August 2021

Bail in the Time of COVID-19

Thomas A. Stinson

Supervisor: Christopher J Sherrin
University of Western Ontario

ABSTRACT

The COVID-19 pandemic that began in early 2020 resulted in changes to both the form and content of bail hearings and reviews within Ontario. While the statutory framework contained within sections 515, 520, 525 and 679 of the *Criminal Code* remained unchanged, practical changes were necessary in order to allow bail matters to occur virtually and safely. Initially, the existence of COVID-19 may have allowed for the release of some accused persons who would not have been let out on bail prior to the pandemic. By early 2021, bail courts appear to have settled into a pattern where the COVID-19 pandemic could be a factor that could lead to release, usually under the tertiary grounds in clause 515(10)(c) of the *Criminal Code*, for any particular defendant, as long as some medical evidence, specific to that accused, could be presented to the court.

KEYWORDS

Bail, COVID-19, judicial interim release, material change in circumstances, judicial notice.

Bail in the time of COVID-19

INTRODUCTION

The application of the procedures concerning bail in Ontario have been the subject of much interest and commentary in recent years. Reports have been commissioned by such organizations as the Canadian Civil Liberties Association[1] and the John Howard Society,[2] government studies have been undertaken,[3] articles have been published,[4] and the Supreme Court of Canada has rendered several landmark decisions, including *R v St-Cloud*,[5] *R v Jordan*,[6] *R v Antic*[7] and *R v Zora*[8] on the topic of judicial interim release.

Yet the sudden onset of the COVID-19 pandemic throughout the world in March 2020 has radically changed the procedures of bail courts and also has led to a need to re-interpret and apply the law that governs bail. This paper will examine the impact and the effect of the pandemic on how bail decisions have been made in Ontario, how they have been reviewed, as well as, briefly, the logistics of how bail hearings are in fact occurring during the pandemic. I will also consider other developments, relevant to bail, that occurred around the same time as the COVID-19 pandemic, such as the Supreme Court's landmark decision in *Zora*[9] and the coming into force of sections 493.1 and 493.2 of the *Criminal*

---

[1] Deshman, Abby & Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (Toronto: Canadian Civil Liberties Association and Education Trust, 2014), online: https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf ("*Set Up to Fail*")
[2] *Reasonable Bail?* (Toronto: John Howard Society of Ontario, 2013).
[3] Cheryl Marie Webster. "Broken Bail" in Canada: How We Might Go About Fixing It. (Ottawa: Government of Canada, 2015).
[4] See e.g., Berger, Benjamin L and James Stribopoulos. "Risk and the Role of the Judge: Lessons from Bail" in Benjamin L Berger, Emma Cunliffe and James Stribopoulos, eds, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters, 2017) 305 - 326; Friedland, Martin L. "The *Bail Reform Act* Revisited" (2012) 16 Can Crim LR 315; Friedland, Martin L. "Reflections on Criminal Justice Reform in Canada" (2017) 64 Crim LQ 274; Myers, Nicole Marie. "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017) 57 Brit J Crim 664; Roach, Kent. "A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?" (2008) 40 SCLR 717; Yule, Carolyn and Rachel Schumann. "Negotiating Release? Analysing Decision Making in Bail Court" (2019) 61 Can J Corr 45.
[5] *R v St-Cloud*, 2015 SCC 27, [2015] 2 SCR 328 [*St-Cloud*].
[6] *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631, 335 CCC (3d) 403 [*Jordan*].
[7] *R v Antic*, 2017 SCC 27, [2017] 1 SCR 509 [*Antic*].
[8] *R v Zora*, 2020 SCC 14 [*Zora*].
[9] *Ibid*.

Code[10] as COVID-19 was not the only evolution within bail in recent years, and its impact cannot properly be considered within a vacuum. Practical issues, such as the form and content of what information or data with respect to COVID-19 would actually be relevant to a court's consideration of bail are also looked at, and this will necessitate a review of how the legal construct of judicial notice has had to evolve in the time of COVID-19.

By the second half of 2021, consensus seems to have resulted in the courts, at either the initial release or bail review stage, could consider the impact of COVID-19 on any of the statutory grounds of release. A pattern has also developed that specific health information regarding individual accused persons and their circumstances would be more influential to a court in deciding whether to release someone rather than generalized information about the COVID-19 pandemic.

BACKGROUND

While some aspects of judicial interim release, such as regular daily video remand courts, have occurred in a virtual setting for many years in Ontario, the main components of the bail process, for decades, have occurred in person in a physical courtroom. An individual arrested by a police officer, if not released by the police at the station, would be physically brought in front of a justice of the peace without unreasonable delay and, in any event, within 24 hours of the arrest, pursuant to the requirements set out in section 503 of the *Criminal Code*.[11] The only regular exceptions to this initial in-person appearance would be, in some parts of the province, if the arrest occurred on a weekend or a statutory holiday or if the accused person was in a medical facility. In those cases, the accused person might appear before a justice, either by telephone or video, from either a police station or a hospital.

If an accused person brought before a justice of the peace could not be released immediately, subsequent appearances before the court might well occur by video or telephone from a detention centre. But in almost all occasions, before the advent of

[10] *Criminal Code*, RSC 1985, c C-46, as amended.
[11] *Ibid*.

COVID-19, the actual show cause hearing would occur in a courtroom, with the accused person brought in person from the detention centre or the police station to the courthouse.

With COVID-19, all that has now changed. All appearances before a justice, and virtually all bail hearings, are now occurring remotely. Individuals may appear by video or audio from the police detachment in order to satisfy the initial requirements of section 503, and all subsequent appearances including show cause hearings are now occurring, again by video or audio, with the accused person remaining at the detention centre.

These practical changes to how bail hearings have traditionally been conducted are permitted by various provisions of the *Criminal Code*.[12] While they are likely not formally acknowledged in most bail hearings, these provisions could include, for example, the justice making rulings that it is necessary to preside by audioconference due to the COVID-19 pandemic,[13] that the Crown and defence counsel are both "participants" and that they are permitted to appear via audioconference,[14] and, if necessary, that both counsel have confirmed their consent to a contested bail hearing involving witness evidence by way of audioconference.[15]

Because of the technological limitations of the detention centres, this has effectively limited the amount of time that is available for most courts to conduct show cause hearings. Previously, as noted, all individuals potentially having a bail hearing on any given day would be physically transported from the detention centre to the relevant courthouse. The court itself then controlled who would appear in front of it, in what order those appearances would occur, how long those appearances would take, and how long each day the court would sit. All this has changed with the need to co-ordinate, in advance, the specific times during each day when each detention centre – which may well have individuals virtually appearing in many courthouses in different regions throughout Ontario – would be able to bring specific individuals into one of their limited number of video suites for them to be remotely visible in the appropriate courtroom for their bail hearings. Once the pandemic

---

[12] *Ibid*.
[13] *Ibid*, s 502.1(5).
[14] *Ibid*, ss 502.1(4) and 715.25(1).
[15] *Ibid*, s 515(2.3).

occurred, the Ontario Court of Justice[16] recognized that this would seriously curtail the flexibility that courts previously enjoyed with respect to conducting bail hearings and that serious time pressures would develop.[17]

HOW COVID-19 HAS CHANGED THE APPLICATION OF THE LAW OF BAIL IN HEARINGS

Along with changing the structure and format of show cause hearings, the COVID-19 pandemic has also resulted in a great number of judicial rulings that have considered how the pandemic has changed the application of the law itself. This has involved both bail hearings of first instance as well as bail reviews and applications for bail pending appeal.

Initial grounds for detention are set out in section 515 of the *Criminal Code.*[18] Much of the relevant bail jurisprudence considers the impact of COVID-19 as a factor when looking at the secondary and tertiary grounds for detention, as outlined respectively in clauses 515(10)(b) and (c) of the *Criminal Code*.[19] Another category of bail cases examines the consideration of COVID-19 as a material change in circumstances justifying a bail review by a Superior Court judge in Ontario pursuant to section 520, or a detention review pursuant to section 525, of the *Criminal Code*.[20] Yet another category looks at COVID-19 as a factor forming part of the public interest criterion under clause 679(3)(c) of the *Criminal Code*[21] where a judge of the Ontario Court of Appeal may be considering an individual's release on bail pending determination of that person's appeal to the highest court in Ontario, as well as other COVID-19 pronouncements by the Court of Appeal. There is,

---

[16] The Ontario Court of Justice is the court that conducts all bail hearings in Ontario, with the exception, as outlined in s 515(1) of the *Criminal Code*, *supra* note 10, of individuals charged with one of the few offences listed in s 469 of the *Criminal Code*. Show cause hearings in Ontario for those individuals are held in the Superior Court of Justice. Most Ontario Court of Justice bail hearings are heard by justices of the peace, though judges of that court certainly hear them on occasion, in accordance with local practice or necessity.

[17] Among the new initiatives put in place is a Bail Hearings Protocol, originally published on May 11, 2020 and updated on April 22, 2021. I was a member of the committee that helped develop this protocol: https://www.ontariocourts.ca/ocj/covid-19/covid-19-protocol-bail-hearings// .

[18] *Criminal Code, supra* note 10.

[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid*.

however, a great deal of overlap of the issues and factual considerations of COVID-19 within all these categories. I will also briefly examine the impact of COVID-19 on other specific types of cases, such as those involving youths or indigenous accused, as well as cases from other jurisdictions within Canada. Within each of these categories of cases, I will, for the most part, be reviewing the relevant decisions on a chronological basis.

THE BAIL SECTIONS OF THE CRIMINAL CODE AND LEADING JURISPRUDENCE

I will begin with a brief review of the relevant sections of the *Criminal Code*[22] and the leading case law. I will then review some of the COVID-19 bail cases as they consider various themes and issues.

INITIAL BAIL HEARINGS PURSUANT TO SECTION 510 OF THE *CRIMINAL CODE*

Subsection 515(10) of the *Criminal Code*[23] sets out the only three reasons by which the detention of an accused in custody is justified. What is generally referred to as the "primary" ground of detention is set out in clause 515(10)(a). It reads as follows:

> (*a*) *where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law.*

During the pandemic, some bail courts specifically opined on whether the pandemic itself was to be considered under what is commonly referred to as the "secondary" ground of detention, found in clause 515(10)(b). That clause currently reads as follows:

> *(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*

[22] *Ibid*.
[23] *Ibid*.

> *from custody, commit a criminal offence or interfere with the administration of justice.*

Even more frequently, the pandemic was considered as relevant to clause 515(10)(c) of the *Criminal Code*,[24] commonly referred to as the "tertiary" ground. It currently reads as follows:

> *(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.*

Parliament has had its difficulties over the years coming up with appropriate wording for what is now clause (c) of subsection 515(10). What was originally referred to as the "public interest" ground contained within the former wording of clause 515(10)(b) was struck down by the Supreme Court of Canada in *R v Morales*[25] as it authorized pre-trial detention in terms that the Court found to be both vague and imprecise.

As a result of *Morales*,[26] Parliament enacted its first version of clause 515(10)(c),[27] but its original wording included the ability to deny bail "on any other just cause being shown." The Supreme Court of Canada, in *R v Hall*,[28] found that phrase violated sections 7 and 11(e) of the *Canadian Charter of Rights and Freedoms.*[29] The constitutionality of the rest of the tertiary ground in clause 515(10)(c) was upheld.[30] As McLachlin CJC stated: "Where, as here, the crime is horrific, inexplicable, and strongly linked to the accused, a

---

[24] *Ibid*.
[25] *R v Morales*, [1992] 3 SCR 711, 77 CCC (3d) 91 [*Morales* cited to SCR].
[26] *Ibid.*
[27] *Criminal Law Improvement Act, 1996*, SC 1997, c 18, s 59.
[28] *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309, 167 CCC (3d) 449 [*Hall*].
[29] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[30] Subsequent to *Hall*, *supra* note 28, s 515(10)(c) was amended by the *Tackling Violent Crime Act*, SC 2008, c 6, s 37(5).

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."[31]

The use of the tertiary ground is further clarified by the Supreme Court of Canada in *St-Cloud*,[32] in which it held that the tertiary ground is a separate and distinct ground for detention. It should not be interpreted narrowly or applied sparingly, nor is its application to be limited to exceptional circumstances, as some pre-*St-Cloud*[33] cases such as *R v B(A)*[34] and *R v LaFramboise*[35] had ruled. As Wagner J (as he then was) states in *St-Cloud*,[36] referring to the use of the tertiary ground: "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."[37]

The broad wording of the tertiary ground, especially in its use of the phrase "having regard to all the circumstances" led many bail courts, primarily in the early days of the COVID-19 pandemic, to examine whether the existence of the pandemic itself would influence tertiary ground considerations. It is fair to say, as well, that far more reported cases during the pandemic have considered COVID-19 as relevant to the tertiary ground considerations as opposed to the secondary ground considerations.[38]

BAIL REVIEWS PURSUANT TO SECTION 520 OF THE *CRIMINAL CODE*

In the early weeks of the COVID-19 pandemic, the Superior Court in Ontario faced an increased number of applications for bail review pursuant to the provisions of section 520 of the *Criminal Code*.[39] Many of the cases already discussed in this paper are section 520

---

[31] *Hall, supra* note 28 at para 40.
[32] *St-Cloud*, *supra* note 5.
[33] *Ibid*.
[34] *R v B(A)* (2006), 204 CCC (3d) 490 (Ont Sup Ct).
[35] *R v LaFramboise* (2005), 203 CCC (3d) 492 (Ont CA) in chambers.
[36] *St-Cloud*, *supra* note 5.
[37] *Ibid* at para 88.
[38] See e.g. *R v Ledinek,* 2020 ONCJ 374, [2020] OJ No 3614 [*Ledinek*] at para 95: "Counsel agreed that concerns about Covid-19 in the jails informs the tertiary grounds, but not the secondary grounds."
[39] *Criminal Code*, *supra* note 10.

decisions. The particularly relevant portions of section 520 are subsections (1) and (7) which read as follows:

> *(1) If a justice….makes an order under subsection 515(2), (5), (6), (7), 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) 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, 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.*

Subsection 520(8) permits an accused person to make multiple applications for bail review under section 520 so long as a period of at least thirty days has elapsed since the most recent application.

The *St-Cloud*[40] decision, written by Wagner J, now Chief Justice of Canada, as well as clarifying the consideration of the tertiary ground under subsection 515(10) of the *Criminal Code*,[41] as discussed earlier, also alters the approach to section 520 bail reviews that can consider any or all of the primary, secondary and tertiary grounds.

In *St-Cloud*,[42] the Supreme Court confirms that a reviewing judge, pursuant to section 520 of the *Criminal Code*,[43] can review an initial bail decision if new evidence is submitted by either the defence or the prosecution that shows a material and relevant change in the circumstances of the accused's case. This is in addition to a reviewing judge's powers to intervene if the initial bail justice had erred in law, or had rendered a decision that was

---

[40] *St-Cloud*, *supra* note 5.
[41] *Criminal Code*, *supra* note 10.
[42] *St-Cloud, supra* note 5 at paras 120 and 121.
[43] *Criminal Code*, *supra* note 10.

clearly inappropriate, by giving excessive weight to one relevant factor or insufficient weight to another.

St-Cloud also sets out a framework[44] for determining when such new evidence would be admissible. In so doing, the Supreme Court of Canada modifies its prior decision concerning the admissibility of new evidence on appeal in *Palmer v R*[45] and the four criteria set out therein. These categories, as modified by *St-Cloud*[46] in the context of bail, are as follows: First, the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial. In the context of a bail review, as set out in *St-Cloud*,[47] the reviewing judge may consider evidence that is either truly new or that did exist at the time of the initial show cause hearing but was not tendered at such hearing for a reason that was both legitimate and reasonable. Second, the evidence must be relevant in the sense that it bears upon a decisive or potential decisive issue in the trial or bail review. Third, the evidence must be credible in the sense that it is reasonably capable of belief, interpreted within the context of the rules of evidence being relaxed at the bail stage. This same expansive approach to relevance is applicable to evidence led by the accused and the Crown alike[48] and is also codified in clause 518(1)(a) of the *Criminal Code*[49] which permits a justice conducting a bail hearing to make such inquiries, whether or not under oath, about an accused, as the justice considers desirable. Fourth, the evidence must be such that if believed it could reasonably be expected to have affected the result of the trial or bail hearing.

