 9 C.C.C. (3d) 480* at 496-7 (Ont. C.A.); *R. v. Sapara* *(2001), 49 W.C.B. (2d) 254* at paras. 18 and 56-68 (Alta. C.A.).

49 I am concerned that, post-*Jordan*, treating delay caused by one co-accused as personal to that accused in cases where a joint trial remains reasonable and justified, will lead to arbitrary results. If this approach is adopted, there will be cases where one co-accused will end up below the 30 month ceiling and another co-accused will be above the 30 month ceiling, even though there may be no real distinction between their overall conduct, their rights, and the interests of justice. This would seem to lose the forest for the trees. It also rewards one co-accused with a windfall that flows solely from the calendar and availability of another accused's counsel. Finally, it complicates s. 11(b) analysis by placing the burden on the Crown in relation to one co-accused and on the defence in relation to another co-accused.

50 On the facts of the present case, there was approximately one month of "defence delay" in the Ontario Court of Justice, when various counsel were not available on three different occasions. There was no attempt to parse these three individual periods of delay and attribute them to one accused or another, by comparing and contrasting the available dates in four lawyers' calendars. This would be contrary to the spirit of *Jordan*, which seeks to simplify s.

11(b) Applications. The Applicants realistically and correctly conceded that this total period of delay was "attributable to the defence" (at para. 53 of the Applicants' Factum).

51 The only other period of "defence delay" was the four months in this Court, from September 2016 to January 2017, when Mr. Rusonik was not available for trial. Once again, I did not attribute this period of delay personally to Mr. Rusonik's client Morris. I attributed it to the case as a whole, as "defence delay" under the *Jordan* framework. Mr. Rusonik and his client have acted responsibly throughout, asking to hear from only two witnesses at the preliminary inquiry, making numerous realistic admissions, and consenting to committal in a timely way. They then waited patiently in this Court until the other accused arrived after their somewhat slower committals. Furthermore, Mr. Rusonik was the only counsel who was retained and on the record from the beginning in this Court. When he needed four months of delay in this Court, in order to clear his calendar, the other accused acquiesced in this delay and did not raise s. 11(b) concerns, presumably because they needed the further delay in order to complete their own retainers and prepare for trial. In all these circumstances, it would have been inappropriate to treat this four months of "defence delay" as applying narrowly to the accused Morris, as opposed to the case as a whole.

52 In the alternative, had I followed Fairburn J.'s approach in *Ny and Phan*, I would have held that the five months of "defence delay" in this case was an "exceptional circumstance" under the *Jordan* framework, due to the added complexity of having to accommodate the calendars of four busy defence counsel in a case where a single joint trial was in the interests of justice and where the period of "defence delay" had not yet become excessive. In other words, there would have been no difference in the result because the relevant period of delay was either below 30 months because of "defence delay" or was above 30 months but justified due to an "exceptional circumstance." See: *R. v. Jordan*, *supra* at paras. 77-80.

D. CONCLUSION

53 Having found that the total period of relevant delay in this case is 27 months and, therefore, below the 30 month presumptive ceiling in *Jordan*, it would be a "rare" case where a s. 11(b) violation could still be found. The present case is not that "rare" case, given that the only periods of unjustified delay were relatively short, as explained above. In these circumstances, the case did not take "markedly longer than it reasonably should have."

54 In the alternative, if my analysis is somehow in error and the relevant period of delay exceeded the 30 month presumptive ceiling, then the "transitional exceptional circumstance" applies as this case was proceeding in "reasonable reliance on the law as it previously existed."

55 For both of these reasons, I dismissed the s. 11(b) Application. I would like to thank all counsel for their thorough materials and their effective advocacy in this developing and somewhat uncertain area of the law.

M.A. CODE J.

End of Document

TAB 7

R. v. Donnelly

Ontario Judgments

Ontario Superior Court of Justice

Toronto, Ontario

I.V.B. Nordheimer J.

Heard: December 2-5 and 9, 2013.

Judgment: December 19, 2013.

Court File No. 464/12

[2013] O.J. No. 5819 | 2013 ONSC 7798 | 2013 CarswellOnt 17801 | 110 W.C.B. (2d) 833

Between Her Majesty the Queen, Respondent, and Brandon Donnelly, Applicant

(85 paras.)

Case Summary

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Protection against arbitrary detention or imprisonment — Protection against unreasonable search and seizure — Right to retain and instruct counsel without delay — Remedies for denial of rights — Specific remedies — Stay of proceedings — Application by Donnelly for stay of proceedings dismissed — Officers knocked on Donnelly's door and, when father opened it, asked to enter, which father allowed — Officers asked Donnelly questions, he answered and officers arrested him — Crown, acting on incorrect information from officer, advised that there was need to adjourn bail application for three days — There was no violation of s. 8 or 10(b) of Charter — There was violation of s. 9, but prejudice would not be perpetuated or aggravated by trial, there were remedies short of stay and it would not be unfair to continue proceeding.

Application by Donnelly for a stay of proceedings. Donnelly worked for Way's company. A police investigation led to Way's arrest based on the alleged involvement of the company in the production and distribution of child pornography. Police officers who conducted surveillance of the company's premises had seen Donnelly there. Officers went to Donnelly's home, knocked on the door and, when Donnelly's father opened it, asked to enter, which the father allowed. The officers asked to speak to Donnelly. The father went to get him. The officers asked Donnelly if he was Donnelly and if he worked for May. He said that he was and did. The officers arrested him and told him that they would take him to the police station. The father told the officers that Donnelly took daily medication for obsessive compulsive disorder, put pills in a container and gave it to the officers. Donnelly was held overnight and taken to court the next day. The Crown, acting on incorrect information from an officer, advised that there was a need to adjourn any bail application for three days so that the police could execute warrants, search computers and prevent the destruction of evidence. In fact, the police already had control of the company's computer systems by that time. Donnelly was released three days later. He was not given his medication during his first two days in custody and was physically and verbally abused by authorities while there. Donnelly claimed a violation of his rights under ss. 7, 8, 9 and 10(b) of the Charter.

HELD: Application dismissed.

There was no violation of s. 8 of the Charter. There was no search while the officers were at Donnelly's home. The "invitation to knock" principle entitled the officers to knock on the door and, since the father allowed it, to enter to speak to Donnelly. Donnelly chose to answer the questions. There was no violation of s. 10(b). Donnelly was not psychologically detained when the officers questioned him. He was in his home and could have refused to answer and left the room. There was a violation of s. 9. The officers had reasonable and probable grounds for the arrest

after Donnelly confirmed that he worked for Way, but Donnelly lost three days of liberty because the Crown, through no fault of its own, forwarded reasons for the continued detention that were fundamentally flawed. It did not matter that Donnelly did not object to the adjournment of the bail application at the time, as he was entitled to accept the Crown's statement as accurate. There was a violation of s. 7. Donnelly was generally mistreated while in custody. However, the prejudice caused by the abuse would not be perpetuated or aggravated by the conduct of the trial. There were remedies short of a stay that could address the prejudice, such as the reduction of an otherwise appropriate sentence if Donnelly were convicted. It would not be fundamentally unfair to continue the proceeding. Society had a direct interest in ensuring that allegations of this type were adjudicated.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8, s. 9, s. 10, s. 10(b), s. 24(1)

Criminal Code, *R.S.C. 1985, c. C-46, s. 495*, s. 516(1)

Counsel

J. Cameron and J. Strasberg, for the respondent.

B. Greenspan and J. Makepeace, for the applicant.

I.V.B. NORDHEIMER J.

1 The applicant, Brandon Donnelly, is charged with possession of child pornography for publication; making child pornography and possession of child pornography for exportation. He brings this application for a stay of proceedings pursuant to s. 24(1) of the on the basis that his rights under ss. 7, 8, 9 and 10 of the were violated including that he was denied a bail hearing for improper reasons and that he was subjected to gross mistreatment for the time period that he was held in custody.

2 I intend to outline some basic facts regarding this matter to place this application into context. I will refer to further facts when I come to address the various grounds upon which the application for a stay is based.

3 The applicant was twenty-six years old at the time of these events. He has suffered from obsessive compulsive disorder ("OCD") since he was twelve. The applicant has been on medication for this disorder, namely Prozac, since that time. The applicant takes Prozac daily to assist in ameliorating the impacts of this disorder. The applicant varies the amount of Prozac that he takes depending on the severity of the symptoms of OCD that he is experiencing on any given day.

4 The charges themselves arise out of the applicant's employment with a company run by another person, Brian Way. That company made videos of different types. It is alleged that within the work done by this company was the production and distribution of child pornography. It is further alleged that the applicant participated in the production of this child pornography by editing raw footage into the finished product. Mr. Way is separately charged with various child pornography offences.

5 In 2010, the Toronto police became aware of the alleged involvement of Mr. Way's company through undercover work on the internet where they came into contact with Mr. Way. Mr. Way was known to the police because of past

complaints regarding his alleged involvement in the distribution of other films that might constitute child pornography. Given the nature of the activities, the police contacted the United States Postal Inspection Service who also became involved in the investigation. As their investigation continued, the police undertook surveillance of the business address of the company. During that surveillance, the police observed the applicant attend at the company's premises. The police thought that the applicant might have some connection to the company and its activities. As a consequence, the police investigated the applicant. At a later stage, they also put the applicant under surveillance.

6 Eventually, the police decided to arrest Mr. Way on child pornography charges. They concluded, at that time, that they did not have sufficient grounds to arrest the applicant because they had insufficient evidence that the applicant actually worked for Mr. Way or his company. As a consequence, officers from the York Regional Police Service had been tasked by the Toronto Police investigators to attend at the home of the parents of the applicant in Aurora where the applicant lived. Those officers were instructed to wait for Mr. Way to be arrested and, upon his arrest, the York Regional Police officers were to knock on the front door of the Donnelly home. The York Regional Police officers were to determine if the applicant worked for Mr. Way's company. If the applicant admitted working for Mr. Way's company, the applicant was then also to be arrested.

7 Mr. Way was, in fact, arrested on May 1, 2011 by Toronto Police officers. The Toronto Police also executed search warrants on the home of Mr. Way and on the company's premises. While this was happening, there were two groups of York Regional Police officers waiting outside of the Donnelly family home. One group consisted of the detectives who were going to speak to the applicant.[1] The other group consisted of uniformed officers (including the canine unit) who were present around the perimeter of the home because the police had learned that there were four firearms in the Donnelly residence. Consequently, there were concerns for officer safety.

8 The York Regional Police officers received radio communication from the Toronto Police that Mr. Way had been arrested. The detectives then knocked on the door of the Donnelly home. One uniformed officer was with them. The applicant's father answered the door. According to the applicant's father, the officers suggested that they step inside which he allowed. The officers said that they wanted to speak with the applicant. The applicant's father left the officers and went downstairs, where the applicant's room was. The applicant's father advised him that the police were there and wanted to speak to him.