In *Zora*, the Supreme Court potentially expands a reviewing judge's powers in section 520 bail reviews with these general comments:

> 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).

---

[44] *Ibid* at paras 132 to 137.
[45] *Palmer v R*, [1980] 1 SCR 759 [*Palmer*].
[46] *St-Cloud*, *supra* note 5.
[47] *Ibid* at para 132.
[48] See Gary Trotter, *The Law of Bail in Canada*, 3rd ed (Toronto: Thomson Reuters Canada, 2017), c 5, s 5.5.
[49] *Criminal Code*, *supra* note 10.

> Conditions set in the bustle of a busy bail court with limited information can, and when necessary should, be fine-tuned through bail review.[50]

DETENTION REVIEWS PURSUANT TO SECTION 525 OF THE *CRIMINAL CODE*

The framework under which section 525 detention review hearings must occur is set out in the Supreme Court of Canada's decision in *R v Myers*.[51] The paramount consideration is whether the continued detention of the accused in custody is justified within the meaning of subsection 515(10) of the *Criminal Code*.[52] The judge conducting the review should respect findings of fact by the initial bail hearing justice if there is no cause to interfere with them. But the section 525 judge must also take into consideration any new evidence or material change in circumstances with respect to the accused and analyze whether the accused's continued detention in custody is justified.[53]

The key purpose of section 525 is to prevent accused persons from languishing in pre-trial custody and to ensure that trials occur as promptly as possible. It accomplishes this, in indictable offence cases, by placing a responsibility on the jail, the "person having the custody of the accused"[54] where the accused is being held, to apply for a detention review hearing 90 days after the date on which the accused was first taken before a justice.

BAIL ON APPEAL PURSUANT TO SECTION 679 OF THE *CRIMINAL CODE*

A judge from a provincial court of appeal also becomes involved in bail considerations when dealing with applications brought pursuant to section 679 of the *Criminal Code*.[55] Many of the considerations under section 679 are similar to those in subsection 515(10),

---

[50] *Zora, supra* note 8 at para 64.
[51] *R v Myers*, 2019 SCC 18 [*Myers*].
[52] *Criminal Code*, *supra* note 10.
[53] *Myers, supra* note 51 at paras 46 to 49.
[54] See s 525(1) of the *Criminal Code, supra* note 10.
[55] *Ibid*.

with one notable difference being that section 679 applies to persons who are no longer presumed innocent. The relevant statutory provisions of section 679 are as follows:

> *679(1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,*
>
> *(a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;*
> *(b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or*
> *(c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.*
>
> *679(3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that*
>
> *(a) the appeal or application for leave to appeal is not frivolous;*
> *(b) he will surrender himself into custody in accordance with the terms of the order; and*
> *(c) his detention is not necessary in the public interest.*

In Ontario, these section 679 applications provided the earliest opportunities for individual judges of the Court of Appeal to consider the application of COVID-19 to bail, as some of these cases arrived on that court's docket before it had any chance to consider any Superior Court decisions on bail reviews.

The leading case for considering a section 679 application for possible release from custody pending an appeal from conviction is the Supreme Court of Canada's decision in *R v Oland.*[56] It requires a court to conduct a three-pronged analysis. The first criterion is outlined in clause 679(3)(a) of the *Criminal Code*[57] and as stated in *Oland*, "requires the appeal judge to examine the grounds of appeal with a view to ensuring that they are 'not frivolous,'"[58] a standard which the Supreme Court of Canada acknowledges is a test that

[56] *R v Oland*, 2017 SCC 17, [2017] 1 SCR 250 [*Oland*].
[57] *Criminal Code*, *supra* note 10.
[58] *Oland, supra* note 56 at para 20.

"is widely recognized as being a very low bar."[59] The second prong of the *Oland*[60] analysis, set out in clause 679(3)(b), asks whether the defendant will surrender himself into custody when necessary. The third prong in *Oland*, the one that attracts the most attention,[61] is the public interest component, and this will be further reviewed later in this paper.

COVID-19 AS A FACTOR AFFECTING ENSURING ATTENDANCE IN COURT UNDER THE PRIMARY GROUND FOR DETENTION IN CLAUSE 515(10)(A) OF THE *CRIMINAL CODE*

The COVID-19 pandemic is rarely considered as being relevant when considering the primary ground for detention – to ensure the defendant's attendance in court. This makes sense, as there is no obvious causal link between the pandemic and attending court, which has mostly been remote since the beginning of the pandemic. However, the primary ground is directly mentioned in a couple of COVID-19 bail decisions. On June 8, 2020, Mr. Justice Leach of the Superior Court releases his written reasons in the section 520 matter of *R v Morris*,[62] which he heard by teleconference on June 2, 2020. While it is discussed later in greater detail, it is one of the few COVID-19 cases that specifically mentions the primary ground for interim detention, and it does so by referencing the decision in *R v Grant*,[63] decided in May 2020, which did consider that an accused's health issues and fear of contracting COVID-19, coupled with pandemic-related travel restrictions, might reduce primary ground concerns even where the accused has a history of fleeing to escape consequences. In *Morris*,[64] it is the accused's history of prior convictions for resisting a police officer, resisting arrest and escaping from lawful custody, as well as existing allegations of failing to report for probation and failing to attend for trial[65] that cause his counsel at the review application to concede that the court could have legitimate concerns

---

[59] *Oland, supra* note 56 at para 20.
[60] *Ibid*.
[61] *Ibid* at paras 23 – 51.
[62] *R v Morris*, 2020 ONSC 3526, [2020] OJ No 2548 [*Morris*].
[63] *R v Grant*, 2020 ONSC 2957, [2020] OJ No 2109 [*Grant*].
[64] *Morris*, *supra* note 62.
[65] *Ibid* at paras 11(d) and 18.

on the primary ground about releasing Morris. COVID-19 itself does not influence the *Morris*[66] decision with respect to the primary ground.

COVID-19 AS A FACTOR AFFECTING PUBLIC SAFETY UNDER THE SECONDARY GROUND FOR DETENTION IN CLAUSE 515(10)(B) OF THE *CRIMINAL CODE*

There are several bases on which COVID-19 could be considered relevant with respect to the secondary ground. Pandemic restrictions put in place by the federal and provincial legislation, either through existing or new legislation[67] which have included closing businesses, restricting movement and cancelling large gatherings, may reduce the opportunities for some individuals to commit certain crimes. For those accused who are released on bail with sureties, there may well be an increased number of sureties either now unemployed or now working from home who may have an increased ability to supervise. Other individuals may have underlying health conditions, with potentially more serious risks of negative effects if exposed to COVID-19. These may cause such people to have less incentive for conducting criminal activity than they previously would have had.[68] Cases considering each of these factual issues will be reviewed later in this paper. Following these lines of reasoning, the pandemic could result in more individuals being released on the secondary ground. At this point, I will review a few of the COVID-19 bail cases that discuss the relevance of the pandemic, in general terms, to the secondary ground.

The case of *R v TK*[69] was decided on March 30, 2020. T.K. had been detained by Woloschuk JP after a bail hearing in Hamilton on March 8, 2019. He had been charged

---

[66] *Ibid*.
[67] See e.g. *Quarantine Act*, SC 2005, c 20, *Emergency Management and Civil Protection Act,* RSO 1990, c E.9, *Health Protection and Promotion Act*, RSO 1990, c H.7, and *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, SO 2020, c 17. Other relevant government actions in Ontario included the *Declaration of Emergency* in Order in Council 518/20 on March 17, 2020, as well as O Reg 52/20, effective March 28, 2020, *Organized Public Events, Certain Gatherings*; O Reg 104/20, effective March 30, 2020, *Closure of Outdoor Recreational Amenities*; O Reg 82/20, effective April 4, 2020*, Rules for Areas in Shutdown Zone and at Step 1*; and O Reg 51/20, *Closure of Establishments*, effective April 16, 2020.
[68] Cases in which release was granted on the secondary ground, apart from those discussed later in this paper, include *R v Boast*, 2020 ONSC 2684; *R v Smith*, 2020 ONSC 2668; and *R v Osman*, 2020 ONSC 2490.
[69] *R v TK*, 2020 ONSC 1935 [*TK*].

with several offences contrary to the *Controlled Drugs and Substances Act*[70], including possession of a Schedule I substance, methamphetamine, for the purpose of trafficking,[71] along with some *Criminal Code*[72] offences. T.K. appeared before Goodman J of the Superior Court for a bail review. In his decision, Mr. Justice Goodman reviews other pre-pandemic section 520 bail decisions, including *R v Obayendo*[73], *R v Bonito*[74], and *R v Samuels*,[75] before concluding that "the jeopardy and risk posed to inmates from COVID-19 while incarcerated at detention centres awaiting trials (that are currently suspended) is also a valid factor when considering the secondary ground for detention; in particular for non-violent offenders on a bail review."[76] It is interesting that Goodman J, in this very early COVID-19 decision, invokes the secondary ground, as subsequent COVID-bail cases refer more frequently to the tertiary ground, as opposed to the secondary.

In the particulars of this specific case, His Honour, while describing the current pandemic as "daunting and challenging",[77] notes that "the court must be mindful of the risks of release of violent offenders back in the community for the sake of reducing the prison population in detention centres." He concludes:

> When I consider the current state of affairs in the detention centres and with due consideration to the COVID-19 pandemic, I am persuaded by Ms. McCourt [T.K.'s counsel on the bail review] that the applicant will abide by the release conditions imposed instead of remaining in detention awaiting trial…In adding the COVID-19 pandemic into the proposed release plan's 'mix'…I am persuaded that the release plan proferred will address the Crown's primary, secondary and tertiary concerns.[78]

Judgment in the section 520 bail review of *R v TL*[79] is issued on March 30, 2020. T.L. had initially been detained by Ng JP pursuant to the secondary and tertiary grounds on November 13, 2019 after a hearing in which three sureties were proposed.[80] The bail

---

[70] *Controlled Drugs and Substances Act*, SC 1996, c 19, as amended [*CDSA*].
[71] *Ibid*, s 5(2).
[72] *Criminal Code*, *supra* note 10.
[73] *R v Obayendo*, 2015 ONSC 6630, [2015] OJ No 5705.
[74] *R v Bonito*, 2015 ONSC 4928, [2015] OJ No 4629.
[75] *R v Samuels*, 2015 ONSC 5798.
[76] *TK*, *supra* note 69 at para 60.
[77] *Ibid* at para 67.
[78] *Ibid* at paras 72 and 73.
[79] *R v TL*, 2020 ONSC 1885 [*TL*].
[80] *Ibid* at para 2.

review begins, in person, in front of Molloy J of the Superior Court on March 13, 2020. Two proposed sureties testify, one of whom is T.L.'s grandmother. The judge is concerned, however, that the proposed plan of release would involve T.L. living with his grandmother, but there is no indication that his grandfather, who also lives there, is aware of or agrees with this plan. The matter is adjourned to March 23, 2020 as several of the involved parties have March break plans during the intervening time period. Of course, during this week, the COVID-19 crisis worsens severely, and in-person court hearings are suspended. The matter continues in front of Her Honour by conference call, though without the participation of T.L.[81] At the conclusion of the conference call, Molloy J advises that she would be ordering T.L.'s release. Relevant terms are discussed and "the final form of the order was then transmitted through various email exchanges."[82] Her Honour's written reasons followed. In light of the proposed house arrest with multiple sureties, Molloy J advises that the secondary ground concerns have been met. The Crown raises one last interesting argument in that since the grandparents were seniors, "admittedly in a higher risk group in terms of the possible ramifications of infection,"[83] it would endanger them to have T.L. come live with them. Her Honour responds as follows: "[T]hey are capable, competent adults. They are aware of the pandemic and its risks. They understand those risks and they accept them, because they love their grandson and they think it is the right thing to do. That is a choice they are entitled to make."[84]

COVID-19 also plays a role in Schreck J's decision on May 26, 2020 to release an individual in the case of *R v GP*.[85] It is an application for a detention review pursuant to section 525 of the *Criminal Code*[86] and was heard on May 7, 2020. While there is a subsection 517(1) ban in place in *GP*,[87] it specifically allows for publication and quotation

---

[81] *Ibid* at paras 4 and 5.
[82] *Ibid* at para 7.
[83] *Ibid* at para 37.
[84] *Ibid* at para 37.
[85] *R v GP*, 2020 ONSC 3240 [*GP*].
[86] *Criminal Code*, *supra* note 10.
[87] The non-publication and non-production orders in *GP, supra* note 85 were issued, as is quite typical, pursuant to the provisions of s 517(1) of the *Criminal Code, supra* note 10. These orders direct 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

of general principles, though still prohibits publication of any facts about the applicant, his personal circumstances or the evidence. This case is worth reviewing because of the question posed by Schreck J in the very first sentence of his decision: "What happens when there are secondary ground concerns about an accused person but he or she has already spent time in custody that is equivalent to or greater than any sentence he or she would receive if convicted?"[88] His Honour goes on to answer his own question:

> Although I have secondary ground concerns and concerns about the adequacy of the proposed plan, in my view there is a significant risk that if he is not released, the applicant will serve more time in custody than he would be sentenced to if found guilty. The principle of proportionality in sentencing requires that a sentence be as long as necessary to make it proportionate to the gravity of the offence and the moral blameworthiness of the offender, but no longer. In my view, that principle is an important factor in this case which tips the balance in favour of release.[89]

COVID-19 influences Schreck J's decision to release as a result of a proportionality consideration as His Honour acknowledges that, if eventually convicted and sentenced, G.P. would receive more than usual pre-trial credit because of the grimmer conditions in the detention centre as a result of COVID-19.[90]

Relying solely on the number of reported cases that discuss the application of COVID-19 to bail, it would appear that, far more often, when courts consider the COVID-19 pandemic in bail hearings specifically as a factor concerning the secondary ground, detention results more frequently than release. This is the case especially if the court finds no strong link between the particular accused and the pandemic.[91] At least one decision has emphasized that COVID-19 considerations should carry less weight when the risk is greater that any further offences committed by accused persons on interim release would be violent ones.[92] Other decisions go further and conclude that an accused does not become less of a risk to

---

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 held."

[88] *GP, supra* note 85 at para 1.

[89] *Ibid* at para 3. On the principle of proportionality, see *Myers, supra* note 51 at para 51 and *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206 at para 42.

[90] *GP, supra* note 85 at para 34.

[91] These include *R v Hastings*, 2020 ONSC 2083 [*Hastings*], [2020] OJ No 1427; *R v Halovich*, 2020 ONSC 2709, *R v Hassan*, 2020 ONSC 2265 and *R v BMD*, 2020 ONSC 2671 [*BMD*]. Some of these cases will be discussed in more detail later in this paper.

[92] *R v JL*, 2020 ONSC 2144.

public protection and safety because of COVID-19, and that the protection of the public, an important component of the secondary ground, is the paramount concern, trumping any possible threat of inmates being exposed to the pandemic while in custody.[93]

On April 9, 2020, the decision in the case of *R v Syed*[94] is released by Harris J. It is pursuant to section 522 of the *Criminal Code*,[95] and is therefore the initial bail hearing for Mr. Syed, who was charged with a section 469 offence. Again, without going into great detail regarding this case, as subsection 517(1) and 520(9) orders are in place,[96] His Honour comments that "if an accused should be detained for the protection of the public, the risk of contracting the virus in jail does not alter that fact. A person does not become less of a risk because of COVID-19."[97]

An interesting bail decision in the early days of the pandemic is *R v Ibrahim*,[98] a decision of Bird J released on April 14, 2020. Mr. Ibrahim was charged with first degree murder.[99] The Crown does not allege that Mr. Ibrahim is one of the people who shot the victim in this case, but rather that he is a party to the first degree murder by virtue of his actions in the days leading up to the shooting. The evidence against him, while strong, is therefore primarily circumstantial.[100] Ibrahim also has no criminal record nor any other outstanding charges against him.[101]

In weighing the COVID-19 risk for accused persons in custody against the grounds outlined in subsection 515(10) of the *Criminal Code*,[102] Her Honour concludes that

---

[93] See e.g. *R v Williams*, 2020 ONSC 2237 [*Williams*], at paras 123 – 126.
[94] *R v Syed*, 2020 ONSC 2195 [*Shayan Syed*].
[95] *Criminal Code*, *supra* note 10.
[96] The non-publication and non-broadcast provisions of s 517 are incorporated into s 520 proceedings by virtue of s 520(9).
[97] *Shayan Syed, supra* note 94 at para 49. A similar decision was reached in *R v Morgan* (unreported) (31 March 2020), M54170 (C67536) (Ont CA) [*Morgan#1*] in which Trotter JA dismisses an application for bail pending appeal notwithstanding COVID-19 concerns, as he finds that Morgan poses a risk to public safety that was not lessened by his proposed release plan, due to his risk of reoffending as well as the inadequacy of his sureties to supervise him.
[98] *R v Ibrahim*, 2020 ONSC 2241, [2020] OJ No 1570 [*Ibrahim*].
[99] Pursuant to ss 231 and 235 of the *Criminal Code, supra* note 10. As murder (s 235) is an offence listed in s 469 of the *Criminal Code*, s 522 of the *Criminal Code* required Mr. Ibrahim's initial bail hearing to occur in the Superior Court of Justice.
[100] *Ibrahim, supra* note 98 at para 7.
[101] *Ibid* at paras 23 and 32.
[102] *Criminal Code*, *supra* note 10.

"COVID-19 is a factor to be considered but is not determinative of a bail application. If it were dispositive, no one would be detained in custody pending trial until the pandemic is over."[103] After reviewing the specifics of Mr. Ibrahim's situation, including what she refers to as his "antisocial lifestyle," his alleged involvement in the "planned and deliberate execution" of the victim and his "lack of respect in the past for both his mother and sister" who are his proposed sureties, Her Honour concludes that she must detain him on the secondary ground, and his application for bail is dismissed.[104] In coming to that conclusion on the secondary ground, she declines to conduct a detailed analysis of the case under the tertiary ground.

On June 4, 2020, North J gives his oral decision in the matter of *R v O'Brien*.[105] If for no other reason, it is worth reading because it is a transcript of the oral delivery of his decision by His Honour. Thus, it is full of complaints by various parties of their difficulty hearing, of feedback and of interruptions.[106] Such occurrences are all too common in pandemic-era remote audio proceedings where the various parties cannot properly hear or see each other.

By virtue of his outstanding release orders and the allegations that he committed indictable offences while on release, Mr. O'Brien was in a "reverse onus" situation[107] wherein it was his onus to show to the court why his release should be justified rather than the Crown's onus to prove to the court why his detention was necessary. When considering whether he should take the pandemic into account when considering the secondary ground, North J states:

> [66] Defence counsel argues that COVID-19 is a relevant consideration on the secondary ground in this case. Some courts have accepted that COVID-19 should be taken into account when assessing the secondary ground.
>
> [67] In this case, even I were to accept that COVID-19 is a factor that should be taken into account when assessing the secondary ground, it is not a significant consideration in assessing whether there would be a substantial likelihood that Mr. O'Brien will, if released from custody, commit a criminal offence.

---

[103] *Ibrahim, supra* note 98 at para 29.
[104] *Ibid at* paras 45, 48, 49 and 51.
[105] *R v O'Brien*, [2020] OJ No 2805 (ONCJ) [*O'Brien*].
[106] *Ibid* at paras 2 and 9.
[107] See s 515(6) of the *Criminal Code, supra* note 10.

> [68] Given his record for not complying with court orders in the past and the serious nature of the alleged breaches in this case (which were allegedly committed during the middle of the COVID-19 pandemic), I am not convinced that the potential prospect of being arrested and held in custody pending his trial during the pandemic would lower the substantial likelihood that, if released, Mr. O'Brien would commit a serious criminal offence.

North J. makes these comments regarding the applicability of COVID-19 to a secondary ground consideration after he has already concluded that Mr. O'Brien should be detained on the secondary ground.[108]

Morris[109] is briefly discussed earlier in this paper under the primary ground. On all three grounds, Leach J orders the detention of Mr. Morris, finding that the accused does not suffer from any relevant health conditions or any subjective fears of contracting COVID-19. With respect to the secondary ground, His Honour also considers that, because of the pandemic, if he were to release Mr. Morris, there are unfortunately fewer supports available during the pandemic to help Mr. Morris with his drug addiction and mental health issues. He also notes that there are – at the time of his decision – no cases of COVID-19 at the Elgin-Middlesex Detention Centre, where Morris is being held, and the probability is strong that Morris would not follow the directions and rules of his proposed surety.[110]

For the most part, the courts have generally concluded that on the secondary ground, the existence of the COVID-19 pandemic has not often been the tipping point that results in an accused person getting bail. Perhaps Quigley J summarizes it best in *R v Bell*:[111]

> There is also the question of the impact of COVID-19, but the jurisprudence that has developed makes clear that will not be an answer where primary or secondary ground concerns are the basis for detention. Persons who present a substantial likelihood of endangering the public by committing offences or interfering with the administration of justice will likely remain in detention.

---

[108] *O'Brien, supra* note 105 at paras 65 to 68. His Honour comes to a similar conclusion when considering the tertiary ground: "In the circumstances of this case, I have concluded that a tertiary ground release order would be inappropriate, as it would be almost entirely dependent on the COVID-19 factor and would significantly under-weigh all of the other relevant considerations." *O'Brien* at para 100.
[109] *Morris*, *supra* note 62.
[110] *Ibid* at para 22.
[111] *R v Bell*, 2020 ONSC 3962 [*Bell*].

> Accused persons who were previously un-releasable will likely remain un-releasable.[112]

Similarly, Molloy J states, in a comment that applies to both the secondary and tertiary grounds: "As many other judges have noted, the COVID-19 pandemic is not a 'get out of jail free' card. There are individuals who represent such a risk to the community that releasing them prior to trial would undermine public confidence in the justice system."[113]

To summarize, substantial case-specific secondary ground concerns will not generally be overcome by factoring the COVID-19 pandemic into the equation. It would appear that, only when the secondary ground concerns are not as serious, such as when there is no, or limited, history of violence, will the pandemic give that extra push to nudge an otherwise wavering judicial official into releasing someone on the secondary ground.

COVID-19 CONSIDERED AS A FACTOR RELEVANT TO PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE UNDER THE TERTIARY GROUND FOR DETENTION IN SECTION 515(10)(C) OF THE CRIMINAL CODE

One of the earliest cases in which COVID-19 is considered in relation to the tertiary grounds is *R v JS*,[114] decided on March 20, 2020 by Copeland J of the Superior Court in a section 520 bail review, held by teleconference in which the proposed sureties are with defence counsel, but J.S. himself does not participate.[115] While there are publication bans in effect pursuant to subsections 517(1) and 520(9) of the *Criminal Code*,[116] I believe I can make the following general comments and reference some quotations from the case. The Crown in this case acknowledges that changes in circumstances have occurred, both in terms of new sureties being proposed and also because of the existence of the COVID-19 pandemic, which arose after the original detention of J.S. by a justice of the peace.[117] In

---

[112] *Bell, supra* note 111 at para 83.
[113] *R v Newman*, 2020 ONSC 4879 at para 21.
[114] *R v JS*, 2020 ONSC 1710 [*JS*].
[115] *Ibid* at para 1.
[116] *Criminal Code*, *supra* note 10.
[117] *JS, supra* note 114 at paras 4 and 5.

this case, the stricter terms of supervision which the new sureties offer lead Her Honour to conclude as follows:

> Where there may be tertiary ground concerns, the terms of a proposed release plan, if sufficiently strict, may be sufficient to address these concerns. In other words, depending on all of the circumstances, the confidence in the administration of justice of a reasonable and well-informed member of the public may not be diminished even where the Crown makes a strong showing on the four St.-Cloud factors, if a defendant is released on a restrictive bail plan.[118]

J.S's lack of a criminal record also helps Justice Copeland determine that release is possible, along with her considerations of the implications of COVID-19: "In my view, the greatly elevated risk posed to detained inmates from the coronavirus, as compared to being at home on house arrest is a factor that must be considered in assessing the tertiary ground."[119] She goes into further details when she considers the impact of COVID-19 in a custodial setting:

> But I take notice of the fact, based on current events around the world, and in this province, that the risks to health from this virus in a confined space with many people, like a jail, are significantly greater than if a defendant is able to self-isolate at home. The virus is clearly easily transmitted, absent strong social distancing or self-isolation, and it is clearly deadly to a significant number of people who it infects. The practical reality is that the ability to practice social distancing and self-isolation is limited, if not impossible, in an institution where inmates do not have single cells.[120]

Not surprisingly, some of the earliest reported COVID-19 cases are initial bail hearings in front of justices of the peace. Two of these occurred on March 26, 2020, both in Toronto. In *R v Chaouche,*[121] Justice of the Peace Bhattacharjee takes COVID-19 into account when considering the tertiary ground. His Worship concludes that tertiary ground concerns are offset by the possibility of coronavirus in jails, and that a reasonable member of the public

---

[118] *Ibid* at para 10. See also *R v Dang*, 2015 ONSC 4254.
[119] *JS, supra* note 114 at para 18.
[120] *Ibid* at para 19. *JS* is one of the cases referenced and cited in *R v Ali*, 2020 ONSC 2374 [*Ali*]: "Although certainly not a universal view, many judges are now placing an increased focus on the strength of the release plan in terms of protection of the public and the impact of COVID-19 on the tertiary ground even when there is no evidence that a particular defendant is at a higher risk if he or she contracts COVID-19." *Ali* at paras 72 and 73.
[121] *R v Chaouche*, [2020] OJ No 1462 (ONCJ) [*Chaouche*].

would take into consideration the individual and public health interest in having an accused put under house arrest, where feasible, rather than being detained in custody.

Also on March 26, 2020, Justice of the Peace Lee releases his decision in *R v Cotterell*.[122] In this case, in reasoning similar to that expressed in *Chaouche*,[123] Lee JP concludes that COVID-19 is relevant to the tertiary ground, as courts must consider the elevated risk of infection in correctional institutions. His Worship's conclusion in *Cotterell*[124] is that the accused met his onus on both the secondary and tertiary grounds.

Another early COVID-19 bail review application was that of *R v Rajan*,[125] a decision by Harris J. It is subject to publication bans under subsections 517(1) and 520(9) of the *Criminal Code*[126] with respect to the evidence of the offences alleged against Mr. Rajan. His Honour summarizes his conclusions in the first two paragraphs of his decision:

> [1] Sohail Rajan makes his fourth application for bail release pending his trial. Crown counsel agrees that there has been a material change of circumstances but opposes release. This bail hearing was heard by way of audioconference due to the COVID-19 pandemic.
>
> [2] I have with considerable reluctance come to the conclusion that the applicant's argument that he should now be released on bail must succeed. The secondary ground which has been the main concern in the past has shifted and now weighs in favour of release. With reference to the tertiary ground, it has been fundamentally altered by the COVID-19 pandemic and the threat it poses to inmates and staff in jails. The applicant has discharged his onus on the tertiary ground as well.

His Honour finds that the COVID-19 pandemic has "radically altered"[127] tertiary ground considerations, and that these are "extraordinary, dire times."[128] He goes on to state that "the simple fact is that a reasonable and informed member of the public would be wary of

---

[122] *R v Cotterell*, [2020] OJ No 1433 (ONCJ) [*Cotterell*].
[123] *Chaouche*, *supra* note 121.
[124] *Cotterell*, *supra* note 122.
[125] *R v Rajan*, 2020 ONSC 2118 [*Rajan*].
[126] *Criminal Code*, *supra* note 10.
[127] *Rajan, supra* note 125 at para 38. Harris J elaborates upon this further at para 66 when he states: "There are major ramifications arising from the COVID-19 pandemic for the tertiary ground. In situations where the tertiary ground may have authorized detention in the past, the threat of COVID-19 to an individual seeking bail must now be incorporated into 'all the circumstances' in Section 515(10)(c)."
[128] *Ibid* at para 53.

keeping alleged offenders in pre-trial custody for the sole purpose of advancing confidence in the system of justice. The dangers to the prison population – both inmates and staff – posed by the risk of contagion have reordered the usual calculus."[129] He concludes that "the tertiary ground must, for the time being, be looked at in a new light."[130] In considering the tertiary ground in this new light, Harris J becomes quite eloquent:

> [68] While the tertiary ground reasons for detention are based on a visceral reaction against release – a somewhat abstract notion premised on gauging the reasonable views of the public – the threat of COVID-19 in a jail setting is based on cold, hard scientific reality.
>
> [69] The two must be counterbalanced against each other. The traditional grounds for the imposition of tertiary ground detention expressed in *Hall*, *Mordue* and *St. Cloud* as quoted above continue to militate towards detention. However, the threat of the virus pulls strongly in the other direction, towards release. In the end, the threat, if not the actuality of COVID-19, goes a long way to cancelling out the traditional basis for tertiary ground detention.
>
> [70] …In the face of the pandemic, bail release, in the absence of primary or secondary ground concerns, may well not shake the confidence of the public.

The bail review case of *R v MK*[131] heard on April 8, 2020, with the decision released by London-Weinstein J on April 15, 2020, is interesting in that it is a review of a detention order issued against M.K. by a justice of the peace on March 19, 2020. By that date, the scope of the COVID-19 pandemic is public knowledge. While both the Crown and defence counsel at the original bail hearing reference the pandemic, the justice of the peace somewhat surprisingly does not address COVID-19 in the March 19 decision. Her Honour relies on the offer of a new surety at the bail review as providing the material change in circumstances that allow her to conduct a *de novo* hearing pursuant to section 520 of the *Criminal Code*.[132]

The case of *R v Tully*[133] raises an interesting jurisdictional issue. Andre Tully had been arrested in November 2018, but he does not seek bail until April 2020. Tully's counsel

---

[129] *Ibid* at para 39. See also at para 56: "In all of this upheaval, to be in jail as an inmate or a staff member must count as one of the most dangerous places imaginable."
[130] *Ibid* at para 40.
[131] *R v MK*, 2020 ONSC 2266 [*MK*].
[132] *Criminal Code*, *supra* note 10.
[133] *R v Tully*, 2020 ONSC 2762, [2020] OJ No 1969 [*Tully*].

frames the application to Superior Court as a section 525 detention review arguing that such a review is available to detainees "who, for whatever reason, do not contest their initial detention."[134] Dawe J is skeptical for several reasons of the validity of this argument, one of which is the acknowledged fact that there is no earlier bail hearing for this detention review to consider.[135]

Nevertheless, for a variety of reasons, including the very practical one that "scheduling multiple hearings in different levels of court during the COVID-19 pandemic is no easy matter,"[136] His Honour decides to go ahead with the bail hearing in the Superior Court. Dawe J concludes that, if necessary, he is prepared to exercise his *ex officio* powers as a justice of the peace[137] to conduct the hearing under section 515 of the *Criminal Code*.[138] While His Honour acknowledges that there is case law that states this power should not be used "save in the most unusual situation"[139] he is prepared to rule that the pandemic – "an unprecedented public health crisis" – fits the definition of most unusual.[140]

His Honour's tertiary ground considerations are twofold. First, extremely strict house arrest conditions are being proposed[141] and "the second major factor that I see as weighing in favour of release under the tertiary ground is the fact that Mr. Tully brings this application during the COVID-19 pandemic"[142] citing support for this proposition in cases such as *JS*,[143] *TL*,[144] *Rajan*,[145] *Williams*[146] and *Ali*.[147]

---

[134] *Myers, supra* note 51 at para 43.
[135] *Tully, supra* note 133 at paras 4 – 6. See *R v Watts*, 2014 ONSC 6246 where C Speyer J held, at para 25: "It is the function of the Ontario Court of Justice to conduct a bail hearing, in the first instance, where no determination of detention or release has previously been made….It is the function of the Superior Court to review a detention or release order. When there is no record to review, and the accused in seeking release for the first time, as in the case at bar, the proper practice is to remit the case to the Ontario Court of Justice for a bail hearing."
[136] *Tully, supra* note 133 at para 7.
[137] See *Justices of the Peace Act*, RSO 1990, c J.4, s 5.
[138] *Criminal Code*, *supra* note 10.
[139] *R v LaFontaine* (1973), 13 CCC (2d) 316 at 317 (Ont HC) per Zuber J.
[140] *Tully, supra* note 133 at para 9.
[141] *Ibid* at para 32.
[142] *Ibid* at para 33.
[143] *JS*, *supra* note 114.
[144] *TL*, *supra* note 79.
[145] *Rajan*, *supra* note 125.
[146] *Williams*, *supra* note 93.
[147] *Ali*, *supra* note 120.