9 The applicant came upstairs. The officers asked the applicant if he was Brandon Donnelly and the applicant said that he was. The officers then asked the applicant if he worked for Brian Way. The applicant said that he did. The officers immediately arrested the applicant. The officers advised the applicant that he would be taken to a Toronto Police division where he would probably remain overnight. The applicant's father told the officers about the applicant's need for daily medication. The applicant's father put a number of Prozac pills into a small container and gave it to the officers who indicated that the pills would accompany the applicant. The York Regional Police officers then handcuffed the applicant and walked him to a police vehicle. Uniformed York Regional Police officers then transported the applicant to 22 Division in Toronto. At 22 Division, the applicant was interviewed twice by Toronto Police detectives. Prior to these interviews, the applicant spoke with duty counsel.

10 The applicant's father contacted 22 Division and spoke with the detective in charge of the case. The applicant's father says that he understood from his conversation with the detective that the applicant would be released on bail the next morning. The detective arranged for the applicant's parents to speak with the applicant. They perceived the applicant to be afraid and upset. The applicant was held in 22 Division overnight.

11 The next day, May 2, the applicant was taken to court. He was not provided with his medication that morning although the medication did accompany the applicant to court. Prior to being taken to court, however, the applicant, along with other prisoners including Mr. Way, was taken to 23 Division to be fingerprinted and photographed. After being transported to 23 Division, the applicant and the other prisoners were then taken to the 2201 Finch Avenue courthouse.

12 According to the applicant, when they got to 23 Division, it took some period of time to process Mr. Way and

then to process him. The applicant says that the other prisoners in the vehicle were talking about why it was taking so long. The applicant perceived that the other prisoners were suspicious about him and Mr. Way as a consequence of these delays. Also, upon leaving 23 Division, the applicant and Mr. Way were placed in a separate compartment of the vehicle away from the other prisoners. The applicant says that, at this time, he heard the other prisoners talking about him and Mr. Way including talking about their charges. The applicant concluded that the other prisoners had overheard the transport officers talking about their charges.

13 The applicant got to the Finch Avenue courthouse. His father was present and he had arranged for counsel to be present for the applicant. At court, the prosecutor advised that bail for the applicant would be opposed. Specifically, the prosecutor said that there was a need to adjourn any bail application for three days "so that the police can execute warrants, can search computers and prevent the destruction of evidence in this matter". Pursuant to s. 516(1) of the *Criminal Code*, a bail hearing cannot be adjourned for more than three clear days without the consent of the accused person. The applicant's counsel did not oppose the adjournment, at least in part, because he did not have any disclosure or other information about the case and therefore he did not have any information upon which he could challenge the investigative needs that the prosecutor was asserting. There was also a practical aspect to counsel's acquiescence to the adjournment and that is that, by the time the matter was addressed in court, it was late in the day and there was no available court to hear a contested bail application.

14 On May 5, the applicant re-attended at court. On this day, the prosecutor initially indicated that she would again oppose any application for bail. However, after further discussions between the prosecutor and the applicant's counsel, the prosecutor eventually consented to the applicant's release. The applicant was, in fact, released towards the end of that day.

15 Many of the applicant's complaints regarding the manner in which he was treated between May 1 and May 5 involve the time that he was held in custody. The applicant recounts a number of events that occurred during that time. These events include the following:

(i) He was not given his medication either on May 2 or May 3;

(ii) He was verbally abused on a number of different occasions by various police officers, court officers and prison guards including implied threats and derogatory terms;

(iii) He was struck in the back of the head on one occasion by a prison guard;

(iv) He was intentionally tripped on one occasion by a court officer while in the cell area at the Finch Avenue courthouse;

(v) The nature of the charges that he faced was announced by prison guards to other inmates in the detention facility;

(vi) He was kept in a cell overnight at the detention facility dressed only in his boxer shorts with nothing to keep warm and no mattress to sleep on;

(vii) He was provided with minimal drink and food;

(viii) He was never provided with hygiene products and only at the very end of his stay was he permitted to have a shower.

16 With that background, I now turn to the individual alleged *Charter* violations. I will address them in the same order that they appeared in the defence factum beginning with the s. 8 issue.

Section 8 issue

17 The defence asserts that the conduct of the police in attending at the Donnelly home, entering that home and asking the applicant questions constituted a breach of the applicant's s. 8 rights under the *Charter* because the conduct amounted to an unlawful search. In particular, the defence says that the prosecution cannot rely on the

"invitation to knock" principle to justify the actions of the police because those actions infringed the reasonable expectation of privacy that the applicant had in his own home.

18 The applicant places particular reliance on the decision of the Supreme Court of Canada in *R. v. Evans*, *[1996] 1 S.C.R. 8*. For example, the applicant relies on the following observation by Sopinka J. at para. 16:

> Clearly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them. Any "waiver" of privacy rights that can be implied through the "invitation to knock" simply fails to extend that far. As a result, where the agents of the state approach a dwelling with the intention of gathering evidence against the occupant, the police have exceeded any authority that is implied by the invitation to knock.

The defence similarly submits that *R. v. Coté*, *[2011] 3 S.C.R. 215* is an analogous situation.

19 I do not agree with the defence position and find their reliance on cases such as *Evans* and *Coté* to be misplaced. Both the decision in *Evans* and in *Coté* involved efforts by the police to obtain physical evidence. It was not a situation where the police attended at a home for the sole purpose of speaking with the occupant of the home as is the case here. Indeed, the decision in *Evans* makes that distinction clear, at para. 18, where Sopinka J. said:

> As stated above, the implied licence to knock extends only to activities for the purpose of facilitating communication with the occupant. Anything beyond this "licensed purpose" is not authorized by the implied invitation. [emphasis added]

20 The "invitation to knock" principle entitled the police to approach the Donnelly home for the purpose of communicating with the applicant. The police were entitled to knock on the door and ask to speak to the applicant. The police were entitled to enter the home, if permitted by the occupants of the home, to facilitate that communication. While there is some issue raised as to whether the police lawfully entered the home, I conclude that they did. The applicant's father clearly allowed the officers into the home. He did not attempt to stop the officers from entering the home and he did not say "No". While the applicant's father now says that he only did so because he felt that he had no choice, the fact remains that he did have the choice and he exercised it in favour of allowing the police to enter. The applicant's father is an accomplished businessman who runs his own company. There is no objective basis to conclude that, merely because of the presence of a number of police officers outside of his home, the applicant's father lost his ability to make a conscious decision to allow the officers into his home as opposed to asking that they remain outside.

21 I am aware that many ordinary citizens may not understand that they have the right to deny the police entry to their homes. Many ordinary citizens also naturally feel a desire to co-operate with, and assist, the police. People generally do not want to be uncooperative or confrontational when dealing with the police. People are also generally somewhat intimidated by police officers and consequently tend to be compliant with their requests. This reality was mentioned in *R. v. Therens*, *[1985] 1 S.C.R. 613* where Le Dain J. said, at p. 644:

> Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand.

22 I am sure that all of these factors were operating in the mind of the applicant's father when he permitted the police officers to enter the home. That fact does not, however, change the legal consequence of the permission granted. The police did not mislead the applicant's father. They told the applicant's father that they were investigating Brian Way and that they wanted to talk to the applicant. The applicant's father knew that his son worked for Mr. Way so it would be perfectly understandable to him why the police would want to talk to the applicant. The applicant's father made a conscious decision to allow the officers into the home. The fact that the applicant's father might, with hindsight, not have done so cannot change the situation as it unfolded at the time.

23 I also reject any suggestion that the police tricked the applicant's father into permitting them to have access to the house. The police told the applicant's father why they were there and that they wanted to speak to the applicant. That was true. The police did not say that they were investigating whether the applicant was involved in the criminal activity that they believed Mr. Way was engaged in but they were not obliged to explain that to the applicant or his father. The fact is that the applicant's father did not ask the police why they wanted to talk to the applicant nor did the applicant ask them. There was no non-disclosure of the purpose of the police attendance. The defence reliance on *R. v. Nguyen*, *[2006] O.J. No. 4393* (S.C.J.) on this point is therefore also misplaced.

24 The same result obtains with respect to the officers' questioning of the applicant. The applicant did not have to answer the officers' questions but he chose to do so. The applicant no doubt also felt some moral or civic compulsion to co-operate with the police but that again does not change the legal consequence of his decision. The applicant was asked two questions: one to confirm his identity and one to establish that he worked for Brian Way. As a result of his answers, he was arrested.

25 As Sopinka J. noted in *Evans*, at para. 11:

> As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a 'search" within the meaning of s. 8.

26 In my view, the actions of the police here did not amount to a search. The rights provided by s. 8 of the *Charter* were not therefore engaged. It follows that there could not have been any breach of those rights.

Section 10 issue

27 The defence contends that, at the time that the police officers questioned the applicant, he was detained by them. It is not suggested that the applicant was physically detained but rather that he was psychologically detained. The nature of a psychological detention was set out in *R. v. Grant*, *[2009] 2 S.C.R. 353* where McLachlin C.J.C. and Charron J. said, at para. 31:

> The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand.

28 I do not agree with the defence contention that, at the time that the police questioned him, the applicant was detained. The applicant was in his home. He would have been entirely within his rights to refuse to answer the officers' questions. The applicant was also able to leave and return to his room downstairs. The fact is that the applicant could have simply said "I do not want to talk to you", turned around and left.

29 The situation here is much more akin to the one referred to in *Grant* where McLachlin C.J.C. and Charron J. said, at para. 37:

> Another often-discussed situation is when police officers approach bystanders in the wake of an accident or crime, to determine if they witnessed the event and obtain information that may assist in their investigation. While many people may be happy to assist the police, the law is clear that, subject to specific provisions that may exceptionally govern, the citizen is free to walk away: *R. v. Grafe* *(1987), 36 C.C.C. (3d) 267* (Ont. C.A.). Given the existence of such a generally understood right in such circumstances, a reasonable person would not conclude that his or her right to choose whether to cooperate with them has been taken away. This conclusion holds true even if the person may feel compelled to cooperate with the police out of a sense of moral or civic duty.

30 The applicant says that he "felt" that he had no choice but to answer the officers' questions but the fact of the

matter is that he did have a choice. The applicant made his choice and his choice was to answer the officers' questions. The issue of detention is not determined by the subjective feelings of the person alleging the detention. Rather, the issue of detention is to be determined objectively -- see both *Grant* and *Therens*. The question to be asked was expressed by McLachlin C.J.C. and Charron J. in *Grant*, at para. 31:

> The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand.