Dawe J expands upon the relevance of the pandemic, and outlines in *Tully*[148] how he believes, based on other court decisions, that it bears on tertiary ground analyses in three different ways. The first is the "greatly elevated risk posed to detained inmates from the coronavirus,"[149] the second is the probable length of time in custody of accused persons awaiting delayed trial dates,[150] and the third is the impact that detaining or releasing a defendant has on others who are required to remain in detention.[151] The first two of these issues are specifically considered in greater detail later in this paper. In His Honour's opinion, explains in further detail his belief that all three of these considerations weigh in favour of Tully's release.[152]

On December 5, 2018, Justice of the Peace Nestico detained Rina Mansour on the tertiary ground only, even though Ms. Mansour had no criminal record. It is alleged that she drove a motor vehicle from the United States back into Canada with twenty-five handguns hidden in the fuel tank. On a first bail review on May 16, 2019, His Worship Nestico's decision was upheld. A further review occurs on May 29, 2020, and Mr. Justice Nakatsuru releases his decision in *R v Mansour*[153] on June 3, 2020. As His Honour puts it succinctly: "This case turns on the consideration of the tertiary ground and the material change in circumstances brought by the COVID-19 pandemic. The parties do not dispute that this is a material change."[154]

Mr. Justice Nakatsuru sets out his framework for considering COVID-19 and the tertiary ground as follows:

> In assessing the impact of COVID-19 on the tertiary ground, I am guided by the following propositions:
>
> (1) judicial notice can be taken about the nature and effects of COVID-19 and the pandemic;
> (2) where the detainee is particularly vulnerable to COVID-19 in the institutional setting, this factor significantly supports release; and

---

[148] *Tully*, *supra* note 133 at paras 34 to 36.
[149] *JS, supra* note 114 at para 18.
[150] *Ali, supra* note 120 at para 88.
[151] *Williams, supra* note 93 at para 124.
[152] *Tully, supra* note 133 at paras 37 to 42.
[153] *R v Mansour*, 2020 ONSC 3478 [*Mansour*].
[154] *Ibid* at para 24.

> (3) even if the detainee is not so vulnerable, their own individual health, the health and safety of others such as that of other inmates and correctional employees as well as their families and extended community contacts should be considered on the tertiary ground.[155]

In Ms. Mansour's case, Nakatsuru J outlines what he believes are the specific health concerns that put her at higher risk as well as a possible delay in her trial as a result of the pandemic.[156] His Honour concludes, notwithstanding his comment that "the COVID-19 pandemic is not a free pass out of jail,"[157] that her release is warranted on strict conditions.[158] His Honour concludes:

> I agree with the jurisprudence holding that the current pandemic is a factor that can support release from pre-trial custody. Put in terms of the test for the tertiary ground, this just makes common sense. The reasonable public's confidence in the administration of justice will not be undermined when an accused's release can assist in addressing a societal crisis. Said in a different way, the community expects the administration of justice itself to play a role in fighting this pandemic.[159]

Throughout the summer of 2020, as the first wave of the pandemic recedes, fewer reported bail cases consider the impact of COVID-19. But, in October 2020, as case numbers rise and the second wave approaches, one case that looks again at the pandemic is *R v Hoo-Hing*.[160] Bawden J, looking back, refers to "the concerns which animated the lenient bail decisions released during the heart of the first wave are still present."[161]

Fantasia Hoo-Hing is a woman in her 30s, with no criminal record, who is charged with second degree murder.[162] The COVID-19 pandemic, in combination with case law, leads Bawden J to conclude that Ms. Hoo-Hing can be released. His Honour frames the relationship between COVID-19 and recent seminal bail decisions in an interesting manner:

> It must also be recognized that the pandemic has only accelerated an evolution in the law of bail which began with the release of *St. Cloud* from the Supreme

---

[155] *Ibid* at para 35.
[156] *Ibid* at paras 37 and 50.
[157] *Ibid* at para 56.
[158] *Ibid* at para 59.
[159] *Ibid* at para 34.
[160] *R v Hoo-Hing*, 2020 ONSC 6343, 2020 CarswellOnt 15248 [*Hoo-Hing*].
[161] *Ibid* at para 39.
[162] *Ibid* at paras 1, 18 and 30.

> Court of Canada in 2015, and has continued with *Antic* in 2017, *Myers* in 2019, and *Zora* in 2020. The Supreme Court of Canada has set a clear direction to courts of first instance concerning the interpretation of s. 510 of the *Code*. Fairness and the recognition of the presumption of innocence lie at the heart of that new direction.[163]

His Honour's decision in *Hoo-Hing*[164] is also one of the few that recognizes that not only has COVID-19 likely resulted in longer pre-trial custody for those who remain in detention, it has made that pre-trial detention harsher: "It has also come at the cost of the freedoms and privileges ordinarily enjoyed by inmates."[165]

Bawden J. takes into account the pandemic and a change in sureties and concludes that "the combination of these two material changes in circumstance tip the balance in favour of the applicant on the tertiary ground."[166]

Nevertheless, while the tertiary ground provides more fertile ground for COVID-19 to be used in cultivating releases[167] than the secondary ground has, by no means does a tertiary ground consideration always result in the accused's release. There is no shortage of cases where, after considering the impact of COVID-19 on the tertiary ground, detention is ordered.

Janson Jeyakanthan applies for a section 520 bail review which is heard on March 27 and 31, 2020. Madam Justice McWatt, now Associate Chief Justice of the Superior Court, releases her decision on March 31, 2020 in *R v Jeyakanthan.*[168] While he has no criminal record, Mr. Jeyakanthan is facing three different sets of charges.[169] On November 4, 2019, he was detained by Justice of the Peace Kirke following a contested hearing.

At the bail review in front of McWatt J, two material changes in circumstances are alleged. First, there is a proposed tightening of the terms of release, including house arrest, and

---

[163] *Ibid* at para 40.
[164] *Ibid*.
[165] *Ibid* at para 39.
[166] *Ibid* at para 42.
[167] Other cases where release was granted on the tertiary ground, after considering the COVID-19 pandemic, include *R v Hui*, 2020 ONSC 3212 and *R v Mustard*, 2020 ONSC 2973.
[168] *R v Jeyakanthan*, 2020 ONSC 1984, [2020] OJ No 1409 [*Jeyakanthan*].
[169] *Ibid* at paras 6, 8, 9, 12 and 13.

second, the existence and prevalence of COVID-19, especially in jails.[170] While Her Honour accepts that COVID-19 is a "material change to be considered in this application,"[171] she is not prepared to go any further.

She rejects Copeland J's conclusions in *JS*,[172] released eleven days earlier, specifically disagreeing with Madam Justice Copeland's comments that "the greatly elevated risk posed to detained inmates from the coronavirus, as compared to be being at home on house arrest is a factor that must be considered in assessing the tertiary ground."[173] McWatt J further believes that Copeland's conclusions, found in paragraph 19 of *JS*,[174] are "conclusions based on speculation and not on evidence."[175] She goes on to criticize those who have followed *JS*:[176] "I have reviewed cases provided by the applicant which follow the line of reasoning set out in *JS* and do not accept the reasoning therein – mainly because they also are not founded on any evidence."[177]

The only evidence that McWatt J has before her is a news article from March 20, 2020 indicating that only one guard, and no inmates, at the Toronto South Detention Centre where Mr. Jeyakanthan was housed have tested positive. She also relies on the data included in the Ministry of the Solicitor General's "Briefing Note – Institutional Services Response to COVID-19" which indicates that the number of inmates in custody in all provincial correctional centres has decreased from 8211 on March 13, 2021 to 6925 on March 25, 2021.[178]

Madam Justice McWatt instead follows the reasoning set out in the cases of *R v Nelson*[179] and *R v Budlakoti*,[180] both discussed later in this paper, that at least some medical evidence,

---

[170] *Ibid* at paras 18, 22 and 23.
[171] *Ibid* at para 27.
[172] *JS*, *supra* note 114.
[173] *Jeyakanthan, supra* note 168 at para 28, citing *JS, supra* note 114 at para 18.
[174] *Ibid*.
[175] *Jeyakanthan*, *supra* note 168 at para 29. The conclusions referred to in *JS* include that health risks in confined spaces such as jails are significantly greater than in situations where someone is able to self-isolate, as well as that theCOVID-19 virus is easily spreadable.
[176] *JS*, supra note 114.
[177] *Jeyakanthan, supra* note 168 at para 32.
[178] *Ibid* at para 31. Further discussion of the Ministry's Information Notes will occur later in this paper.
[179] *R v Nelson*, 2020 ONSC 1728 [*Nelson*].
[180] *R v Budlakoti*, [2020] OJ No 1352 (ONSC) [*Budlakoti*].

specific to the individual accused, must be provided to a bail court if the COVID-19 material change in circumstances argument is to be successful. As there is no such evidence in *Jeyakanthan*, Her Honour affirms his detention by the justice of the peace.[181]

A week later, on April 3, 2020, Mr. Justice Phillips releases a brief decision in the matter of *R v Frantzy.*[182] While His Honour says "I take judicial notice of the fact that the custodial environment exposes inmates to higher risk of contracting the virus than would otherwise be the case" he goes on to state that "the existence of the Covid-19 pandemic cannot be a trump-card argument against the notion of custody itself."[183] Mr. Frantzy's criminal record, including a history of failing to attend court or to follow court orders, leads His Honour to conclude that Mr. Frantzy has failed to discharge his onus: "But, it remains the case that the public must have faith in its justice system, and that those who ought to be awaiting their trials in custody remain in custody, notwithstanding the higher risk of exposure to the coronavirus."[184] Interestingly, Phillips J takes note of the fact and indeed says he is "comforted to a significant degree"[185] that the Ottawa jail has not yet had any COVID-19 cases, and he does hold open the possibility of revisiting Mr. Frantzy's situation in the future: "The Covid-19 pandemic is a dynamic circumstance and I am open to re-considering the matter if the present environment at the detention centre should deteriorate."[186]

In *R v Brown*,[187] Crawford J follows the line of reasoning outlined by McWatt J in *Jeyakanthan*,[188] as well as that of the judges in *Nelson*[189] and *Budlakoti*.[190] In *Brown*,[191] there is no evidence of any COVID-19 cases at the Central East Correctional Centre where Brown is being held, nor is there any evidence from a medical professional that Mr. Brown's pre-existing health issues (resulting from childhood asthma and having been

---

[181] *Jeyakanthan, supra* note 168 at paras 33 through 37.
[182] *R v Frantzy*, [2020] OJ No 1549 (ONSC) [*Frantzy*].
[183] *Ibid* at paras 8 and 9.
[184] *Ibid* at paras 11 and 19.
[185] *Ibid* at para 21.
[186] *Ibid* at para 22.
[187] *R v Brown*, [2020] OJ No 1432 (ONCJ) [*Brown*].
[188] *Jeyakanthan*, *supra* note 168.
[189] *Nelson*, *supra* note 179.
[190] *Budlakoti*, *supra* note 180.
[191] *Brown*, *supra* note 187.

stabbed in the lung as an adolescent) make him more susceptible to contracting COVID-19. Her Honour, after commenting that "the court cannot be seen to be giving the impression that as a result of this virus, the criminal justice system is a free-for-all"[192] concludes:

> This is a case where, given the seriousness of the charges (including a consideration of the safety and security of the victim and public as a whole), Mr. Brown's prior criminal record, the court's lack of confidence that Mr. Brown will follow the proposed plan of release, and the absence of medical or other evidence that Mr. Brown may be more susceptible to contracting the virus or the consequences of it, I am not satisfied that there would be confidence in the administration of justice if Mr. Brown was released from jail.[193]

On April 20, 2020, Lemon J releases his decision in *R v Kinghorn*.[194] Delano Kinghorn had been detained after a bail hearing on October 18, 2019 on charges of assault, aggravated assault, unlawful confinement, uttering a death threat and breach of probation, all of which resulted from an altercation that Mr. Kinghorn had with his spouse.[195] Defence counsel argues that a change in his release plan and the COVID-19 pandemic constitute material changes that would permit the judge to conduct a *de novo* hearing. Without going into great detail, His Honour quickly concludes that he is satisfied that a material change has occurred such that Mr. Kinghorn is entitled to a review.[196]

With respect to the tertiary ground analysis, His Honour reviews the relevant passages from *St-Cloud*[197] as well as the statutory provisions of clause 515(10)(c) of the *Criminal Code*.[198] He then concludes:

> Taking all of these circumstances into account, I would expect that an informed person would lose confidence in the administration of justice if an individual facing a strong case alleging that he committed repeated offences against the same victim and with a lengthy history of failing to comply with terms of court orders were released to his optimistic brother prior to trial.[199]

---

[192] *Ibid* at para 62.
[193] *Ibid* at para 63.
[194] *R v Kinghorn*, 2020 ONSC 2399 [*Kinghorn*].
[195] *Ibid* at paras 1 and 2.
[196] *Ibid* at para 2.
[197] *St-Cloud*, *supra* note 5.
[198] *Criminal Code*, *supra* note 10.
[199] *Kinghorn*, *supra* note 194 at para 42.

A bail decision that does arise during the second wave is *R v HK*[200] which is a bail review for the accused after his initial detention in October 2019. A bail review occurred in May 2020. Quigley J conducts this second bail review on December 20, 2020 and releases his written reasons on January 8, 2021.[201] One material change in circumstances alleged by H.K. is that "the number of positive COVID-19 cases in Ontario is rising and that there has been a recent outbreak at Toronto South, where the applicant is in custody."[202] Quigley J, in his analysis, requires that the material change in circumstances be specific to H.K. himself, and he believes that "the preponderance of COVID-19 litigation that has taken place since the onset of the pandemic" has taken the same position.[203] He therefore narrow the options for finding that a material change has occurred, stating that "[T]he pandemic, in and of itself, does not automatically constitute a material change in circumstance. The fact that the number of cases in Ontario or even inside a correctional facility may be rising is not evidence that there has been any corresponding effect on HK."[204] His Honour acknowledges that as of December 9, 2020 Toronto Public Health has declared an outbreak of COVID-19 at the Toronto South Detention Centre, but he notes that, "at this time, HK is not housed on a precautionary unit. That means that as of the date of this hearing, there were no reported positive or potential cases on his unit." His Honour goes on to say:

> Evidence of rising cases of COVID-19 in the province of Ontario is of concern for all residents of the province of Ontario, while evidence of rising cases inside a correctional facility will obviously be of concern to the inmates of that facility. Generally, however, that does not establish that it represents a material change in circumstance for HK specifically.[205]

His Honour therefore concludes that there have been no material changes and concludes that thus he does not have the jurisdiction to conduct a *de novo* hearing. H.K.'s bail review application is dismissed.[206]

---

[200] *R v HK*, 2021 ONSC 182 [*HK*].
[201] *Ibid* at paras 3 and 6.
[202] *Ibid* at para 24.
[203] *Ibid* at para 26.
[204] *Ibid* at para 26.
[205] *Ibid* at para 28.
[206] *Ibid* at paras 30 and 35.

In many ways, COVID-19's effect on tertiary ground analysis is quite similar to its influence on secondary ground analysis. However, especially in the early cases, such as *JS*[207] and *Rajan*,[208] decided during the first wave of the pandemic in the spring of 2020, there are clear examples of COVID-19 leading judges to release individuals when they plainly did not wish to do so. As 2020 continues and the first wave subsides, the ability of the pandemic to lead to releases on the tertiary ground subsides, so that, by the time of *HK*[209] in early January 2021, as the second wave of COVID-19 cases in Ontario is arriving, it is no longer the game-changer that it so often was earlier in the year.

COVID-19 CONSIDERED AS A MATERIAL CHANGE IN CIRCUMSTANCE JUSTIFYING A BAIL REVIEW UNDER S. 520 OF THE *CRIMINAL CODE*

Section 520 bail review cases consider the context of the pandemic under the same framework of the secondary or tertiary grounds and, as such, many are reviewed elsewhere in this paper.[210] An example of this is *Cain*, Madam Justice London-Weinstein bluntly concludes that "I am of the view that the existence of the Covid 19 virus in Ottawa constitutes a material change of circumstances such that it permits me to conduct a *de novo* hearing under s. 520."[211]

There are several other cases, not yet reviewed in this paper, that specifically consider the issue of COVID-19 within the context of a section 520 bail review. One of these is *R v Sappleton*,[212] a decision of Bird J of the Superior Court released on March 26, 2020. Gregory Sappleton is charged with possessing a loaded restricted or prohibited firearm,

---

[207] *JS*, *supra* note 114.
[208] *Rajan*, *supra* note 125.
[209] *HK*, *supra* note 200.
[210] These include *JS, supra* note 114*; R v CJ*, 2020 ONSC 1933 [*CJ#1*]; *TL*, *supra* note 79; *TK*, *supra* note 69; *R v Fraser*, 2020 ONSC 2045, [2020] OJ No 1411 [*Fraser*]; *Morris*, *supra* note 62; *R v Cain*, 2020 ONSC 2018 [*Cain*]; *Rajan, supra* note 125; *MK, supra* note 131; *Grant*, *supra* note 63; *Mansour, supra* note 153; *Hoo-Hing,* supra note 160; *Nelson, supra* note 179; *Budlakoti, supra* note 180; *Jeyakanthan, supra* note 168; *Frantzy, supra* note 182; *R v Phuntsok*, 2020 ONSC 2158 [*Phuntsok*]; *R v Forbes*, 2020 ONSC 1798 [*Forbes*]; *Kinghorn, supra* note 194; *R v DP,* 2020 ONSC 3133 [*DP*]; *R v BE*, 2020 ONSC 3830 [*BE*]; *R v CJ*, 2020 ONSC 6154, 2020 CarswellOnt 14631 [*CJ#2*]; and *HK, supra* note 200.
[211] *Cain, supra* note 210 at para 8. See also para 13.
[212] *R v Sappleton*, [2020] OJ No 1531 (ONCJ) [*Sappleton*].

possession of that firearm despite being the subject of a weapon prohibition, and two counts of failing to comply with a recognizance. He was detained by a justice of the peace on October 22, 2019, and an initial application for a bail review was dismissed by a Superior Court judge on December 20, 2019.[213] One of the three new changes in circumstances alleged by Sappleton in this second bail review is the COVID-19 pandemic. As this new hearing occurs in the early days of the pandemic, it is somewhat disorganized:

> On consent, Mr. Sappleton's current bail review was held by teleconference. A judge's Order was signed requiring the detention centre to bring Mr. Sappleton to a telephone in the facility so that he could participate in the call. That did not happen. Despite the best efforts of Mr. Sappleton's lawyer and the Trial Coordinators, Mr. Sappleton never joined the conference call. It is not necessary for an accused person to be present for his bail review and all parties agreed to proceed in his absence.[214]

In Her Honour's consideration of Sappleton's situation with respect to COVID-19, she does note that he suffers from asthma.[215] On this point, though, she concludes as follows:

> In this case, I am not satisfied that the Covid-19 pandemic is a material change of circumstances that ought to lead to Mr. Sappleton's release. In coming to this conclusion, I do not in any way wish to minimize the seriousness of the virus or its potential impact on a large segment of the population. However, there is no evidence that at the current time Mr. Sappleton's health is at risk. There is no evidence that there are cases of Covid-19 in his detention centre. Nor is there evidence of any failure on the part of correctional staff to appropriately manage the health concerns created by the virus.[216]

Interestingly, and despite having come to this conclusion that COVID-19, in Sappleton's case, was not a material change in circumstances, Bird J does release him. One of the other material changes alleged in *Sappleton*[217] concerned a section 8 *Charter*[218] argument in relation to the seizure of the gun, an argument that Her Honour notes "appears to have considerable merit."[219]

---

[213] *Ibid* at paras 1 – 3. As more than 90 days had passed since his initial bail review, this proceeding also went ahead, not just as another section 520 review, but as a section 525 detention review as well. See paras 5 and 6.
[214] *Ibid* at para 7.
[215] *Ibid* at para 20.
[216] *Ibid* at para 22.
[217] *Ibid*.
[218] *Charter*, *supra* note 29.
[219] *Sappleton, supra* note 212 at paras 5 and 24.

The case of *R v McArthur*[220] is slightly different, in that the bail review is considered pursuant to section 521 of the *Criminal Code*,[221] rather than section 520.[222] The procedure in section 521 must be used when it is the Crown seeking to review a release order that had been made by a justice under any of subsections 515(1), (2), (7) or (12) or of an order by a justice under clause 523(2)(b) of the *Criminal Code*,[223] after a preliminary hearing, vacating a prior order. The legal principles governing section 521 hearings are the same as those considered under section 520.

Steven McArthur was arrested on February 1, 2020, on charges of aggravated assault and failing to comply with the terms of a pre-existing recognizance, and he was released at his reverse onus bail hearing on February 7, 2020 by Justice of the Peace Worku.[224] The Crown brings the section 521 review application and it is heard by Quigley J on April 9, 2020. The Crown alleges both that the justice of the peace's decision to release McArthur was clearly inappropriate and that there is a material change in circumstances in terms of new video footage of the alleged attacks that is now available.[225] His Honour disagrees with the Crown's submissions and concludes that it has not met its onus in this application: "In my view, it is not open to me to vacate the J.P.'s order, considered in its entirety and contextually applying the review principles mandated in *R v St. Cloud*."[226]

Quigley J states that the actual material change in circumstances that has transpired since McArthur's release on bail is the pandemic: "[W]hat is quite clear today is that there is a different material change in circumstances. It is the ominous presence of the COVID-19 pandemic in our communities and our correctional institutions, only 2 months after the accused was released."[227]

---

[220] *R v McArthur*, 2020 ONSC 2276 [*McArthur*].
[221] *Criminal Code*, *supra* note 10.
[222] "As of April 9 [2020], however, when this hearing was conducted just before the Easter weekend, neither counsel nor I were aware of any decisions considering COVID-19 in the context of a Crown application, like this one, to *revoke* an accused's bail and cause him to be detained, as in this case." *McArthur, supra* note 220 at para 56.
[223] *Criminal Code*, *supra* note 10.
[224] *McArthur, supra* note 220 at paras 2 and 3.
[225] *Ibid* at para 4.
[226] *Ibid* at para 6.
[227] *Ibid* at paras 6 and 50.

This review decision by Quigley J is also a rare but refreshing example of a higher court acknowledging some of the inherent obstacles that a justice of the peace often faces when crafting a bail decision:

> It is important in the context of this review proceeding to understand the circumstances of the show cause hearing and the position taken by counsel at that time. The hearing took place at the Scarborough courthouse on a frantically busy day Friday, February 7, a week after Mr. McArthur was arrested. The matter was quite literally squeezed in that day. Indeed, I understood from counsel that the J.P. permitted the matter to go ahead even though it took an hour and a half and ate materially into the midday break. Nevertheless, the matter was completed and the J.P. gave his decision on the spot. The J.P.'s reasons may not be linguistically perfect, but in my view some of the alleged deficiencies in his reasons for releasing the accused need to be considered and viewed in that context.[228]

Quigley J finds no reason to disturb the decision of the justice of the peace[229] and concludes:

> Even if COVID-19 can itself constitute a material change in circumstances, in my view it is not open to a reviewing judge to use the existence of that change alone to reopen a hearing where the accused was previously released, absent a conclusion by the reviewing judge that the decision of the J.P. was clearly inappropriate, or otherwise failed one of the two other tests set out in paragraph 121 of *St. Cloud*, that is, an error of law or the presence of new evidence, neither of which is present in this case.[230]

It appears that Quigley J is attempting to alter the framework that permits judges to vary initial bail decisions, but only in the context of Crown applications pursuant to section 521 of the *Criminal Code.*[231] While the wording of the Supreme Court of Canada in *St-Cloud*[232] is quite clear that, as previously reviewed, any one of first, an error in law, second, a clearly inappropriate decision or third, new evidence that shows a material and relevant change in the circumstances of the case can allow a reviewing judge to vary the initial decision, Quigley J is arguing that a section 521 review requires the finding of either the first or

---

[228] *Ibid* at para 28. See also para 40: "As reviewing judge, however, I need not and must not look for perfection."
[229] *Ibid* at para 46.
[230] *Ibid* at para 63.
[231] *Criminal Code*, *supra* note 10.
[232] *St-Cloud*, *supra* note 5 at para 121.

second factor, and that the third factor – the material change in circumstances – is not enough in and of itself to permit a judge to overturn a releasing justice's decision.

The case of *R v Yusuf*[233] is an early example of a case – the hearing occurred on April 2 and 6, 2020, and the decision was released on April 8, 2020 – where the court finds that COVID-19 constitutes a material change in circumstances that could allow the Superior Court to conduct a *de novo* bail review. Despite this finding, Laliberte J concludes that Mr. Yusuf has not shown, on the balance of probabilities, that his continued detention is not warranted. He remained in custody.[234]

As is often the case in these recent bail decisions, the material changes in circumstances alleged in *R v Dawson*[235] include the COVID-19 pandemic. Daniel Dawson is charged with assault causing bodily harm, assault with a weapon and two counts of breach of probation, all arising out of incidents that occurred on October 8, 2019. He was detained by Justice of the Peace Stevely on the secondary ground after a bail hearing on January 20, 2020.[236] The section 520 bail review is heard by Goodman J on April 20, 2020 by videoconference, in the absence of Mr. Dawson, but with counsel and the proposed surety participating. Mr. Dawson provides an unsworn affidavit, and the Crown does not feel the need to cross-examine him. His Honour renders his decision three days later.[237]

Having read Goodman J's decision in *TK*,[238] the Crown in *Dawson*[239] wisely concedes that there is a material change in circumstances in this case and that His Honour could consider the matter as a *de novo* hearing. The crown argues, though, that the material change does not address the pre-existing secondary ground concerns.[240] In great detail, His Honour goes through the process outlined in *St-Cloud*[241] and *Palmer*.[242] Relying on his own precedent in *TK*[243] and the fact of what defence counsel refers to as "the preponderance of

---

[233] *R v Yusuf*, [2020] OJ No 1546 (ONSC) [*Yusuf*].
[234] *Ibid* at para 33 and 36.
[235] *R v Dawson*, 2020 ONSC 2481 [*Dawson*].
[236] *Ibid* at paras 2 and 3.
[237] *Ibid* at paras 4, 5 and 6.
[238] *TK, supra* note 69.
[239] *Dawson*, *supra* note 235.
[240] *Ibid* at para 10.
[241] *St-Cloud*, *supra* note 5.
[242] *Palmer*, *supra* note 45.
[243] *TK*, *supra* note 69.

recent jurisprudence [that] opens wide the threshold consideration of a material change in circumstances and allows for a hearing *de novo*"[244] Goodman J concludes that the material change exists.[245] He does, however, make it clear that this is only a first step:

> Suffice it to state, that while I am entitled to conduct a hearing *de novo* at this stage, it doesn't mean that the aforementioned consideration of the global pandemic allows for a *de facto* release. These factors must also be balanced with the plan being proposed, along with the jurisprudence related to the secondary grounds for detention.[246]

Upon completing his analysis of the release plan, Goodman J chooses not to take the second, necessary step that would result in Mr. Dawson's release. He notes that, "at this juncture, there is no evidence of a COVID-19 outbreak at the Hamilton Detention Centre."[247] In considering the tertiary ground, he reviews, among other cases, *Jeyakanthan*,[248] *Nelson*,[249] *Budlakoti*,[250] *TL*,[251] *Cain*,[252] and *Rajan*[253] finding that he can distinguish most of them from *Dawson* on the facts.[254]

His Honour makes an interesting conclusion when considering the link between the accused's history of non-compliance with prior court orders and the pandemic:

> Indeed, during this pandemic, an individual is required to adhere to social distancing and any rules implemented under quarantine legislation. An accused's personal history regarding non-compliance with previous court orders is particularly relevant in assessing whether the accused would likely adhere to social distancing and stay-at-home rules. An accused who violates social distancing rules and stay at home rules would not be any safer at large than in an institution where risk is being managed adequately.[255]

---

[244] *Dawson* at para 29.
[245] *Ibid* at para 32.
[246] *Ibid* at para 34.
[247] *Ibid* at para 54.
[248] *Jeyakanthan*, *supra* note 168.
[249] *Nelson*, *supra* note 179.
[250] *Budlakoti*, *supra* note 180.
[251] *TL*, *supra* note 79.
[252] *Cain*, supra note 210.
[253] *Rajan, supra* note 125.
[254] *Dawson, supra* note 235 at paras 56 through 65.
[255] *Ibid* at para 80.

On the very same day, April 23, 2020, that he releases his decision in *Dawson*,[256] Goodman J begins hearing another section 520 bail review matter, that of *PK*.[257] The hearing continues on April 27, and His Honour releases his decision on April 30, 2020. While there is a section 517(1) and 520(9) publication ban in this case, there are a few general comments that can be made about this case. P.K. was detained by Justice of the Peace Child following a bail hearing on September 27, 2019, a pre-pandemic date. Therefore, it is the pandemic, along with the time he has spent in pre-trial custody, that form the basis for his argument that a material change in circumstances has occurred.[258]

Not surprisingly, given the close connection in time, His Honour's conclusions are similar to those he expresses in *Dawson*.[259] *PK* may have had a more exuberant Crown[260] and an outbreak is declared at the Hamilton jail on April 24, 2020,[261] but Goodman J concludes in *PK* that secondary and tertiary concerns are not met, and P.K.'s continued detention is ordered.[262]

There are other cases in which not only is release denied, but the courts find that no material change in circumstances exists, notwithstanding the COVID-19 epidemic. One of the earliest of these cases is *R v Baidwan*,[263] released on April 20, 2020. In this decision, Skarica J takes a strict, narrow view with respect to finding that a change in proposed sureties offered to a reviewing court can create a material change in circumstances, relying on *R v Ferguson*.[264]

Another major reason why His Honour finds no material change in circumstances in *Baidwan*[265] is a result of his narrow interpretation of the concept of judicial notice, which

---

[256] *Ibid*.
[257] *R v PK,* 2020 ONSC 2694 [*PK*].
[258] *Ibid* at paras 1 and 7.
[259] *Dawson*, *supra* note 235.
[260] *PK, supra* note 257 at para 11: "The Crown submits that this court ought to take a narrow approach to the assessment of the threshold issue and not acquiesce to the hyperbole surrounding the pandemic."
[261] *Ibid* at para 51. The lack of cases at this same detention centre was a factor considered by Goodman J in *Dawson, supra* note 235.
[262] *Ibid* at para 107.
[263] *R v Baidwan*, 2020 ONSC 2349 [*Baidwan*].
[264] *R v Ferguson*, [2002] OJ No 1969 (Sup Ct) at para 17.
[265] *Baidwan*, *supra* note 263.

will be discussed later in this paper. This leads him to suggest that a reviewing justice, when assessing risk to a detained accused, in the context of whether there has been a material change in circumstances due to the COVID-19 pandemic, should consider certain factors.