31 This is not a situation where the police stopped the applicant on the street or otherwise impeded his normal daily affairs. The officers entered the Donnelly home with the agreement of the applicant's father, as I have already found. They asked the applicant two questions. Nothing was done by the police that prevented the applicant from asking the officers why they wanted to speak to him. Nothing prevented the applicant from saying that he wanted to seek legal advice before speaking with the officers. And, as I have already said, nothing prevented the applicant from simply saying that he did not wish to speak with the officers and returning to his room in the basement. The applicant was, at the time, twenty-six years old. He is educated. Indeed, he graduated from college with honours. He has been employed since college including starting his own business. There is nothing in the particular characteristics of the applicant, save for his OCD, that would suggest that he was especially vulnerable or susceptible to police direction. I have not heard any evidence that suggested that his OCD made the applicant any more or less vulnerable in such a situation. I note, in addition, that the applicant's father was present at the time.

32 I do not accept that the applicant was detained at this point and it therefore follows that his rights under s. 10(b) were not triggered.[2] As Rosenberg J.A. recently noted in *R. v. MacMillan* *(2013), 114 O.R. (3d) 506* (C.A.) at para. 36:

> As is made clear in *R. v. Suberu*, *2009 SCC 33*, *[2009] 2 S.C.R. 460*, at para. 23, even where a person is under investigation for criminal activity and is asked questions, the person is not necessarily detained. In the absence of a legal obligation to comply, detention arises where a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

33 However, even if my analysis on this point is in error, and the applicant's s. 10 rights were breached by the conduct of the police, the remedy that would flow from that breach would be the exclusion of the answer that the applicant gave to the police, that is, that he worked for Mr. Way. The violation of the applicant's rights in this scenario would not provide a foundation for an order staying the proceedings.

Section 9 issue

34 The defence submits that the applicant's arrest was arbitrary because the police did not have reasonable and probable grounds for an arrest. Again, I do not agree. The police knew, prior to May 1, that there was some connection between the applicant, Mr. Way and the company that Mr. Way operated. The police had reasonable and probable grounds to believe that Mr. Way was in the business of producing and distributing child pornography. Initially, the police had a reasonable suspicion that the applicant might be involved in the company and its business from his appearance at the company's offices. Once the applicant confirmed that he worked for Mr. Way, the police then had reasonable and probable grounds to believe that the applicant was involved in the child pornography enterprise. The police did not have to know the precise role that the applicant performed. For the purposes of forming reasonable and probable grounds, it was sufficient that the police then knew that the applicant was involved in Mr. Way's business -- part of which was the production and/or distribution of child pornography. Whether the applicant edited the films, or filled orders or stocked the shelves, he could still be a party to the criminal activity. The police were therefore within their lawful authority to arrest the applicant without a warrant pursuant to s. 495 of the *Criminal Code*. I should add that there was no requirement for the police to obtain a *Feeney* warrant for the arrest of the applicant given that the police were already lawfully inside the Donnelly home when the arrest occurred.

35 The defence also submits that the applicant's incarceration between May 2 and May 5 amounted to an arbitrary detention in violation of his s. 9 rights. The defence says that that arbitrary detention arose from the manner in

which the prosecution arranged to keep the applicant in custody. Specifically, the defence contends that the prosecution achieved this result by seeking an adjournment of the applicant's bail hearing on a premise that was entirely false. In that regard, the defence relies on the following observation, as to the application of s. 516(1) of the *Criminal Code*, found in Trotter, Gary T., *The Law of Bail in Canada*, looseleaf ed., Carswell, at p. 5-21:

> While there is no guidance to be found in the provision itself, to obtain an adjournment of any length of time, it seems reasonable that the prosecutor must offer some legitimate reason for attempting to pre-empt the accused's right to secure release on bail. An adjournment on behalf of the prosecutor need not be granted merely because it is requested. [emphasis added]

36 In this case, the prosecutor was told by a detective that a delay in any possible release of the applicant was required in order to ensure that evidence was not destroyed. This concern arose from the fact that the main evidence in this case was believed to be contained on the computer system of Mr. Way's company and that it might be possible for persons associated with that company to remotely access and erase such evidence from the computer system.

37 On the surface, the police had a legitimate concern in this regard. Computer systems, smart phones and like devices are all capable of being accessed remotely and, if one can access such devices remotely, the information on them can be altered or erased remotely. Two factors affect the legitimacy of that concern when it comes to the applicant's position, however.

38 One is that, by the time of the applicant's appearance in court on May 2, the police already had control of the company's computer systems. According to the evidence, the police had already disconnected those computer systems from the internet. Without that connection, there was no longer any prospect of the computers being remotely accessed. Therefore, the real concern that the police originally had, no longer existed.

39 The other factor is that the police did not make any effort, after they arrested the applicant, to determine if the applicant had any computers in his home and, if he did, whether any of those computers was connected to the internet. They also did not make any effort to determine whether the applicant in fact had remote access to the computer system of Mr. Way's company. The fact is that the actions of the police, or their inaction, undermine their contention that they had a reasonable concern, if the applicant was released, that he would destroy evidence.

40 I am cognizant of the fact that the applicant's counsel (not his current counsel) did not object to the three day adjournment. That fact is not, however, fatal to any contention that the adjournment amounted to a violation of the applicant's s. 9 rights. I agree with counsel for the applicant that adjournment requests such as this have to be based on a high level of trust and good faith among prosecutors and defence counsel. Defence counsel are entitled to take at face value information relayed by a prosecutor as justifying the need for an adjournment. At this early stage, the defence has virtually no information about the case. All of that information rests with the police and, to the degree that they have passed it along, with the prosecution. This information imbalance leaves defence counsel generally ill-equipped to challenge the reasons offered by the prosecutor for an adjournment.

41 In addition, from an entirely practical point of view, our system requires that adjournment requests of this type be handled expeditiously. First appearances cannot routinely turn into contested hearings or the system will collapse. This is another reason why there has to be full, fair and frank disclosure of the true state of affairs when an adjournment is requested.

42 In asking for the adjournment, the prosecutor gave her reasons as follows:

> ... so that the police can continue their investigation and can execute warrants, can search computers, and prevent the destruction of evidence in this matter.

43 Counsel for the applicant accepted that statement as accurate and he was entitled to do so. In light of that assertion, counsel for the applicant determined that any opposition to the adjournment request was unlikely to

succeed so he took the path of least resistance and agreed to it. Given the circumstances, I believe that counsel's analysis of the situation was a correct one.

44 However, it turned out that the reasons given by the prosecutor for seeking an adjournment were based on faulty information. There was no factual basis for any belief that the release of the applicant would interfere with the police investigation or the execution of further search warrants or the search of any computers. The police had already secured the company's facilities along with Mr. Way's home and were in the process of downloading information from all of the computers. While this was a laborious exercise that took many days, there was nothing that the applicant could have done to interfere with that process.

45 It is clear that the most compelling reason for the prosecutor's request for an adjournment was the asserted potential for the destruction of evidence. As I have already set out, however, by the time that the applicant appeared for his bail hearing, the police had disconnected the computers from the internet and had thereby eliminated any risk of remote access or remote wiping of the computer hard drives. Again, there was nothing that the applicant could have done, if he was released, to destroy any evidence.

46 The fact is that the prosecutor had been provided with erroneous information regarding the status of the investigation. That erroneous information came from an officer who apparently was not integrally involved in the investigation or, at least, was not fully informed as to its status. While that may be the reason why the erroneous information was provided to the prosecutor, that is not an excuse for providing faulty information. Had the true state of affairs been known by the prosecutor, she would have been aware that there was no threat to the investigation if the applicant was released. The applicant was a relatively young man with no criminal record and a entirely acceptable surety. A consent release should have been forthcoming -- a fact that another prosecutor appears to have realized three days later, on May 5, when a consent release was given to the applicant.

47 The consequence is that the applicant was detained for three days when he ought not to have been. As Iacobucci J. famously remarked in *R. v. Hall*, *[2002] 3 S.C.R. 309*, at para. 47:

> At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.

48 When it comes to the question of bail for an accused person, police and prosecutors must be especially vigilant to ensure that only those persons whose continued detention is essential to the proper administration of justice are detained. Great care must be taken to ensure that any information provided to the court relating to the accused person, and any reasons underlying a request for that continued detention, even for a short period, are as complete and accurate as possible. Neither the immediacy of the matter coming forward, or the complexity of the investigation, or the volume of material, or the number of persons arrested, or any other like matters, can excuse non-compliance with the overarching need to be full, fair and frank with defence counsel and the court.

49 In this case, the prosecutor, through no fault of her own, put forward reasons for the continued detention of the applicant for three more days that were fundamentally flawed. As a consequence, the applicant lost three days of liberty -- a deprivation of liberty that was particularly problematic for the applicant given his OCD. In my view, that deprivation constituted a breach of the applicant's right under s. 9 of the *Charter* not to be arbitrarily detained or imprisoned.

Section 7 issue

50 The defence contends that the abuse and degradation that the applicant suffered while in custody (outlined in paragraph 15 above) amounts to a violation of his s. 7 right to life, liberty and security of the person. In support of this contention, the defence points to existing authority that has held that significant physical harm caused to a

prisoner amounts to a violation of s. 7. The defence extrapolates from that authority that significant psychological injury should similarly constitute a violation of s. 7.

51 At the outset, I will say that I see no principled reason for the purposes of s. 7 to draw a distinction between the effects of physical injury and the effects of psychological injury. Torture, for example, can involve abuse of the body and it can involve abuse of the mind. In either case, a person may be seriously harmed. If state actors intentionally inflict injury on an accused person, it is an intolerable result whether the injury impacts the accused person's body or his/her mind. I accept therefore as a basic premise that significant psychological injury amounts to a breach of a person's s. 7 rights in the same fashion that physical injury does.

52 The issue is then whether the applicant suffered such injury during the time that he was held in custody from the afternoon of May 1, through to the afternoon of May 5, when he was ultimately released on bail. To resolve that issue requires an elaboration of certain events that occurred through that period of time as summarized in paragraph 15 above. I will deal with those events in the same order that they are set out in that paragraph.

53 The applicant has been on medication for his OCD since he was twelve. His father made sure that the police took some of that medication with them when they arrested the applicant. The only purpose for taking the medication was, obviously, so that the applicant could take it. However, that did not happen.

54 Despite the fact that the police took the medication, the applicant was not given any medication on May 2 either while he was in the custody of the police or after he was transferred into the custody of the detention facility. It is not clear why the applicant did not receive any medication while he was in the custody of the police. The applicant was not delivered to the detention facility until early in the afternoon of May 2, so there was ample time for the police to have provided the applicant with his medication. There is simply no explanation for why this did not happen.

55 The detention facility says that the applicant did not receive his medication initially on arrival at the detention facility because it is the policy of the detention facility that they will not administer medication that accompanies a prisoner because the detention facility does not know its source. That is a fair and reasonable policy but only if it carries with it a parallel duty to ensure that replacement medication is provided in a timely fashion. That did not happen in this case. Taking the evidence as favourably to the Crown as is possible, the applicant did not receive his medication until very late in the afternoon or early evening on May 3. By this time, more than forty-eight hours had passed since the applicant had last had his medication -- medication that he is supposed to take daily.