These include first, recent reliable data, second, specific risks to the particular accused including age and underlying medical conditions, third, the specific risk of an accused at a particular institution, fourth, any medical evidence particular to an accused's physical and/or mental health, fifth, the accused's personal history regarding compliance with prior court orders, specifically in order to assess whether the accused would likely adhere to social distancing and stay at home rules, and sixth, any other relevant circumstances such as the development of vaccines, cures or improved testing and treatment.[266]

While I am not suggesting that these factors are not relevant, I do not, with respect, feel that they are necessary preconditions to determining whether a material change of circumstances has, in and of itself, occurred. In many of the other cases where judges have quite quickly jumped over the first hurdle and determined that the material change in circumstances has occurred, this has not led inexorably to a release order. The proper review of whether the material change impacts the considerations of the subsection 515(10) analysis on the primary, secondary and tertiary grounds must still occur. *Baidwan*[267] appears to conflate the two step process set out by the Supreme Court in *St-Cloud*[268] in its analysis of section 520 by, especially in the fifth factor outlined above, considering the accused's personal history of non-compliance with court orders as a pre-condition for finding that the new evidence provided constitutes a material change in circumstances.

The result, in any case, is likely the same. In the conclusion to his decision in *Baidwan*, Skarica J states:

> However, the Crown, in its written submission, took the position that it does not dispute that there has been a material change in circumstances, but I disagree for the reasons outlined. I am not bound by the Crown's submission as to the law…I might add, that even if I had found that there was a change in

[266] *Ibid* at para 61.
[267] *Ibid.*
[268] *St-Cloud*, *supra* note 5.

> material circumstances, I would have detained the accused in any event on the secondary ground.[269]

His Honour then analyzes the specific data with respect to COVID-19 that he feels are appropriate to consider within his interpretation of judicial notice, concluding that, at that time, "in the accused's age range, there is only one person in Ontario was has died after being infected by the virus"[270] and that Baidwan "has presented no medical evidence regarding any health/mental conditions that would make him more susceptible to serious consequences from an infection from the virus."[271]

In case there is any doubt about His Honour's overall opinions regarding COVID-19 as a reason for releasing accused persons, he states the following:

> The last thing that the Canadian public needs right now is a third wave of fear arising from an emptying out of the jails of persons charged with serious and violence crimes who have been legitimately detained after being afforded due process and after having been provided the full panoply of legal rights provided by the *Charter of Rights and Freedoms* and the Canadian judicial system. The wholesale release of dangerous persons who would otherwise be detained but for the COVID-19 pandemic would seriously undermine the confidence of the public in the administration of justice.[272]

An important reason why the court in *R v Virag*[273] finds that there is no material change in circumstances is because, as in *MK*,[274] the bail hearing being reviewed in this section 520 application itself occurs after the onslaught of the COVID-19 pandemic. Joshua Virag's initial bail hearing was on April 8, 2020 at what Goodman J, ironically in retrospect, describes as "the height of the COVID-19 pandemic."[275] The review occurs on May 20, 2020 and His Honour releases his decision on May 26, 2020.

While Mr. Virag's counsel agrees that Child JP[276] considered the COVID-19 pandemic in coming to his initial bail decision to detain his client, he nonetheless argues that the material

---

[269] *Baidwan, supra* note 263 at paras 83 and 84.
[270] *Ibid* at para 75.2. See also para 76.
[271] *Ibid* at para 75.4. See also para 77.
[272] *Ibid* at para 82.
[273] *R v Virag*, 2020 ONSC 3255 [*Virag*].
[274] *MK*, *supra* note 131.
[275] *Virag, supra* note 273 at para 36.
[276] Goodman J comments that Child JP provided a "thorough, comprehensive, clear, and thoughtful examination of the relevant issues" and that His Worship's analysis "is the gold standard for reasons at a bail hearing." *Virag, supra* note 273 at para 31.

change in circumstances arises because of a recent COVID-19 outbreak at the Hamilton Wentworth Detention Centre that had not existed at the time of the initial hearing. An affidavit from Mr. Virag, dated April 29, 2020, outlines some of his concerns:

> I am still being triple bunked. The size of our cell makes staying six feet apart from one another at all times impossible. There are currently 28 people being housed on my range, 5C Right, with 10 cells…
>
> Since my arrival at the detention centre…our detention conditions have deteriorated…Our access to the telephone and counsel have decreased. Access to programming has decreased and is currently non-existent.
>
> As of April 29, 2020, there are twenty-eight inmates on my range sharing two phones, although one of the two phones stopped working two-days ago. The phones are not cleaned between each inmates use and we are not provided with wipes or materials to clean the phones ourselves.
>
> I am very fearful for my health and safety. I am concerned about the impact the Corona virus will have on me if I were to contract it while in custody at the Hamilton Wentworth Detention Centre.
>
> While many of the guards, food service workers and health care workers have been wearing masks in recent days, many are not which concerns me. Also of concern is the fact that I have not been provided or offered a mask for my own protection. While detained at Hamilton Wentworth Detention Centre, I have not seen a single inmate be provided with a mask…[277]

Nevertheless, while acknowledging that Mr. Virag is under no obligation to provide any evidence of the personal impact of COVID-19 on him, Goodman J notes that since no such evidence is provided, "any effect on him is speculative as best."[278] He goes on to state that "the applicant tends to overstate his observations or concerns about cleaning, lockdowns, correctional officers and other related issues at HWDC. He makes various bald assertions intermixed with some conjecture."[279]

His Honour concludes: "More importantly on the threshold issue, from my perspective, with the justice of the peace addressing the COVID-19 issue, even with the updated information presented in this review, as well as with all of the evidence adduced in this

---

[277] *Ibid* at para 39.
[278] *Ibid* at paras 44 and 45.
[279] *Ibid* at para 47.

hearing, the applicant has not met his onus to show a material change in circumstances on this basis."[280]

The bail review application is dismissed.[281] While this may be viewed as a harsh conclusion, it is an important recognition that if COVID-19 played a role in the initial bail hearing, it will be much more difficult for a detained accused to argue on review that the pandemic provides a court the option to determine that a material change in circumstances has occurred and that a *de novo* hearing can occur on this basis.

Baidwan[282] and *Virag*[283] are by no means the only cases that consider the specific medical concerns (or lack thereof) of a defendant. Other decisions that that look at these issues will be considered later in this paper.

COVID-19 CONSIDERED BY THE ONTARIO COURT OF APPEAL

One of the earliest COVID-19 bail decisions is *R v Kazman*,[284] heard on April 1, 2020 by Harvison Young JA. Reasons are released a week later, on April 8. It is a section 679 application. Marshall Kazman was charged in 2011 and convicted in 2017. The Court of Appeal dismissed the appeal of the disbarred lawyer in late 2019[285] and he now seeks bail pending his application for leave to appeal to the Supreme Court of Canada. Justice Harvison Young characterizes Mr. Kazman's charges as serious, noting that he was "at the center of a multi-layered, sophisticated scheme to fraudulently obtain small business loans from Canadian banks." She also notes that, apart from these charges, Mr. Kazman has no criminal record. The only ground of appeal to the Supreme Court from his conviction was that the trial judge had erred in summarily dismissing Mr. Kazman's subsection 11(b) *Charter*[286] motions.[287]

---

[280] *Ibid* at para 49.
[281] *Ibid* at para 69.
[282] *Baidwan*, *supra* note 263.
[283] *Virag*, *supra* note 273.
[284] *R v Kazman*, 2020 ONCA 251 [*Kazman*].
[285] *Ibid* at para 2. The ONCA's decision is at 2020 ONCA 22 at para 6.
[286] *Charter*, *supra* note 29.
[287] *Kazman, supra* note 284 at paras 3 and 4. The SCC subsequently dismissed the application for leave to appeal: *Kazman v R*, (2020) CanLII 48927, (July 23, 2020).

In *Kazman*, even though Harvison Young JA feels it "unclear at best whether leave to appeal will be granted in this case"[288] by the Supreme Court, she finds that Kazman meets the low bar of the first prong – that it not be frivolous – of the *Oland*[289] test. Justice Harvison Young also concludes that Mr. Kazman satisfies the second prong of the *Oland*[290] analysis, that he would surrender himself into custody when necessary, as he had done this after his appeal was denied by the Court of Appeal.[291]

Justice Harvison Young devotes most of her decision to considering the third prong in *Oland*, the public interest component.[292] Mr. Kazman's counsel acknowledges that "where this court [the OCA] has dismissed an appeal and the appellant does not have an appeal as of right, bail is seldom granted before the SCC has granted leave to appeal."[293] Despite this, she argues that the COVID-19 pandemic creates exceptional circumstances, including the close quarters and poor living conditions for inmates in custody, and that older people and those with underlying health conditions are at greater risk from COVID-19. The specific evidence regarding Mr. Kazman is that he is 64 years old and suffers from asthma, respiratory issues and a heart condition. Mr. Kazman's counsel submits: "If COVID-19 spreads amongst the prison population, staff will also contract the virus and carry it into the community"[294] and she concludes that a reasonable, well-informed public would not find Mr Kazman's immediate detention necessary in these exceptional circumstances.[295] In response, the Crown points to Doherty JA's statement in *R v Drabinsky*,[296] that "the pendulum must swing towards enforceability and away from bail pending further review after the correctness of the convictions entered at trial has been affirmed."[297]

Justice Harvison Young does note that the merits, while not frivolous, are weak. However, she points out that the Supreme Court has granted leave in cases regarding section 11(b)

---

[288] *Kazman, supra* note 284 at para 6.
[289] *Oland*, *supra* note 56.
[290] *Ibid*.
[291] *Kazman, supra* note 284 at paras 5 and 6.
[292] *Oland, supra* note 56 at paras 23 – 51.
[293] *Kazman, supra* note 284 at para 8.
[294] *Ibid* at para 8.
[295] *Ibid* at para 9.
[296] *R v Drabinsky*, 2011 ONCA 647, 276 CCC (3d) 277 [*Drabinsky*].
[297] *Ibid* at para 10.

Charter[298] cases and how they need to be interpreted and clarified in light of *Jordan*.[299] Harvison Young JA's conclusion is that "the particular circumstances of this case justify release"[300] as Mr. Kazman's crimes are not violent, and these are the only convictions on his record. She also takes into account his specific health concerns, as well as the inherent difficulties in social distancing in prisons, and concludes that "the appellant's release for a limited period would not undermine a reasonable and informed person's confidence in the administration of justice."[301] She distinguishes this from an earlier Court of Appeal bail pending appeal decision, *Morgan#1*,[302] where bail was denied due to that individual's risk of reoffending and the inadequacies of his sureties.

Another case where the Court of Appeal grants release, on April 22, 2020, is *R v WM*[303] in which W.M. applies for bail pursuant to sections 515 and 679(7.1) of the *Criminal Code*.[304] In *WM*,[305] subsection 679(7.1) applies because while he was convicted on May 30, 2017 and sentenced to four years for sexual interference[306] the Court of Appeal allowed W.M.'s appeal and ordered a new trial.[307] The provisions of subsection 679(7.1) are relevant in this case as the Crown is appealing the Court of Appeal's ordering of the new trial. The subsection reads as follows:

> *679(7.1) Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial, section 515 or 522, as the case may be, applies to the release or detention of that person pending the new trial or new hearing as through that person were charged with the offence for the first time, except that the powers of a justice under section 515 or of a judge under section 522 are exercised by a judge of the court of appeal.*

W.M's bail is thus considered by Brown JA of the Court of Appeal as if were a *de novo* hearing. Therefore, in this case, the provisions of subsections 679(1) and (3) do not apply. Nevertheless, as it is a bail decision of the Court of Appeal, I have chosen to include it in

---

[298] *Charter*, *supra* note 29.
[299] *Jordan*, *supra* note 6.
[300] *Kazman, supra* note 284 at para 16.
[301] *Ibid* at paras 17 – 19.
[302] *Morgan#1*, supra note 97.
[303] *R v WM*, 2020 ONCA 266 [*WM*].
[304] *Criminal Code*, *supra* note 10.
[305] *WM*, *supra* note 303.
[306] Pursuant to s 151 of the *Criminal Code, supra* note 10.
[307] *WM, supra* note 303 at paras 6 and 9. The ONCA's decision granting the new trial is at 2020 ONCA 236.

this section of this paper. Like many bail decisions in the spring of 2020, COVID-19 considerations are at the forefront. The proposed release for W.M. involved being under the supervision of the Toronto Bail Program, as no surety was available. The Toronto Bail Program's normal procedure of meeting regularly in person with those whom they are supervising is of course suspended as a result of the pandemic. While Justice Brown is clearly concerned by this, he does not hold the inability of W.M. to have direct in person supervision against the effectiveness of his release plan.[308] Brown JA also considers W.M.'s health risks, and concludes, both on the secondary and tertiary grounds, that W.M.'s detention is not necessary.[309]

On May 20, 2020, Jamal JA[310] hears an application for bail pending conviction and sentence appeal and he releases his decision in *R v Sangster*[311] on May 28, 2020. The Crown opposes the application on the grounds that Sangster fails to establish that his detention is not necessary in the public interest pursuant to clause 679(3)(c) of the *Criminal Code*.[312] The Crown concedes that Sangster had met his onus under clauses 679(3)(a) and (b).[313]

The clause 679(3)(c) analysis requires considering both public safety and public confidence in the administration of justice.[314] Sangster's apparent ability to overcome his drug and alcohol addictions and his mother's now willingness to act as a residential surety for him satisfies Jamal JA that the public safety concerns could be met.[315] The public confidence component involves what Justice Jamal describes as "two competing interests: enforceability and reviewability."[316]

---

[308] *WM, supra* note 303 at para 25.
[309] *Ibid* at paras 26 and 40 – 42.
[310] On July 1, 2021, Justice Jamal was elevated to the Supreme Court of Canada to succeed Justice Rosalie Abella, who retired. Justice Jamal's nomination was announced on June 17, 2021 by Prime Minister Justin Trudeau.
[311] *R v Sangster*, 2020 ONCA 332 [*Sangster*].
[312] *Criminal Code*, *supra* note 10.
[313] *Sangster, supra* note 311 at paras 2, 10 and 11.
[314] *Oland, supra* note 56 at paras 23 and 26.
[315] *Sangster, supra* note 311 at paras 19, 23 and 24.
[316] *Ibid* at para 27.

Justice Jamal concludes that the enforceability interest is enhanced by his renewed family connections as well as his sobriety, and this leads the judge to believe that there is an absence of flight risk. This satisfies him on the enforceability issue.