56 The Crown says that this occurred because the applicant did not make any issue about getting his medication. It is true that the applicant did not push this issue. He says that he did not do so because he was in a state of fear arising from other events that had happened to him (and that I will come to shortly) and he was therefore scared that if he made an issue about his medication he would reduce, rather than enhance, his chances of getting it. Regardless of the reason why the applicant did not press this issue, his failure to make an issue about the medication does not excuse the failure of the staff of the detention facility, especially the medical staff, to ensure that the medication was provided. The detention facility had absolute control over the applicant. The staff knew that the applicant was on medication. Indeed, they had the container with the applicant's medication in it. The medical staff especially should have made direct inquiries of the applicant as to when he had last had his medication and then made provision for him to receive it. There is nothing in the evidence to indicate that this occurred. Rather, it appears that some general inquiries where made about the applicant's well-being but, because the applicant simply said that he was okay and because he did not demand his medication, the issue was ignored at the detention facility for over twenty-four hours. That is not acceptable. If the state is going to incarcerate people with medical conditions (a result that is inevitable) then they have a positive obligation to deal with medical issues properly, promptly and effectively.

57 I acknowledge that the applicant did not suffer any physical harm as a result of the delay in getting his medication but it is clear to me that the failure to provide his medication added to the fear and anxiety that the applicant experienced from the situation in which he found himself. I heard the expert evidence of Dr. Antony, a psychologist who treated the applicant after these events, who said very clearly that the applicant would suffer

psychologically from the fact that his medication was withheld. I accept Dr. Antony's view that there is a qualitative difference between a person missing medication by their own choice (e.g. forgetfulness) and missing medication because persons in authority are either withholding it or are perceived to be withholding it. It was entirely reasonable for the applicant to believe, knowing that his medication had accompanied him but that it was not being provided to him, that the authorities were intentionally not providing him with his medication.

58 The next issue is the verbal abuse. The applicant says that he was called names and was otherwise subject to derogatory remarks throughout the time that he was held in custody. There is a particular alleged incident at 23 Division where the applicant was taken with others for photographs and fingerprints. During that process, the applicant says that the officer taking the prints subjected him to a number of derogatory comments. I heard from the officer who did the fingerprinting and he denies any such conduct. I am not prepared on the evidence that I heard to make a finding that the officer engaged in this conduct. There was nothing in the manner in which the officer gave his evidence that suggests that he was being untruthful about what occurred.[3] I also consider it likely, given his state of mind at the time, that the applicant may have taken comments made by others and attributed them to this officer. I do expressly reject the applicant's evidence that the officer called to other officers as they passed the fingerprint room and, in some fashion, held the applicant up to ridicule before them. Not only does that seem like an unlikely event by its nature, the unlikelihood of it occurring is heightened both by the physical layout of that area of 23 Division and the fact that the room is video monitored.

59 That said, I have no doubt that the applicant was subjected to derogatory comments during the course of the time that he was being moved from 22 Division to 23 Division, and then to the Finch Avenue courthouse and then while held in that courthouse. Unfortunately, common sense and experience strongly support the likelihood that such comments would have been made by some officers given the nature of the charges that the applicant was facing. Further, Mr. Way gave evidence that he was also subject to such comments during this period of time. There is a measure of corroboration to be found in Mr. Way's evidence as to what the applicant says happened especially since there is no advantage to Mr. Way that would be achieved by him making up such allegations. It remains a regrettable reality that not all officers conduct themselves with the degree of professionalism that we would hope for and, frankly, have the right to expect. The fact that persons are in custody does not give any right to those responsible for handling them to subject prisoners to either physical or verbal abuse.

60 The applicant also gave evidence of two physical events that occurred while he was in custody. While at the Finch Avenue courthouse, the applicant says that he was tripped by a court officer while he was being walked through the cells. The applicant also says that, while he was at the Toronto West detention facility, a guard struck him in the back of the head for no reason. I accept that both of these events occurred. Neither of these events is of a type that the applicant would misinterpret nor are they the type of events that the applicant might have confusion about arising from his OCD and related symptoms. These are clear and straightforward events and I can find no reason to conclude that the applicant simply made them up. Again, unfortunately, experience demonstrates repeatedly that these type of events occur.

61 The alleged announcement of the applicant's charges to other inmates at the detention facility is a matter that is less easy to reach a conclusion about. However, in my view, it is not necessary to reach a conclusion as to whether it occurred in the manner that the applicant describes because it is clear on the evidence that, in one way or another, other inmates did become aware of the applicant's charges. In fact, it is self-evident that this will occur from the fact that persons charged with such offences are routinely placed into protective custody. That is a procedure that would be unnecessary if there was little likelihood that other inmates would become aware of another inmate's charges. It is also a reality, inherent in the nature of the process, that it is going to be virtually impossible to keep such information secret.

62 I accept that the fact that other inmates knew of his charges added to the applicant's fear regarding his safety. I do not, however, consider that that effect can be blamed on the authorities. As I have said, it is inevitable that such information will become known. It is also a reality that some individuals will react badly to learning that another person is subject to these types of charges. There is little that the authorities can do about those realities other than take the steps that they do which is to place such inmates in protective custody or segregation. The fact that

someone in that position will be afraid in those circumstances is understandable but it is not something for which the authorities can, in my view, be held responsible.

63 I should add on this point that these realities were acknowledged by the supervisor at the Toronto West detention facility when he spoke to the parents of the applicant. While the supervisor in question denied that he had made any comments about the applicant's safety to his parents, I reject his evidence on that point. I accept the evidence of the applicant's parents that the supervisor told them that, if their son was in the general population, he would not survive the night and that, even if he was in protective custody, his safety could not be guaranteed. I found the supervisor's evidence generally unsatisfactory whereas the evidence of the applicant's parents was given in a direct and straightforward manner. The supervisor's comments made at the time are, of course, consistent with experience and common knowledge.

64 I turn next to the allegation by the applicant that he was kept in his boxer shorts with no blanket or mattress overnight on the first night that he was in the detention facility. I accept that this occurred although it may not have lasted to the extent that the applicant remembers. On this point I note two relevant facts. One is that this is an event that the applicant told his father about, somewhat reticently, when he spoke to his parents the next day. The other is that there was evidence that, prior to being put in a segregation cell, inmates are strip searched and then provided with clothing and a mattress "some short time later". I believe that that short time became a much longer time in the case of the applicant and I believe that this likely occurred as a juvenile way for the guards to express their displeasure regarding the applicant. Both of these facts provide some corroboration for the applicant's evidence respecting this event.

65 I will make one further general observation at this stage. The Crown asserts that the evidence of the alleged abuse comes solely from the applicant. That is true but it is not clear to me from whom else the Crown would expect it to come. The applicant is the one being subjected to this treatment. He has no one else "on his side" at these times to observe the events and then come to confirm that they happened. At the same time, I did not hear from any of the guards who were on duty when these events are said to have occurred. I am not suggesting that the Crown had to call them as witnesses. They undoubtedly would say that they have no specific recollection of the applicant and would almost certainly offer general denials of improper conduct. While I do have the records of the detention facility, if improper conduct occurred, of course, it is not going to be laid out in the records. In addition, there are no surveillance videos in these specific areas of the facility to review.

66 I also appreciate the Crown's point that it is difficult for them to refute these allegations when they first arise some two and a half years after they are said to have occurred. Of course, persons who are charged with offences that arise out of events that occurred many months or years before can make the same complaint. That does not change the fact that we must still hear and determine such cases, always keeping those considerations in mind.

67 The applicant says that he was provided with minimal food and drink and that he was denied hygiene products and only provided with a shower at the very end of his stay. The records show that the applicant received all appropriate meals that included drink. I accept the applicant's evidence that two cells in which he was housed did not have working water fountains. However, it does not appear that the applicant made any real issue about the malfunctioning water fountains and it is difficult to criticize the detention facility for not fixing a problem that they may well not have been aware of. There is also no evidence that the applicant ever made a request for additional drink -- a request that I suggest could have been made without invoking any hostility from the guards regarding which the applicant was so concerned.

68 In terms of the hygiene products and the shower, I heard evidence that the policy of the detention facility is to only provide inmates with showers once every three days. Without commenting on either the desirability or advisability of that policy, it is clear that the applicant was not treated any differently in this regard than any other inmate. It was on the third day that he was offered and took his shower. Nonetheless, I appreciate that, given his OCD, the applicant would react more negatively to the denial of showers and hygiene products than would other inmates. I do not believe, however, that the detention facility can be fixed with the knowledge of how the applicant's

OCD would impact on this issue, given the many different ways that OCD can manifest itself from person to person. The applicant, of course, did not advise anyone of any issue in this respect.

69 In the end result, I am satisfied that during the time that he was held in custody, the applicant was verbally abused, he was physically abused and he was generally mistreated. The impact of this mistreatment was especially acute for the applicant given his OCD. There is no justification for this conduct. The fact that persons are in custody does not bestow on the authorities responsible for their care, the right to abuse or mistreat inmates simply because they are offended by the nature of the allegations found in the charges that the inmate faces. The requirement that prisoners are to be provided with humane treatment is a longstanding principle that has international application.

70 I conclude therefore that the applicant's rights under s. 7 of the *Charter* were breached by the conduct to which he was subject during the time that he was held in custody.

Remedy

71 Having concluded that the applicant's *Charter* rights were violated, the issue then becomes what remedy is appropriate. The applicant seeks a stay of the charges. In order to obtain a stay, the applicant must satisfy the twin requirements adopted in *R. v. O'Connor*, *[1995] 4 S.C.R. 411*, at para. 75 (QL):

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

72 The Supreme Court of Canada in *O'Connor* added an overriding consideration regarding the imposition of a stay. In the words of L'Heureux-Dubé J., at para. 82 (QL):

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

73 In my view, the applicant fails to meet either of the *O'Connor* requirements. The prejudice caused by the abuse in question will not be perpetuated or aggravated by the conduct of the trial. While the trial may hold its own challenges for the applicant given his OCD, those challenges will have to be faced by the applicant regardless of the issues that arose while he was held in custody. Similarly, while there may be ongoing ramifications for the applicant arising from the manner in which he was treated while in custody, those ramifications are ones that he must contend with whether a trial does or does not occur.

74 There are also other remedies, short of a stay, that could be utilized to address the prejudice that the applicant has sustained. Chief among those is the right of the court to take these matters into consideration on sentencing if the applicant is convicted of any of the charges. State misconduct, even falling short of a *Charter* breach, can be used to reduce what would otherwise be an appropriate sentence. This form of remedy was approved by the Supreme Court of Canada in *R. v. Nasogaluak*, *[2010] 1 S.C.R. 206* where LeBel J. said, at para. 55:

> Thus, a sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence, without requiring the offender to prove that the incidents complained of amount to a *Charter* breach. Provided the interests at stake can properly be considered by the court while acting within the sentencing regime in the *Criminal Code*, there is simply no need to turn to the *Charter* for a remedy. However, if a *Charter* breach has already been alleged and established, a trial judge should not be prevented from reducing the sentence accordingly, so long as the incidents giving rise to the breach are relevant to the usual sentencing regime.

75 I appreciate that there is a residual category where a stay may still be warranted if the state conduct is such that its continuation in the future would offend society's sense of justice. However, with respect to that residual category, the Supreme Court of Canada held in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 that the first of the twin requirements would still generally have to be met.

76 The court in *Tobiass* then clarified the nature of a stay as a remedy. The court said, at para. 96:

> A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent -- a remedy aimed at preventing the perpetuation or aggravation of a particular abuse. Admittedly, if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice. It is conceivable, we suppose, that something so traumatic could be done to an individual in the course of a proceeding that to continue the prosecution of him, even in an otherwise unexceptionable manner, would be unfair.

77 It is at this point that I should once again refer to the evidence of Dr. Antony, the defence expert psychologist. There are two aspects to Dr. Antony's opinion that should be mentioned. One is that, given the applicant's OCD, he would have a greater negative reaction from his experience in custody than would a person who does not suffer from that disorder. Simply put, the applicant's OCD would amplify the anxiety, depression and fear that a person would experience from being incarcerated. It would also likely increase the applicant's perception that others were hostile to him even where, in reality, they were not. The other aspect of Dr. Antony's opinion is his conclusion that the applicant's experience while incarcerated has not only worsened the applicant's OCD but has added other concerns to his mental well-being including posttraumatic stress disorder and panic disorder.

78 If it is not already clear from my reasons, I accept that the applicant was terrified throughout the time that he was held in custody, that he sincerely feared for his safety and that he also reasonably feared being seriously injured or worse. However, having heard Dr. Antony's evidence, I am satisfied that the applicant would have suffered exacerbations of his mental state, even if he had been treated in an exemplary manner while he was incarcerated. While the actual treatment that the applicant was subjected to has aggravated the effect on him, it is evident that some increased harm to the applicant's well-being would have resulted from his arrest and incarceration regardless of the added element of mistreatment. The totality of the harm caused cannot, therefore, be solely attributed to the *Charter* breaches. Another factor impacting on the degree of harm is that Dr. Antony is not prepared to opine that the harm occasioned to the applicant in this regard is permanent. Rather, Dr. Antony says in his report:

> Therefore, it is possible that the severity of Mr. Donnelly's problems will improve once his current life stresses are behind him. However, it is likely that these difficulties will not go away completely.

79 I have concluded, therefore, that the increased harm suffered by the applicant does not constitute the type of "exceedingly serious abuse" that would warrant a stay of proceedings. The harm visited on the applicant, separated from the impact that these proceeding will inevitably have on him because of his disorder, was not so extreme that it would constitute the continuation of the proceeding as fundamentally unfair. Here the conduct was offensive but it was not so egregious as to require a stay of the proceedings in order to make a statement or to adequately reflect society's condemnation of the conduct. As the Supreme Court of Canada observed in *Tobiass*, also at para. 91:

> The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings.

80 There is a strong societal interest in having a determination on the merits of any criminal charge but especially more serious ones. Child pornography is a serious and especially insidious offence because of the nature of the

victims. Children are the most vulnerable of our citizens and the most in need of protection. Society has a direct interest in ensuring that allegations of this type of conduct are fully and properly adjudicated.

Conclusion

81 Before concluding, I note that the Crown asked that I withhold any determination whether a stay should be granted until after the trial is held and the Crown has proven the charges against the applicant. The Crown relied on the decision in *R. v. Aziz*, *[2011] O.J. No. 1260* (O.C.J.), and cases cited therein, for this proposition.

82 In my view, the Crown misapplies the decision in *Aziz* to this case. The point made in *Aziz* relates principally to when applications for a stay in circumstances such as these (i.e. where the issues raised therein are collateral to the issues at trial) should be heard, not when they should be decided. In *Aziz*, the trial judge said that he would entertain the application for a stay but would not hear and determine it until after a decision was made whether the accused person was guilty of the offence. It is of some importance to the rationale for that decision to note that the charge in *Aziz* was impaired driving and, therefore, the trial was expected to take no more, and quite possibly less, time than would the application for a stay.

83 While there is considerable practical merit to the approach taken in *Aziz* where the time required for the application may dwarf the time required for the trial, that is not this case. Here the application has already been heard and it relates to a trial that is scheduled to take four weeks. In addition, in these circumstances, the remedial benefit of a stay is somewhat lost if that remedy is only granted after the trial is completed since that is, after all, the central proceeding that the accused seeks to shut down.

84 In any event, the only matter now left is the outcome of the application. I can see nothing that is likely to arise in the course of the trial that would impact on my conclusion whether a stay is an appropriate remedy for the *Charter* breaches that I have found. Having concluded that a stay is not an appropriate remedy, I do not see any reason to withhold my conclusion for some months until the trial is heard.

85 The application for a stay of proceedings is dismissed.

I.V.B. NORDHEIMER J.

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1 These officers were in plain clothes although one of them may have been wearing a "raid jacket" with "POLICE" on it.

2 I note that similar conclusions have been reached in other like cases such as *R. v. Esposito* *(1985), 53 O.R. (2d) 356* (C.A.) and *R. v. Hicks*, *[1988] O.J. No. 957* (C.A.).

3 I also note on this point that the officer's notes from the day show that the fingerprints and photographs of the applicant did not take appreciably more time than did the fingerprints and photographs of any of the other prisoners that day save and except for Brian Way which the officer explained arose from the lengthy list of charges that Mr. Way faced -- a fact recorded in the officer's notes.

End of Document

TAB 8

R. v. Allen

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Doherty, Weiler and Moldaver JJ.A.

Heard: August 1, 1996.

Judgment: September 19, 1996.

No. C16897

[1996] O.J. No. 3175 | 92 O.A.C. 345 | 110 C.C.C. (3d) 331 | 1 C.R. (5th) 347 | 32 W.C.B. (2d) 163 | 1996 CanLII 4011

Between Her Majesty the Queen, appellant, and Hopeton Delaney Allen, respondent

(34 pp.)

Counsel

David Butt, for the appellant. Samuel I. Willoughby, for the respondent.

The judgment of the Court was delivered by

DOHERTY J.A.

I. Overview:

1 On October 5, 1993, Ferguson J. held that the respondent's right to a trial within a reasonable time had been violated and directed that the ongoing proceedings against him be stayed. The Crown appeals from that order.

2 The respondent was initially arrested in November 1989 and charged with four fraud related offences. He was arrested again in October 1990 and charged with some 500 additional fraud related charges. All of the charges arose out of the respondent's business activities. He prepared tax returns for individuals and took his fee from the tax refund claimed on their behalf. The Crown alleged that the respondent claimed fraudulent deductions from income to increase the refund and his fee. According to the Crown, the scheme went on for years and involved hundreds of false claims made on behalf of numerous individual taxpayers. The Crown also contended that the respondent continued to carry out business after his initial arrest.

3 The history of these proceedings, beginning with the respondent's initial arrest in November 1989 and ending with the stay of proceedings entered almost four years later on October 5, 1993, is a prolonged and, in some respects, confusing one. Crown counsel has provided a detailed review of that history. Fortunately, much of it is not in issue and need not be referred to at length in these reasons.

II. Chronology:

4 The relevant chronology of events is as follows:

Date: November 30, 1989 [first set of fraud charges]. Event: The respondent is charged with four fraud related counts and released on bail.

Date: January 30, 1990.
Event: The respondent appears to set a date for his preliminary inquiry. His counsel has provided a letter suggesting dates in 1991. The Crown offers earlier dates, but the respondent indicates that he wants the dates referred to in his counsel's letter. The preliminary inquiry is set for March 4, 1991.

Date: October 10, 1990 [second set of fraud charges]. Event: The respondent is arrested and charged with over 500 additional fraud related charges. The respondent is detained in custody.

Date: October 22, 1990.
Event: Dates in December 1990 and January 1991 are set for a preliminary inquiry into the second set of fraud charges.

Date: November 9, 1990.
Event: The respondent is released on bail on the second set of fraud charges.

Date: December 1990 - July 1991.
Event: The preliminary inquiry continues on an intermittent basis. Dates for the resumption of the preliminary inquiry are set according to the availability of respondent's counsel.

Date: April 30, 1991 [first set of perjury charges]. Event: The respondent is charged with 2 counts of perjury, 2 counts of obstruct justice and 1 count of breach of recognizance. The respondent is detained in custody and the matter is adjourned at the request of his counsel.

Date: May 29, 1991.
Event: The respondent fires his lawyer and retains new counsel.

Date: July 23, 1991.
Event: The preliminary inquiry on the fraud charges which have been continuing is adjourned to September 3rd on consent so that new counsel can get transcripts of the prior proceedings.

Date: August 12, 1991.
Event: The trial on the perjury charges commences and is adjourned to September 9th.

Date: August - September, 1991.
Event: Both the preliminary inquiry on the fraud charges and the perjury charges are adjourned from time to time on consent.

Date: October 11, 1991.
Event: The respondent is convicted of 1 count of perjury and 2 counts of obstruct justice and sentenced to 4 months in jail. The preliminary inquiry into the fraud charges is adjourned at the request of defence counsel until November 8, 1991.

Date: November 1991 - April 1992.
Event: The preliminary inquiry continues on an intermittent basis. Some time is lost because of defence counsel's unavailability on dates he had agreed to, and some time is lost because of the difficulty in scheduling Crown witnesses.

Date: April 3, 1992.
Event: Crown counsel places a new information before the court containing 26 counts. The information replaces the two existing informations which allege over 500 charges. The new charges encompass all of the allegations made in the old charges. The respondent is committed for trial on 24 of the 26 counts.

Date: May 4, 1992.
Event: An indictment is presented in the Ontario Court (General Division) and a pre-trial is set for May 22, 1992.

Date: May 22, 1992.
Event: The pre-trial is held. The respondent re-elects trial by judge alone. The Crown estimates that the trial will take 3 months. The trial is set to begin on January 25, 1993.

Date: August 31, 1992 [second set of perjury charges]. Event: The accused is arrested for a fourth time and charged with perjury, fraud, forgery, uttering a forged document, obstruct justice and failure to comply with a recognizance. All of the charges relate to an alleged fraudulent affidavit filed by the respondent on a bail review.

Date: August 31 - September 18, 1992.
Event: The respondent's bail hearing on the new perjury charges is adjourned several times at the request or with the consent of defence. On September 18, 1992, the respondent agrees to a detention order.

Date: September 1992 - December 1992.
Event: The respondent waives the preliminary inquiry on the second set of perjury charges and an indictment is presented in the Ontario Court (General Division). The trial of the perjury charge is adjourned from time to time at the request of counsel for the respondent.

Date: November 1992 [exact date not specified].
Event: A further pre-trial is held. Counsel for the respondent indicates that certain concessions will be made at trial. Counsel agrees that the trial will now take 3-4 weeks.