The strength of the appeal is key to assessing the reviewability interest.[317] Justice Jamal believes that there is "a general legal plausibility and a foundation in the record" to Mr. Sangster's appeal on the ground that his *Charter*[318] right to privacy had been infringed.[319] Reviewing the other grounds of appeal that Sangster puts forward, Jamal JA concludes that his "preliminary assessment is that while some grounds of appeal are stronger than others, cumulatively they clearly surpass the 'not frivolous' standard."[320]

With specific respect to COVID-19, Justice Jamal accepts that the pandemic is a factor that may be considered as part of the public interest criterion, citing *Kazman*,[321] as well as *R v Omitiran*[322] and *R v Jesso*,[323] which are both discussed in greater detail later in this paper. In the specific circumstances of this case, Jamal JA takes into consideration that Mr. Sangster may have greater access to addiction support in the community, as opposed to in custody, as well as the fact that Mr. Sangster's request seeking bail pending appeal is not happening at the beginning of a long sentence. Sangster has already served over three years of his sentence and would be eligible for parole within three months. Considering all these factors, Justice Jamal concludes that the public interest in reviewability outweighs the interest in enforceability, and that Mr. Sangster has established that his continued detention is not necessary in the public interest.[324]

Justice Jamal grants bail pending conviction and sentence appeal in another case, *R v McRae*,[325] a decision which he releases on August 4, 2020. On July 14, 2018, John McRae had been convicted of the second-degree murder of his son. He spends much of the intervening time between the commission of the offence on July 7, 2015 and his conviction

---

[317] *Oland, supra* note 56 at para 40.
[318] *Charter*, *supra* note 29.
[319] *Sangster, supra* note 311 at para 34.
[320] *Ibid* at paras 37 – 44.
[321] *Kazman*, *supra* note 284.
[322] *R v Omitiran*, 2020 ONCA 261 at para 26 [*Omitiran*].
[323] *R v Jesso*, 2020 ONCA 280 at para 36 [*Jesso*].
[324] *Sangster, supra* note 311 at paras 47, 50 and 51.
[325] *R v McRae*, 2020 ONCA 498 [*McRae*].

by the jury out on bail, without incident.[326] McRae, who is in his 70s, suffers from, among other ailments, a heart condition, diabetes, hepatitis C and gallstones.[327]

Again, it is only on the third ground set out in subsection 679(3) – the public interest criterion – that the Crown opposes Mr. McRae obtaining bail at this time.[328] Jamal JA is satisfied that, despite McRae's conviction being for murder, the applicant poses no significant risk to public safety.[329] On the enforceability interest issue, Jamal JA reviews McRae's grounds of appeal, including grounds that the trial judge erred by failing to charge the jury on the partial defence of provocation and well as by giving the jury a special hearsay caution, even though the relevant utterances had been adduced for a non-hearsay purpose.[330] Justice Jamal is satisfied that some of these grounds of appeal weigh in favour of reviewability.[331]

At this point, Justice Jamal considers COVID-19 as a factor that can be considered as part of the public interest criterion. In this case, as noted, the applicant is elderly and has serious underlying medical issues. Taking all this into consideration, Jamal JA concludes that "the reviewability interest overshadows the enforceability interest and therefore the applicant's detention is not necessary in the public interest" based on the "attenuated public safety concerns, the absence of flight risks and the strong plan of supervision with a proven track record of success, the applicant's advanced age and health challenges in the context of the current public health climate, and because the applicant has already served three years of his sentence and has a clearly arguable appeal."[332] The application for bail pending appeal is granted.

Another case in which bail is granted by the Ontario Court of Appeal, though pursuant to a different section of the *Criminal Code*,[333] is *R v Jaser*,[334] a decision released by Doherty JA on September 24, 2020. It results from an application pursuant to section 680 of the

---

[326] *Ibid* at paras 2 and 11.
[327] *Ibid* at paras 16 and 19.
[328] *Ibid* at para 24.
[329] *Ibid* at para 29.
[330] *Ibid* at para 37.
[331] *Ibid* at para 46.
[332] *Ibid* at para 51.
[333] *Criminal Code*, *supra* note 10.
[334] *R v Jaser*, 2020 ONCA 606 [*Jaser*].

Criminal Code,[335] seeking to appeal a denial of Mr. Jaser's bail which had been the result of a section 522 application for bail in the Superior Court.[336] The relevant portion of section 680 reads as follows:

> *680(1) A decision made by a judge under section 522…may, on the direction of the chief justice of 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.*

The *Jaser*[337] case is somewhat notorious. He is one of two co-accused, alleged by the Crown to have conspired to commit mass murder, including derailing a passenger train and systematically assassinating prominent community members.[338] Mr. Jaser and his co-accused were convicted at trial of some, though not all, of the charges.[339] In 2019, the Court of Appeal ordered a new trial on the ground that the jury selection process had been improper.[340] While this ordering of a retrial has now been appealed by the Crown to the Supreme Court of Canada, Mr. Jaser in the interim brought a second section 522 bail application for release pending the retrial, the failure of which provides the basis for this decision by Doherty JA. That bail judge had detained Mr. Jaser on both the secondary and tertiary grounds.

The *Oland*[341] decision also sets out the framework for section 680 reviews. As Justice Moldaver states:

> Ultimately, in my view, a panel reviewing a decision of a single judge under s. 680(1) should be guided by the following three principles. First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied the judge erred in law or

---

[335] *Criminal Code*, *supra* note 10.
[336] *Jaser, supra* note 334 at para 12. The s 522 bail application, which Jaser seeks to appeal in this case, is reported at 2020 ONSC 1001. This s 680 application for bail pending retrial in the Superior Court could have been brought before a judge of the Court of Appeal pursuant to s 679(7.1).
[337] *Jaser*, *supra* note 334.
[338] *Ibid* at para 14.
[339] *R v Esseghaier*, 2015 ONSC 5855.
[340] *R v Esseghaier*, 2019 ONCA 672.
[341] *Oland*, *supra* note 56.

> in principle and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where in concludes that the decision was clearly unwarranted.[342]

Doherty JA sees the *Oland*[343] standard of review as the basis for considering any errors by the bail judge. Citing *R v Gale*[344] and *R v D(R)*,[345] Doherty JA is of the opinion that, while there is no right to produce new evidence in a section 680 matter, fresh evidence can be routinely received if it is both relevant and relates to matters that post-date the bail decision being reviewed.[346]

There are three main categories of fresh evidence that Jaser's counsel wishes to introduce on his behalf. These are evidence regarding the added delay in the scheduling of the retrial, evidence with respect to psychological testing and spiritual counselling of Jaser, and – not surprisingly – the COVID-19 pandemic.[347]

In *Jaser*, Justice Doherty concludes his COVID-19 comments as follows:

> The presence of COVID-19 is a factor to be balanced in the tertiary ground analysis, especially where there is a viable alternative to actual incarceration, which can go a long way to achieving de facto incarceration outside of the correctional institution. I must, however, reject the contention that post-COVID-19 detention on the tertiary ground will 'rarely be justified'. Like all other factors in the tertiary ground balancing, the significance of the pandemic depends on the individual case and the evidence provided to the court. On the evidence I have, COVID-19 concerns are relevant in the tertiary ground assessment. They are far from determinative.[348]

Doherty JA concludes that "appropriate terms can be fashioned" for Jaser's release which will minimize his movements outside his mother's home, limit his contact with non-family members and provide the police with broad oversight powers to monitor Jaser's movements

---

[342] *Ibid* at para 61.
[343] *Ibid.*
[344] *R v Gale*, 2011 ONCA 144 at para 23.
[345] *R v D(R)*, 2010 ONCA 899 at para 23.
[346] *Jaser, supra* note 334 at para 50.
[347] *Ibid* at paras 95 – 107.
[348] *Ibid* at para 103. The reference to 'rarely be justified' is from *R v JR,* 2020 ONSC 1938 [*JR*] at para 47.

and compliance.[349] In drafting the terms, some of which are quite onerous, Doherty JA does make note of the Supreme Court's comments:

> In attempting to formulate appropriate terms, I have borne in mind the strong admonition in *R. v. Zora*, at paras. 83 – 89, cautioning against unclear, unnecessary, punitive bail terms, and terms which seem calculated to produce a breach of the bail order. I am satisfied the conditions I propose are directly related to the risks associated with Jaser's release. The terms are needed to ameliorate those risks to the extent detention will not be necessary on either the secondary or tertiary ground.[350]

Perhaps following the thinking of Doherty JA in *Drabinsky*,[351] noted earlier, it appears that more of the section 679 applications in the COVID-19 context fail than succeed. Soon after her decision in *Kazman*,[352] in which Harvison Young JA releases Mr. Kazman, she issues *Omitiran*[353] on April 20, 2020.

Adekunle Omitiran seeks to appeal both his conviction on several fraud charges and his four-year sentence, and he wishes to be released on bail pending the appeal. Mr. Omitiran has previous convictions for other fraud-related offences, and these offences now being appealed occur while he is on probation, in violation of the terms of that probation.[354] COVID-19 is among the public interest factors that Omitiran believes should result in him getting bail.[355] As Justice Harvison Young puts it, "this application turns on the public interest factor under s. 679(3)(c). As I have just indicated, the merits of the appeal are arguable but weak. The central concern in this case is public safety. His offences were not violent, but they were serious, complex, and motivated by greed."[356] Harvison Young JA picks up on a suggestion by the Crown[357] that COVID-19 and the difficult economic circumstances it has created increase the importance of protection of the public:

> Many individuals, businesses, and Canada's financial institutions are currently under increased stress due to the COVID-19 crisis. Given the applicant's repeat offending and the current economic climate, protecting the public

[349] *Jaser, supra* note 334 at para 119.
[350] *Ibid* at para 133.
[351] *Drabinsky*, *supra* note 296.
[352] *Kazman*, *supra* note 284.
[353] *Omitiran*, *supra* note 322.
[354] *Ibid* at paras 1 – 5.
[355] *Ibid* at para 6(iv).
[356] *Ibid* at para 20.
[357] *Ibid* at para 8(ii).

> against the fraudulent schemes is an important factor weighing against the applicant's release.[358]

While acknowledging that her own decision in *Kazman*[359] went the other way, Justice Harvison Young concludes that, in this case, "the public interest analysis favours enforceability over reviewability. I cannot conclude that a reasonable, fully informed member of the public would understand his release to be warranted in these circumstances." Mr. Omitiran's application is dismissed.[360]

On April 29, 2020, Brown JA releases his decision in *Jesso*.[361] It is another case in which the Crown opposes the application for bail pending appeal on the grounds that Mr. Jesso has not demonstrated that his detention is not necessary in the public interest, pursuant to clause 679(3)(c) of the *Criminal Code*.[362] In so doing, the Crown again relies on the public safety component of the public interest criterion.[363]

For several reasons, Justice Brown denies the application. Fundamentally, he feels there is a substantial likelihood that Mr. Jesso would commit further criminal offenses if released, even under a more restrictive bail plan. These include the allegations that Jesso had already recently committed further drugs and weapons offences while released on a prior bail and while already bound by firearms prohibition orders.[364] Justice Brown notes that the financial consequences to his mother and sister – his prior sureties – of breaching his bail terms did not deter Mr. Jesso. As well, Mr. Jesso has a substantial record, including a prior conviction for failing to comply.[365] Justice Brown also notes the limitations to the practical effectiveness of the GPS monitoring being proposed by the defence as part of its bail plan.[366]

---

[358] *Ibid* at para 23.
[359] *Kazman*, *supra* note 284.
[360] *Omitiran, supra* note 322 at paras 28 – 29.
[361] *Jesso*, *supra* note 323.
[362] *Criminal Code*, *supra* note 10.
[363] *Jesso* at para 9.
[364] *Ibid* at paras 16 and 17.
[365] *Ibid* at paras 19 and 20.
[366] *Ibid* at paras 23 – 27.

Brown JA then reviews what impact the COVID-19 pandemic has in *Jesso*.[367] He acknowledges that *Omitiran*[368] has held that it can be relevant to the public interest criterion. He sums up Mr. Jesso's situation with respect to COVID-19:

> In the present case, the applicant is detained in the Hamilton-Wentworth Detention Centre. He is 23 years old. His affidavit does not disclose any medical condition that puts him in a group with increased vulnerability to the effects of COVID-19. While his counsel's supporting affidavit states that in late March one employee at the Hamilton-Wentworth Detention Centre tested positive for the virus, the applicant's record does not contain evidence of a significant COVID-19 outbreak at the facility.[369]

Justice Brown concludes that "consequently, I do not see the fact of the COVID-19 pandemic outweighing, on its own or in combination with the merits of the applicant's appeal, the substantial risk to public safety that I have identified" and he dismisses Mr. Jesso's application for bail pending appeal.[370]

The very next day, on April 30, 2020, Brown JA releases another bail pending appeal decision that considers COVID-19 as a factor when considering such applications: *R v Stojanovski*.[371] The applicants are twin brothers convicted on May 30, 2018 of attempted murder and discharging a firearm with attempt to endanger a life.[372] Each was sentenced to eighteen years' imprisonment.[373] The Crown opposes their application for bail pending appeal on the basis that they have not met any of the criteria set out in subsection 679(3) of the *Criminal Code*,[374] especially on the enumerated ground that their detention is not necessary in the public interest, pursuant to clause 679(3)(c).[375]

Justice Brown holds that the public safety component of clause 679(3)(c) "essentially tracks the requirements" of clause 515(10)(b) – the secondary ground – in its governance

---

[367] *Ibid*.
[368] *Omitiran, supra* note 322 at para 26.
[369] *Jesso, supra* note 323 at para 37.
[370] *Ibid* at paras 38 and 39.
[371] *R v Stojanovski*, 2020 ONCA 285 [*Stojanovski*].
[372] Pursuant to ss 239(1)(a) and 244(2)(a) of the *Criminal Code, supra* note 10.
[373] *Stojanovski, supra* note 371 at para 2. The ONSC decision is *R v Daniel Stojanovski and Darko Stojanovski*, 2018 ONSC 4243.
[374] *Criminal Code*, *supra* note 10.
[375] *Stojanovski, supra* note 371 at paras 3 and 16.

of release on bail pending a retrial[376] relying both on *Oland*[377] and *Morales*[378] for this conclusion. Therefore, his conclusion that the release plan is weak, specifically because of the "lack of any requirement that they be in the presence of a surety when they leave the residence" directly relates to his concerns that there would be a substantial likelihood they would commit further offences if released.[379]

A factor that tilts towards reviewability rather than enforceability, in the opinion of the appellants' counsel, is the COVID-19 pandemic. In their affidavits, both Stojanovski brothers state that social distancing is impossible in the Beaver Creek institution where they are incarcerated, that neither inmates nor staff have been given personal protective equipment, and that there is much anxiety concerning a possible COVID-19 outbreak.[380]

Again citing *Omitiran*,[381] Brown JA acknowledges that the current COVID-19 outbreak can be taken into account when considering the public interest criterion, but that the weight it is given must be dependent upon the individual circumstances of each applicant. Justice Brown outlines the brothers' situation:

> In the present case, the applicants are 36 years old. Neither deposed to having a medical condition that would increase his vulnerability to the virus. The Crown filed a Correctional Services Canada document reporting on inmate COVID-19 testing in federal correctional institutions as of April 21, 2020. It recorded that two tests of Beaver Creek inmates had been taken. One returned negative; the other result was pending. As of April 21, 2020, no positive tests of inmates at the institution had been recorded.[382]

Brown JA conducts what he believes to be the appropriate "qualitative and contextual"[383] assessment, taking into account the extremely serious offences of the applicants and the corresponding lengthy sentences, the weakness of their release plan, the weakness of their

---

[376] *Stojanovski, supra* note 371 at para 18.
[377] *Oland, supra* note 56 at para 24.
[378] *Morales*, *supra* note 25 at 737.
[379] *Stojanovski, supra* note 371 at para 24.
[380] *Ibid* at para 34.
[381] *Omitiran*, *supra* note 322.
[382] *Stojanovski, supra* note 371 at para 36.
[383] *Oland, supra* note 56 at para 49.