Date: December 18, 1992.
Event: The respondent has retained Mr. Roach, at least on the perjury charges. Crown counsel suggests that the perjury charges proceed on January 25, 1993 and that the fraud trial presently scheduled for January 25th be delayed one week to February 1st as a judge will be available on that date for a 4-week trail.

Date: January 13, 15, 1993.
Event: The respondent's counsel moves to be removed from the record on the fraud charges because he may be a witness on the primary charge. Counsel is permitted to withdraw. Mr. Roach has already been retained to act on the fraud charges. Counsel have agreed that the fraud related charges and the breach of recognizance charge contained in the second set of perjury charges would be added to the fraud indictment. Crown counsel proposed to proceed separately on the remaining charges of perjury and obstruct justice. Mr. Roach indicated that he would move to "join" both indictments at the commencement of proceedings on February 1st.

Date: February 1, 1993.
Event: Sheppard J. dismissed the motion to "join" the two indictments and a motion to quash the fraud indictment. The respondent states that he is prepared to proceed with the fraud trial and that trial starts. The continues through February. There are several short adjournments, most to assist defence counsel in his ongoing preparation for trail.

Date: February 16, 1993.
Event: It is apparent that the case will not be finished in the time allotted. Mr. Roach indicates that he has freed his schedule until the end of March. In the course of discussing scheduling, the trial judge indicates that he proposes to continue with the case until its completion provided that the necessary arrangements to adjust his sitting schedule can be made. He indicates that the Regional Chief Judge will determine whether his schedule can be adjusted.

Date: February 17, 1993.
Event: The trial judge advises counsel that he has been informed by the Regional Chief Judge that the case will have to be adjourned if not completed in the four weeks allotted to it. It is clear that the case would not be completed by the end of February.

Date: February 19, 1993.
Event: The trial judge indicates that the case will be adjourned at the end of February and that there has been some suggestion that it can be completed during the summer. Mr. Roach indicates that an adjournment of the trial will cause difficulties because of his other commitments. The trial

judge tells Mr. Roach that he should speak to the Regional Chief Judge if he wishes more information as to why the case cannot proceed without interruption.

Date: February 25, 1993.
Event: The trial judge indicates that he has been made aware that Mr. Roach will be bringing a motion in the Court of Appeal seeking an order requiring that the trial proceed without interruption. As the allotted time for the case has expired, the trial judge adjourns the case to March 5th to set a date for continuation.

Date: March 5, 1993.
Event: Mr. Roach informs the assignment court that he wishes to proceed immediately with the completion of the trial and the failing that, he is unavailable until November 1993. Mr. Roach also indicates that his motions in the Court of Appeal seeking an order compelling the continuation of the trial are still outstanding. November 29, 1993 is set as a "target date" for the continuation of the trial, although the Crown indicates that earlier dates may well be available.

Date: March 11, 1993.
Event: Attempts to set a date for the continuation of the trial are stalled as the respondent's motions in the Court of Appeal are still outstanding.

Date: March 22, 1993.
Event: The Court of Appeal has dismissed the motions on the basis that it has no jurisdiction to make the order requested. The Crown attempts to set a date for the trial on the perjury charge. Counsel appearing for Mr. Roach urges that the perjury trial be held after the fraud trial. The respondent is in custody on the perjury charge. It is anticipated that the perjury trial will take three days. Despite counsel's objection, the court fixes the perjury trial for June 28th. Counsel also advises that Mr. Roach can now proceed with the fraud matter prior to the November date given by Mr. Roach at earlier proceedings. Counsel is advised that the trial judge's schedule has now been set through November and that any application should be made to the Regional Senior Judge.

Date: May 7, 1993.
Event: Mr. Willoughby writes to the Regional Senior Judge on behalf of Mr. Roach asking that the fraud trial be rescheduled for an earlier continuation date.

Date: May 27, 1993.
Event: The Regional Senior Judge, after reviewing the history of the proceedings, advises counsel in writing that the continuation date for the fraud trial has been moved forward to August 30, 1993.

Date: June 16, 1993.
Event: Mr. Willoughby is now acting for the respondent. He requests an adjournment of the perjury trial until after the completion of the fraud trial. The request is refused.

Date: June 28, 1993.
Event: The perjury trial commences and is completed on July 2, 1993. The respondent is convicted of perjury and sentencing is adjourned.

Date: August 30, 1993.
Event: The fraud trial recommences and continues on a more or less regular basis through to September 16, 1993.

Date: September 16, 1993.
Event: Mr. Willoughby brings a motion before the trial judge (Sheppard J.) seeking a stay of proceedings on the basis that the respondent's right to trial within a reasonable time has been infringed. The trial judge holds that he should not decide the motion. The trial continues.

Date: October 1, 1993.
Event: The respondent is sentenced to 18 months on the perjury charge. In imposing sentence, the trial judge (Howden J.) expressly gives the respondent credit for the time spent in pre-trial custody (13 months).

Date: October 1, 1993.
Event: The motion to stay the fraud trial on the basis of unreasonable delay commences before Justice Ferguson and continues through to October 4th.

Date: October 5, 1993.
Event: Justice Ferguson finds that the respondent's right to trial within a reasonable time has been infringed and directs that the proceedings on the fraud trial be stayed.

Date: October 5, 1993.
Event: Justice Sheppard directs that a stay be entered. At this point there were about three days of evidence left in the Crown's case.

III. Reasons of Ferguson J.:

5 In his reasons, Ferguson J. reviewed the history of the entire proceedings and then fixed on the six-month period between the end of February 1993 and August 30, 1993. In his view, the validity of the respondent's s. 11(b) claim rested entirely on the reasonableness of that six-month adjournment. He said:

> The crucial issue on this motion is whether unreasonable delay occurred when, with the accused in custody, the trial was adjourned for six months.

6 Ferguson J. then considered the reasons advanced for the six-month adjournment. He concluded that the length of the adjournment could only be explained by the chronic and longstanding scarcity of judicial resources in the jurisdiction. Ferguson J. discounted counsel for the respondent's initial indication in late February that he was unavailable until November 1993 as relevant to the length of the adjournment because there was no evidence that earlier dates might have been made available.[1] Ferguson J. also held that once defence counsel made his desire to continue the trial without delay clear, he was under no obligation to take steps to obtain an earlier date. Ferguson J. held that it was the duty of the Crown to apply to the Senior Judge for an earlier date.

7 Ferguson J. rejected most of the prejudice claims put forward on behalf of the respondent, but found merit in one. He said:

> ... Where an accused is charged with serious offences giving rise to a complicated trial he is generally entitled to have the trial continue without significant interruptions. In a case like this which might be described as a paper chase, it is difficult for counsel and the trial judge to keep the evidence in mind. Indeed, in this case the trial judge took several days off during the first month for this very reason.[2] An adjournment of several months would make the task of the trial judge and defence counsel exceedingly difficult and could be prejudicial to the accused.

8 Having considered the length of the adjournment, the cause of and explanations for an adjournment of that length, and potential prejudice to the respondent, Ferguson J. concluded:

> ... However, I think an adjournment of a complicated case for six months because of a chronic scarcity of judicial resources is unreasonable. It is especially so when the accused is in custody.

IV. Preliminary Issues:

9 Before turning to the substantive submissions made by the Crown, I will address two preliminary matters, one raised by the court, and the other by the respondent. At the outset of the oral argument, the court questioned its jurisdiction to hear the appeal. Ferguson J. was not the trial judge. In ordering a stay he acted under s. 24(1) of the Charter and not under the authority of the Criminal Code. Ferguson J. was, however, a judge of the court in which the respondent was being tried, and was, therefore, "a trial court" for the purposes of s. 676(1)(c) of the Criminal Code. Since his order directed a stay of proceedings, the Crown had a statutory right of appeal under s. 676(1)(c).

10 Mr. Butt, for the Crown, also noted that Sheppard J., the trial judge, in effect adopted the ruling of Ferguson J. on October 5th when he acknowledged the order and said "So this case is stayed. Mr. Registrar, secure all exhibits." Mr. Butt submits on the authority of R. v. Litchfield *(1993), 86 C.C.C. (3d) 97* at 110-111 (S.C.C.), that Sheppard J., as the trial judge, could have set aside the order of Ferguson J. Mr. Butt further contends that the failure of Sheppard J. to do so is reviewable on appeal by the Crown under s. 676(1)(c). That review of necessity turns on the correctness of the order made by Ferguson J. I accept this submission and it provides an alternative basis for this court's jurisdiction to hear this appeal.

11 The respondent's preliminary submission concerned the record placed before this court by the appellant. Crown counsel filed transcripts of virtually all of the proceedings relating to the charges against the respondent. Mr. Willoughby contended that the Crown was limited to the record which the parties had placed before Ferguson J. That record contained some but by no means all of the transcripts which Crown counsel made available to this court.

12 When s. 11(b) is in issue, this court has come to expect that full transcripts of the proceedings under review will be placed before it. A fair assessment of an alleged breach of s. 11(b) is best made after a review of all available transcripts pertaining to the challenged proceedings. In any event, the additional transcripts filed by the Crown in this court do not change the factual matrix. At most, they elaborate on the facts placed before Ferguson J. by providing the primary sources from which those facts are drawn. Mr. Willoughby was invited to refer to any facts

relied on by the Crown in this court which he contended were not supported by the record placed before Ferguson J. Mr. Willoughby did not pursue that invitation in his submissions. I would not give effect to this preliminary objection.

V. The Nature of the Right Guaranteed by s. 11(b)

13 Ferguson J. was concerned that a lengthy and complex criminal trial was adjourned for six months during the taking of evidence. His concern is well founded. Long adjournments in the course of a complex trial can cause difficulties for the parties, witnesses and the court. Unfortunately, such delays are not uncommon even in criminal proceedings.

14 While I share the concerns of Justice Ferguson, I cannot agree with his interpretation of s. 11(b) of the Charter.

15 Section 11(b) provides:

> Any person charged with an offence has the right to be tried within a reasonable time.

16 Ferguson J. interpreted s. 11(b) as providing for two constitutional rights. He found a right to have one's trial completed within a reasonable time and a separate right not to be subjected to any unreasonable delay during the process. As he interpreted s. 11(b), both the entire time period from the laying of the charge to the completion of the trial and discrete delays within that time period were subject to separate s. 11(b) analysis. After referring to R. v. Rahey *(1987), 33 C.C.C. (3d) 289* (S.C.C.), he said:

> ... it appears to me that the court contemplated that a breach of an accused's rights under s. 11(b) can arise either from the totality of delay or from the unreasonable delay of any part of the proceeding. In Rahey, supra, the court was focusing on the delay in the trial judge's rendering a ruling on a motion for a directed verdict. It seems to me that if a trial started on the very day a charge was laid but that during the trial the judge delayed 11 months to consider a ruling on a motion then that could constitute a breach of s. 11 even though the total length of the proceeding was not unreasonable. Similarly, I think an unreasonable delay during a trial for other reasons can constitute such a breach even though the total length of time from the laying of the charge to the bringing of the motion is not in itself unreasonable. The issue, of course, must be considered in the context of the entire proceeding.

17 I can see nothing in the language of s. 11(b) which suggests any right to have one's trial proceed according to a constitutionally mandated timetable. Section 11(b) creates one right - the right to be tried within a reasonable time. As long as the entire time period in issue cannot be said to be unreasonable when tested against the principles pronounced in R. v. Morin *(1992), 71 C.C.C. (3d) 1* (S.C.C.), there is no violation of s. 11(b). Justice L'Heureux-Dubé, writing for the majority in R. v. Conway *(1989), 49 C.C.C. (3d) 289* at 307 (S.C.C.), put it this way:

> In deciding a claim made under s. 11(b) of the Charter, the correct approach is in my view to evaluate the reasonableness of the overall lapse of time. A piecemeal analysis is generally not appropriate. In a case where each individual period, taken in isolation from the others, may constitute a reasonable delay, the total period may nevertheless be unreasonable for the purpose of s. 11(b). The case of Rahey illustrates the point. While each adjournment initiated by the judge was for a short period, the accumulation of all 19 adjournments over the span of 11 months was held to infringe s. 11(b). However, nothing prevents a court from focusing on specific time periods which may be significant in the over-all assessment, as going to the weight to give to specific delays, as opposed to their reasonableness. [Emphasis added]

18 Arbour J.A. followed the same approach in R. v. Bennett *(1991), 64 C.C.C. (3d) 449* at 467 (Ont. C.A.), aff'd, *(1992), 74 C.C.C. (3d) 384* (S.C.C.). She observed:

> It is easy to lose sight of the importance of the total period of delay, particularly when engaged in an examination of the causes for various components of the total delay. A case may take too long to reach the preliminary inquiry, but then may be tried very expeditiously after committal, or vice versa. Ultimately, it is the reasonableness of the total period of time that has to be assessed, in the light of the reasons that explain its constituent parts. [Emphasis added]

19 The approach adopted by Ferguson J. is diametrically opposed to that dictated by Conway and Bennett. The six-month period between the adjournment of the trial at the end of February and its continuation on August 30th should not have been subject to a separate s. 11(b) analysis. In finding a breach of s. 11(b) and directing a stay of proceedings because he regarded the six-month adjournment as unreasonable, Ferguson J. erred in law and failed to address the real issue - was the respondent, in all of the circumstances, denied a trial within a reasonable time? I must now address that issue.

VI. Was there an infringement of s. 11(b)?

20 The approach to be followed when a s. 11(b) claim is made is now firmly established: R. v. Morin, supra; R. v. Bennett, supra. In Morin, Sopinka J. said at pp. 13-14:

> ... the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial: [citations omitted]. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanations for the delay, and the prejudice to the accused.

Following that blueprint, I cannot find a breach of s. 11(b) in this case.

21 The charges were in the Ontario Court (Provincial Division) for 26 months. This lengthy period of time is fully explained by the complexity of the case, the intervening charges brought against the respondent, efforts to accommodate the schedule of counsel for the respondent, and the delay caused when the respondent chose to discharge one counsel and retain another. Indeed, under the authority of Morin, supra, at p. 15, much of this 26-month period can be excluded for s. 11(b) purposes as the respondent waived his rights under s. 11(b). For example, on January 30, 1990, the respondent insisted that his preliminary inquiry be set for March 4, 1991 to suit his counsel's schedule and rejected earlier dates offered to him. The respondent's position amounted to a waiver of his s. 11(b) rights for that period of time. It is crystal clear that prior to his committal for trial, the respondent was in no hurry to go to trial on the fraud related charges and was willing to let his counsel's availability dictate the pace of the criminal process.

22 The fraud indictment was lodged in the Ontario Court (General Division) in May of 1992. A trial date was set within seven weeks of the committal for trial. The trial was set on consent for January 25th, some eight months in the future. Given the length of the anticipated trial (3 months), I do not regard an eight-month time period between the setting of the date and the commencement of the trial as even approaching the limits of unacceptable delay. The trial in fact started one week later on February 1, 1993. Had it proceeded to completion, there could be no argument that s. 11(b) had been infringed. I do not understand the respondent to suggest otherwise.

23 It is the delay between the adjournment of the trial on February 25th and its recommencement on August 30th which raises the possibility of a breach of s. 11(b). I repeat, however, that the question is not whether that delay was in and of itself unreasonable, but whether it rendered the over-all time period unreasonable. The reasons for, as well as the length of that delay must be factored into the assessment of whether the entire time period from the commencement of the proceedings resulted in a denial of the respondent's rights under s. 11(b).

24 Clearly, the delay between February and August, 1993 was not waived. The respondent wanted to proceed without delay. It is therefore necessary to consider the reasons for the delay: R. v. Morin, supra, at p. 16. I turn first to a consideration of why the case had to be adjourned at all. The trial commenced on February 1st. It had been

scheduled for four weeks. This time estimate was provided by counsel for the Crown and the respondent at a pre-trial in November 1992, and was based on a number of concessions which respondent's counsel said would be made at trial. Obviously, courts must operate according to a schedule and those who fix court schedules must rely on time estimates made jointly by counsel, particularly when those estimates are made well on in the proceedings.

25 In January, 1993, respondent's counsel moved to withdraw from the fraud case because he was potentially a witness on the perjury case. Counsel was permitted to withdraw. Mr. Roach was retained on the fraud charges in the middle of January after the pre-trial at which the time estimates had been made by Crown counsel and the respondent's previous counsel. Mr. Roach was told of the estimated time for trial and one must assume that he was aware that the estimate was premised on concessions which previous counsel had made on behalf of the respondent. Certainly the Crown and the trial judge were entitled to assume, absent any indication to the contrary, that Mr. Roach would abide by those concessions. Mr. Roach did not indicate prior to February 1st that he would not make the concessions agreed upon by previous counsel. Mr. Roach knew that without these concessions the time allotted for trial was inadequate. Indeed, prior to February 1st Mr. Roach had cleared his calendar for the entire month of March. Counsel's decision not to make the concessions agreed upon by previous counsel made it impossible to complete the trial within the allotted time and more than doubled the length of the trial. In my view, one must reasonably anticipate that such a significant change in the time needed to complete a case will necessitate some adjournment of the trial at the end of the allotted time.

26 The failure to complete the trial within the allotted time or within a time very near to the allotted time had nothing to do with a lack of adequate institutional resources, the conduct of the Crown, or the conduct of the trial judge. It was a direct result of the respondent's decision to instruct Mr. Roach not to make the concessions which previous counsel had said would be made. That decision insured that the trial would not be completed in the allotted time and made some adjournment of the trial virtually inevitable. In so holding, I do not place "blame" on the respondent for the choice he made, but merely identify the cause of the adjournment which, of necessity, precipitated some delay in the completion of the trial: R. v. Morin, supra, at pp. 17-18.

27 I turn next to the length of the delay which resulted when the case was adjourned. Justice Ferguson held that the entire six months could be attributed to a chronic scarcity of judicial resources. I disagree. When addressing s. 11(b), one must consider the inherent time requirements needed to get a case into the system and to complete that case: R. v. Morin, supra, at p. 16. Those time requirements can include adjournments necessitated by the need to find additional court time when initial time estimates prove inaccurate: R. v. Hawkins *(1991), 6 O.R. (3d) 724* at 728 (C.A.), aff'd, *(1992), 11 O.R. (3d) 64* (S.C.C.); R. v. Philip *(1993), 80 C.C.C. (3d) 167* at 172-73 (Ont. C.A.). The inherent time requirements needed to complete a case are considered to be neutral in the s. 11(b) calculus. The recognition and treatment of such inherent time requirements in the s. 11(b) jurisprudence is simply a reflection of the reality of the world in which the criminal justice system operates. No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case, but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.

28 The length of delay attributable to the inherent demands of a case will depend on a number of factors: R. v. Morin, supra, at pp. 16-17. The amount of additional time required will be an important consideration. Here, counsel needed an additional five weeks. Surely, it is an unusual situation when initial time estimates prove to be so inadequate. This must be described as an extraordinary situation. In my view, a substantial adjournment was inherent in the time requirements of the case given the added time needed to complete the trial.

29 In considering the reasons for the six-month delay between February 25th and August 30, 1993 I would break that time period into three parts. They are:

February 25th to March 22nd;

March 22nd to May 7th;

May 7th to August 30th.

(a) February 25th, 1993 to March 22, 1993

30 During this first period, Mr. Roach refused to provide dates for the recommencement of the trial before November of 1993. He took the position that the trial should proceed uninterrupted, failing which he was unavailable until November 1993. Mr. Roach appeared to operate on the assumption that he could accept a retainer in a case which was scheduled for four weeks, reject concessions which had been agreed upon, thereby adding five weeks to the trial, clear his own schedule to accommodate those added five weeks and then demand that the system do the same. Mr. Roach's assumption is both unfounded and unreasonable. His position also made it useless for the Crown to attempt to secure an earlier date for the recommencement of the trial before the Regional Chief Judge.

31 Mr. Roach also launched proceedings in the Court of Appeal in the last week of February, 1993. He sought an order from the Court of Appeal requiring that the trial proceed without interruption. The motions brought by Mr. Roach in the Court of Appeal were entirely misconceived and self-evidently doomed to failure. By bringing these motions, Mr. Roach effectively removed the case from the trial court until late March of 1993. I would ascribe the delay between February 25th and March 22nd to the tactical decisions made on behalf of the respondent by Mr. Roach.

(b) March 22nd, 1993 to May 7th, 1993

32 By March 22nd, the Court of Appeal had dismissed Mr. Roach's motions. Mr. Roach had also changed his position and announced that he was available to continue the fraud trial before November 1993. On March 22, 1993, the assignment court judge told an agent for Mr. Roach and counsel for the Crown that the trial judge's schedule was now set through November, and that any requests to have the trial recommenced before November 1993 would have to be made to the Regional Chief Judge. It was not until May 7, 1993 that Mr. Willoughby wrote to the Regional Chief Judge on behalf of Mr. Roach seeking an earlier date for the continuation of the trial. No explanation is offered for the six-week period between March 22nd and May 7th. This delay cannot be attributed to a lack of institutional resources, but is the direct product of the failure of counsel for the Crown and the respondent to make efforts to access the available resources. I would count this period of time against both the Crown and the defence.

33 Once counsel for the respondent chose to access the available resources, the Regional Chief Judge needed some time to consider the request. Within about three weeks, she responded to the request by providing an additional large block of court time some three months in the future. A 3 1/2 month adjournment in the middle of a criminal trial is hardly desirable. However, in view of the amount of additional time required to complete the case and the Regional Chief Judge's obvious desire to provide an adequate amount of time to complete the trial without further interruption, I regard 3 1/2 months as properly reflective of the inherent time requirements needed to reschedule the remainder of the trial.

34 Mr. Willoughby characterized the administrative procedures in place for determining whether the case would proceed beyond its allotted time and for fixing new dates for the continuation of cases as "very inflexible." I took him to suggest that this inflexibility caused both the initial adjournment in February and the six-month delay before the case could be rescheduled. I cannot agree. The Central East Region is a large and busy jurisdiction. Many judges circulate among the many different courthouses in that jurisdiction. Some centralized means of allocating resources throughout the Region is essential to an effective use of available resources. I see nothing particularly onerous in requiring counsel to make their positions known to the Regional Chief Judge. I also find no evidence of inflexibility. To the contrary, when Mr. Roach changed his position as to his availability, the court responded with an earlier date for the continuation of the trial.

35 There is nothing in the record to support the conclusion that the chronic scarcity of judicial resources contributed in any meaningful way to the six-month delay between the end of February 1993 and August 30, 1993. I cannot agree with Justice Ferguson's conclusion that the trial judge's unavailability beyond the time scheduled for the trial

was indicative of "scarce judicial resources." To me, it demonstrates an attempt to effectively use available resources by scheduling cases according to the estimates provided by counsel.

36 In summary, I would hold the defence responsible for a little over a month of the delay, I would fix the Crown and defence with joint responsibility for a little over a month of the delay, and I would attribute some 3 1/2 months of the delay to the inherent time requirements needed for the system to respond to the request for an additional five weeks of court time. This last period should not count against either the Crown or the defence.

37 I turn lastly to the question of prejudice. I agree with Ferguson J.'s conclusion that most of the allegations of prejudice advanced by the respondent were without substance. I cannot agree, however, with his conclusion that a lengthy adjournment in the trial would necessarily cause prejudice to the accused. Ferguson J. appears to hold that a six-month adjournment of any complicated case involving a great deal of documentary evidence must prejudice the accused because the trial judge will be unable to "keep the evidence in mind." In my view, this is the type of case which suffers least from a long adjournment during the trial. In cases like this, the trial judge can refresh his memory by re-examining the documents and can obtain the transcripts of the earlier proceedings. In any event, I find it unrealistic to suggest that a six-month delay necessarily means that a trial judge will be unable to "keep the evidence in mind." Complicated civil, criminal and administrative proceedings can sometimes extend over a number of months punctuated by various adjournments. I have never heard it suggested that in all such cases there is a presumption that the tribunal cannot adequately recall the evidence. It is sheer speculation to suggest that Sheppard J. would not have been able to adequately recall the evidence led in February. In any event, had that difficulty developed, it must be presumed that Sheppard J. would have dealt with it in an appropriate manner.

38 I see no basis to assume the kind of prejudice contemplated by Ferguson J. I would add, with due respect to the decision of Sheppard J. disqualifying himself from the s. 11(b) motion, that the need to address the kind of prejudice referred to by Ferguson J. provides a good reason for the trial judge deciding whether there has in fact been a breach of s. 11(b). The trial judge is in the best position to assess that kind of prejudice claim.

39 In this court, Mr. Willoughby relied on two other forms of prejudice in contending that Ferguson J. had properly directed a stay of proceedings. Mr. Willoughby pointed out that the respondent was in custody throughout the adjournment between February and the end of August. The detention order which was the basis for the respondent's custody was a result of the second set of perjury charges laid in August 1992. Although the detention order extended to four of the counts added to the fraud indictment, I am sure that the appellant would have remained in custody until the perjury charge was tried. I say that having in mind the fact that the respondent had earlier been charged with and convicted of perjury and obstruct justice while on bail on the fraud charges.

40 The perjury charges were not tried until June 28, 1993. That date was fixed over the strenuous objection of the respondent who wanted the perjury trial to follow the fraud trial, no doubt, because he did not want to face the prospect of testifying in the fraud trial with two convictions for perjury on his criminal record.

41 The delay in the continuation of the fraud trial had no effect on the respondent's status and did not prolong his custody by so much as one day. He was in jail and would remain there until the perjury trial was completed. I also observe that the trial judge who sentenced the respondent on the perjury charges specifically gave the respondent credit for the time he had spent in custody. In the circumstances of this case, the detention of the respondent during the period between February 25th and August 30th does not constitute prejudice for the purposes of determining whether he was tried on the fraud charges within a reasonable time.

42 Mr. Willoughby further submitted that the appellant's defence on the perjury charges was prejudiced when that trial proceeded before the completion of the fraud trial. He put it this way in his factum:

> ... The delay in the completion of the fraud trial led to the respondent being tried on the related perjury and obstruct charges before the fraud charges which put him in an untenable position insofar as defending himself in the perjury and obstruct trial is concerned. [Emphasis added]

43 In oral argument, Mr. Willoughby explained that the respondent was faced with the choice between giving evidence on the perjury charge and thereby possibly providing information to the Crown which could assist it on the fraud trial and not testifying on the perjury trial and thereby diminishing his chances for acquittal on that charge. He chose not to testify. This prejudice claim goes to the respondent's ability to defend himself on the perjury charges. To the extent that this claim could have any possible merit, it is properly raised in the context of the perjury charges. It is not a form of prejudice which has any relevance to the respondent's right to be tried on the fraud charges within a reasonable time.

VII. Conclusion

44 Having considered and balanced the factors discussed in Morin, I must conclude that s. 11(b) was not infringed. A stay of proceedings should not have been ordered and I would set it aside.

VIII. The Appropriate Order

45 Ferguson J. erred in law in holding that the respondent's right to a trial within a reasonable time had been violated. While s. 676 of the Criminal Code expressly permits a Crown appeal from an order directing a stay of proceedings, s. 686(4), the corresponding remedial section, refers only to appeals from acquittals. Given the court's power to entertain Crown appeals from an order staying proceedings, it must follow that the court has remedial power where it finds that the trial court erred in law in entering the stay. The word "acquittal" in s. 684(4) should be read as including an order directing a stay of proceedings based on a violation of s. 11(b): R. v. Jewitt *(1985), 21 C.C.C. (3d) 7* (S.C.C.).

46 Prior to the statutory recognition of the Crown's right to appeal from a stay of proceedings at trial, the predecessor section to s. 686(4) had been interpreted as providing for only two primary remedies, a new trial or, in limited circumstances, a conviction: R. v. Gunn *(1982), 66 C.C.C. (2d) 294* (S.C.C.). That reading of s. 684(4) may no longer be applicable, given the Crown's power to appeal a stay order. It may be that this court could set aside the stay and direct a continuation of the trial proceedings from the point where the stay was entered.[3] I need not decide that issue as, in my view, a new trial is necessary here. I would allow the appeal, set aside the stay and direct a new trial on the fraud indictment.

47 A postscript is necessary. As the matter may arise at some subsequent point in these proceedings, it should be recorded that although almost three years passed between the stay and the hearing of the appeal (October 1993 to August 1996), the question of appellate delay and any consequent breach of the respondent's constitutional rights was not raised by the respondent in this court: See R. v. Potvin *(1993), 83 C.C.C. (3d) 97* at 112 (S.C.C.).

DOHERTY J.A.
WEILER J.A. -- I agree.
MOLDAVER J.A. -- I agree.

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1 The record does not support this statement. When the trial judge first indicated that the case would be adjourned, he said that there was some chance that it could continue in the summer. More importantly, when Mr. Roach finally requested an earlier date in May 1993, the trial was scheduled for August 30th.

2 The transcripts do not support this finding. While the trial judge did adjourn the trial on at least one occasion to give him an opportunity to digest and organize evidence, most of the adjournments were ordered to allow Mr. Roach an opportunity to prepare legal submissions or examine documents.

3 It would appear that s. 46.1 of the Supreme Court Act, R.S. 1985, ch. S-26 as amended, gives the Supreme Court of Canada that power.

End of Document

Exhibit "W"

This is the Affidavit of

William Adamson Skelly

sworn before me this 12 day of April, 2021.

Commissioner of Oaths

Katherine Kowalchuk
Barrister and Solicitor

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December 18, 2020

ADAMSON BARBECUE LIMITED
(Ontario Corp No. 2589834)
o/a Adamson Barbecue
176 Wicksteed Avenue
Toronto, ON M4G 2B6

WILLIAM ADAMSON SKELLY
Director, Adamson Barbecue Limited
42 Merritt Road
Toronto, ON M4B 3K5
adam@adamsonbarbecue.com

Dear Sir:

Re: Recovery of Expenses

We are retained by the Board of Health for the City of Toronto Health Unit (the "Board") to recover expenses incurred by the Board in carrying out directions given by Dr. Eileen de Villa, Medical Officer of Health for the City of Toronto, relating to enforcement of the s. 22 Order dated November 24, 2020 issued to Adamson Barbecue Limited and William Adamson Skelly. As you aware, the s. 22 Order required immediate closure of the premises carrying on business operating as Adamson BBQ and located at 7 Queen Elizabeth Boulevard in Toronto (the "Premises").

Due to your failure to comply with that s. 22 Order, the Medical Officer of Health directed Municipal Licensing and Standards and Toronto Public Health staff as well as the Chief of Police of the Toronto Police Services and members of the Toronto Police Services to take actions necessary to ensure that the Premises was and remained closed and that access to the Premises was restricted until such time as the s. 22 Order was lifted.

Again due to your failure to comply with the s. 22 Order, and other steps taken by you to deliberately defy that Order, significant resources were required to close the Premises and ensure that it remained closed.

Attached to this letter is a summary of the expenses which total $187,030.56. The Board intends to recover these expenses from you and will proceed with legal action to do so if necessary.

Please contact me no later than **December 30, 2020** to make satisfactory arrangements for payment of the $187,030.56 amount, failing which we are instructed and will proceed to issue a statement of claim against you in Superior Court to recover these expenses as well as interest and legal costs.

Yours truly,

Kirsten Franz

Attach. Expense Summary

BOARD OF HEALTH

Adamson BBQ (7 Queen Elizabeth Blvd)

Expenses incurred by Board in carrying out directions given by Dr. Eileen De Vlila

Staffing Costs	
Municipal Licensing & Standards	$ 4,566.74
Toronto Public Health	$ 8,140.82
Toronto Police Services	$ 165,188.73
	$ 177,896.29
Non-Staffing Costs	
Invoice #7449 - Lock-up	$ 2,356.76
Invoice #CT-200046 - Sure Contractors	$ 6,777.51
	$ 9,134.27
Total Costs	**$ 187,030.56**

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Applicant/Respondent	and	**ADAMSON BARBECUE LIMITED AND WILLIAM ADAMSON SKELLY** Respondents/Applicants	Court File No. CV-20-00652216-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at the City of Toronto

SUPPLEMENTARY AFFIDAVIT OF WILLIAM ADAMSON SKELLY

(Sworn on April 12, 2021)

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Lawyers for the Respondents/Applicants in this Motion