grounds of appeal, and their relative non-vulnerability to COVID-19 and dismisses their applications for bail pending appeal.[384]

In *R v Stone*,[385] Juriansz JA is quickly prepared to grant leave to appeal sentence to the applicant, but more thoroughly reviews whether he should grant bail pending that appeal. The applicant's main argument supporting the request is that release should be granted because of the COVID-19 pandemic. Because Mr. Stone is only appealing his sentence, and not his conviction, the relevant statutory provisions are found in subsection 679(4) of the *Criminal Code*,[386] as opposed to subsection 679(3). While the wording is not identical between the two subsections, the practical considerations are virtually the same.[387]

Juriansz JA reviews the legal test of "unnecessary hardship" under clause 679(4)(a) of the *Criminal Code*[388] as it is discussed by the Court of Appeal in *R v Hassan*.[389] It depends on the likelihood that the applicant would spend more time in custody than his sentence is ultimately determined to be, considering the merits of the appeal, and Justice Juriansz concludes that there is little likelihood of that happening in Mr. Stone's case.[390] The COVID-19 pandemic becomes relevant when considering clause 679(4)(c), identical in wording to clause 679(3)(c). Citing *Omitiran*[391] and *Jesso*,[392] Justice Juriansz acknowledges that the pandemic is a factor to be considered in assessing the public interest criterion. Looking at the specific COVID-19 concerns of Mr. Stone, Juriansz JA has this to say:

> In this case, the applicant is in custody at Bath Institution where no inmate has tested positive to date. The applicant is diabetic and a former smoker and says he is especially vulnerable to the virus. He attributes his high sugar levels to being incarcerated. The Crown has introduced evidence that he has consistently been purchasing from the canteen a high number of products high in carbohydrates such as pop, cookies, swiss rolls, and Fudgee-O cookies. The

---

[384] *Stojanovski, supra* note 371 at paras 38 and 39.
[385] *R v Stone*, 2020 ONCA 448 [*Stone*].
[386] *Criminal Code*, *supra* note 10.
[387] The only difference is that s 679(3)(a) requires that the appeal is "not frivolous" and s 679(4)(a) requires that the appeal "has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody."
[388] *Criminal Code*, *supra* note 10.
[389] *R v Hassan*, 2017 ONCA 1008 at para 33.
[390] *Stone, supra* note 385 at paras 10 – 12.
[391] *Omitiran, supra* note 322 at para 26.
[392] *Jesso, supra* note 323 at para 36.

> evidence does not satisfy me the applicant's high sugar levels are attributable to his incarceration.[393]

Aside from that somewhat sarcastic comment by Justice Juriansz, he also considers Stone's record, including breaches of recognizances, his weak release plan and the seriousness of his offences. Based on this, Juriansz J concludes that Mr. Stone has not satisfied the court that his detention is not necessary in the public interest, and the application for release pending appeal is dismissed.[394]

One further case where subsection 679(3) of the *Criminal Code*[395] is discussed is that of *R v Cole*,[396] a decision released on November 6, 2020. Margaret Cole's application for interim release pending the hearing of her appeal is viewed skeptically by Roberts JA, the motions judge hearing the matter. Despite having been sentenced to life imprisonment in 2015 after being convicted of first-degree murder, Ms. Cole has not previously sought bail at any time. Justice Roberts, in a brief decision, concludes that her grounds of appeal are very weak, the charge is patently extremely serious and the release plan is "not adequate to ensure that the serious risk she poses to public safety is appropriately diminished."[397]

Her plan, which the judge finds unsatisfactory, would have the Elizabeth Fry Society monitor her while she resides in a hotel. The last issue raised by Ms. Cole in support of her release is the COVID-19 pandemic. Justice Roberts, citing *McRae*,[398] acknowledges that "[I]t is common ground that the COVID-19 pandemic is a factor to be considered on an application for judicial interim release pending appeal, though the weight given to this factor depends on the particularities of the case."[399]

In her decision, Roberts JA makes no mention of any specific health concerns of Ms. Cole. Her Honour notes that "the evidence falls short of showing any serious or immediate risk to the applicant" based on information that there are no active cases of COVID-19 at the institution where Ms. Cole has been residing and that the institution has "a rigorous

---

[393] *Stone, supra* note 385 at para 18.
[394] *Ibid* at paras 20 and 21.
[395] *Criminal Code*, *supra* note 10.
[396] *R v Cole*, 2020 ONCA 713 [*Cole*].
[397] *Ibid* at paras 1, 2, 6 and 14.
[398] *McRae, supra* note 325 at para 48.
[399] *Cole, supra* note 396 at para 17.

cleaning protocol in place that, as the results appear to show, attenuates the spreading of the virus."[400] Justice Roberts therefore concludes that the public interest in the enforceability of the judgement under appeals outweighs the public interest in its reviewability, and that to release Ms. Cole would undermine a reasonable member of the public's confidence in the administration of justice.[401]

A sentence appeal to the Court of Appeal, as opposed to an application for bail pending appeal heard by a single judge, provides an early opportunity for that court to consider COVID-19, when the panel of MacPherson, Benotto and Nordheimer JJA hear the case of *R v Morgan*.[402] The matter proceeds by way of teleconference on April 29, 2020 and the panel releases its decision on May 4, 2020. Mr. Morgan, who is acting in person, raises an interesting argument: "The appellant does not dispute that the sentence was a fit one at the time that it was imposed. Rather, the appellant submits that intervening events, namely the COVID-19 pandemic, have served to render the sentence unfit. He seeks a reduction in his sentence as a consequence of these events."[403]

Mr. Morgan is serving his sentence at the Central North Correctional Centre in Penetanguishene. He states that the only way the authorities there can hope to maintain physical distancing among the inmates is to confine them to their own cells as much as possible. Therefore, he is only out of his cell, at most, for three hours each day, and only twenty minutes of that can be spent outside in the fresh air. As a result of this confinement, rehabilitative programs normally provided to inmates are cancelled:

> The appellant says that it is clear that the sentencing judge imposed the sentence that she did in an effort to maximize the prospect for rehabilitation and now that prospect is being thwarted. The appellant says that, had the sentencing judge been aware that these events would happen, she would have imposed a lesser sentence to accommodate the rehabilitative goal.[404]

---

[400] *Ibid* at para 18.
[401] *Ibid* at para 19.
[402] *R v Morgan*, 2020 ONCA 279 [*Morgan#2*]
[403] *Ibid* at para 3.
[404] *Ibid* at paras 4 and 5.

Morgan thus requests a reduction in his sentence by one-third, so that he would immediately be eligible for parole. The Crown, in contrast, says that the sentence is fit, even taking into account the pandemic.[405]

In the specific circumstances of *Morgan#2*,[406] the Court of Appeal is of the opinion that the sentence already imposed was "at the very low end" and that "to reduce the sentence any further would result in a sentence that is unfit, one that would be disproportionate to the gravity of the offence. In coming to this conclusion, they cite the Supreme Court of Canada in *R v Pham*:[407] "It follows that where a sentence is varied to avoid collateral consequences, the further the varied sentence is from the range of otherwise appropriate sentences, the less likely it is that it will remain proportionate to the gravity of the offence and the responsibility of the offender." The Court of Appeal goes on to suggest that perhaps Mr. Morgan will obtain some COVID-19 related relief from the Parole Board.[408]

On October 21, 2020, a three judge panel of the Ontario Court of Appeal weighs in on many of the legal issues concerning COVID-19 and bail, when Miller, Nordheimer and Thorburn JJA release their decisions in *R v JA*.[409] J.A. is charged with two counts of first-degree murder, one count of attempted murder, and count of conspiracy to commit murder. As these are section 469 *Criminal Code*[410] offences, his bail hearing occurred in the Superior Court. J.A. was detained on the primary and secondary grounds. A section 680 review by J.A. was unsuccessful, but a section 522 review by a second bail judge did succeed and J.A. was released on bail, as that judge held that not only had the Crown's case substantially weakened, but that COVID-19 represented a material change in circumstances. The Crown then sought a section 680 review of this second bail decision, alleging, among other things, that the second bail judge made an error in law in determining that COVID-19 *per se* constituted a material change in circumstances.[411]

---

[405] *Ibid* at paras 6 and 7.
[406] *Ibid*.
[407] *Ibid* at para 11, citing *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739 at para 18.
[408] *Morgan#2, supra* note 402 at para 12.
[409] *R v JA*, 2020 ONCA 660 [*JA*]. Thorburn JA wrote the majority decision with Miller JA concurring. Nordheimer JA wrote a dissenting opinion.
[410] *Criminal Code*, *supra* note 10.
[411] *JA, supra* note 409 at paras 7 – 14.

Justice Thorburn sets aside the release order of the second bail judge and substitutes a detention order pending J.A.'s trial.[412] Thorburn JA begins by clarifying some of the confusion that results in these situations as to how to choose between a section 522 review and a section 680 review. Section 522 reviews – second or subsequent bail applications – should be brought in the Superior Court where the applicant concedes the validity of the bail decision but wishes a review on the basis of a material change in circumstances.[413] Section 680 reviews to a court of appeal should be sought when the applicant challenges the denial of bail on the basis of the correctness of the bail decision. This does not foreclose considering a material change in circumstances in a section 680 application. In such cases, both the Superior Court of Justice and the Court of Appeal have concurrent jurisdiction to determine whether a material change in circumstances has occurred, such that release on bail should occur.[414]

In the second bail hearing, that judge held that there was a material change in circumstances by virtue of COVID-19's existence. In this review, the Crown acknowledges that while COVID-19 can constitute a relevant circumstance, it does not in *JA*,[415] because J.A. had been detained on the primary and secondary grounds, not the tertiary ground. As well, J.A.'s youth, health and current safe conditions in the Stratford jail where he would be housed are such that COVID-19 is not relevantly material. J.A.'s counsel argues that the materiality of COVID-19 can apply to any or all grounds of detention, not just the tertiary.[416] J.A.'s lawyer also makes the interesting point that "the Crown's suggestion of proving a medical history that would make one more susceptible to COVID-19 is impractical and, for many bail applicants, impossible to meet as many are marginalized individuals for whom access to medical records would present a significant, perhaps insurmountable hurdle."[417]

---

[412] *Ibid* at para 17.
[413] *Ibid* at para 22, citing *R v Whyte*, 2014 ONCA 268, 119 OR (3d) 305 [*Whyte*] at para 21 and *R v Robinson*, 2009 ONCA 205, 95 OR (3d) 309 [*Robinson*] at para 5.
[414] *JA, supra* note 409 at para 24, citing *Whyte, supra* note 413 at para 22.
[415] *JA*, *supra* note 409.
[416] *Ibid* at paras 51 – 53.
[417] *Ibid* at para 54.

Drawing both on *St-Cloud*[418] and *Whyte*,[419] the Court of Appeal, in its majority decision, concludes that COVID-19 constitutes a material change where its circumstances are relevantly material to a specific individual in that specific individual's circumstances.[420] The Court of Appeal is of the opinion that the second bail judge decided that COVID-19, in and of itself, is a material change justifying a new bail hearing, without first considering if COVID-19 was relevantly material before deciding to hear the second bail application and, in so doing, made an error in law.[421]

In *JA*,[422] the Court of Appeal also makes clear that, depending on the circumstances, the COVID-19 pandemic can be a factor to be considered pursuant to any or all of the primary,[423] secondary,[424] and tertiary grounds,[425] setting out that the determination of relevance and materiality require a review of the specific individual's age and health, the conditions at the relevant institution where detention would occur and whether COVID-19 would affect the individual's attendance at court or threaten public safety if the individual were released.[426] The Court of Appeal continues: "All this COVID-19 evidence then needs to be considered, along with the findings of the earlier bail judge, to determine whether the new evidence *could reasonably be expected to affect the conclusion reached by the first bail judge* [emphasis in original].[427]

Thorburn JA states that the specific, new evidence relating to J.A.'s health and the conditions at the Stratford jail would not have altered the original bail judge's concerns on the primary or secondary grounds, qualifying this by stating that she is not suggesting that an accused must present evidence of a particular risk with respect to COVID-19, only that

---

[418] *St-Cloud, supra* note 5 at para 137.
[419] *Whyte, supra* note 413 at para 26.
[420] *JA, supra* note 409 at para 55.
[421] *Ibid* at para 61.
[422] *Ibid*.
[423] See *Grant*, *supra* note 63; *Hastings*, *supra* note 91; *Morris, supra* note 62; and *R v Cahill,* 2020 ONSC 2171 [*Cahill*].
[424] See *Cahill, supra* note 423 at paras 27 – 30; *R v Elliott*, 2020 ONSC 2976 at para 19.
[425] *Morris, supra* note 62 at para 22*; Kazman, supra* note 284*; R v SM,* 2020 ONCA 427; and *R v Abdullahi,* 2020 ONCA 350 at para 49.
[426] *JA, supra* note 409 at paras 63 – 66.
[427] *Ibid* at para 67.

the absence of a particular risk is relevant is assessing whether the pandemic evidence is relevantly material.[428]

Justice Thorburn's conclusion is clear:

> I do not agree that the existence of the COVID-19 pandemic necessarily constitutes a material change in circumstance for every bail decision rendered before the pandemic struck Ontario. I accept however, that in a proper case, circumstances arising from the COVID-19 pandemic may amount to a material change in circumstance in respect of any of the grounds for detention such that a new hearing should be conducted. For that to be the case, however, the pandemic must reasonably be expected to have affected the result, bearing in mind the reasons given by the first bail judge for denying bail.[429]

Using this analysis, she concludes that, in J.A.'s specific case, COVID-19 does not constitute a relevant and material change. The second bail judge, therefore, was in error in conducting a review of the first bail judge's decision and in deciding to release J.A. The Crown's application is thus granted and J.A. is detained pending his trial.[430]

A key part of Justice Nordheimer's dissent[431] is on the issue of the role of COVID-19. He clearly believes that his colleagues on this Court of Appeal panel interpret its impact too narrowly. His initial premise in his argument is that "in my view, there can be no reasonable debate that COVID-19 impacts directly on the incarceration of individuals"[432] and he expands upon this belief when he states:

> [109] I am of the view that COVID-19 constitutes a material change in circumstances with respect to every detention order that was made prior to the advent of the pandemic. COVID-19 changed the lives of every person in this country. Indeed, it has changed the lives of almost everyone on this planet. The appearance of the pandemic necessitated a review of every person who was being held in custody pending their trial, just as it necessitated a review of, and change to, the manner in which detention facilities dealt with incarcerated individuals, including the release of individuals who might not otherwise have strictly merited release in the traditional sense.
>
> [110] The impact of the pandemic does not mean that detention orders will not still be warranted. What it does mean is that the detention of every person

---

[428] *Ibid* at paras 71 – 73 and 76.
[429] *Ibid* at para 85.
[430] *Ibid* at paras 86 and 87.
[431] *Ibid* at paras 101 – 120.
[432] *Ibid* at para 107.

> needs to be reviewed, in light of the extraordinary situation that the pandemic poses, to ensure that the continued incarceration of a person pending trial will not result in a disproportional impact. It also means that, going forward, the impact of the pandemic must properly be considered in every bail hearing when determining whether a detention order is warranted.

Justice Nordheimer continues by stating that there can be no serious issue taken with the proposition that correctional facilities are locations of inherent higher risk, because of correctional officers moving through public spaces and the detention centre, as well as a consistent influx of new accused persons arriving at detention centres. Nordheimer JA also notes that "by requiring inmates to eat meals in their cells and exercise on an individual basis, those steps, while militating the risk of transmission of the virus, only increase the negative psychological impact of being incarcerated. Indeed, that general approach to incarceration comes perilously close to a state of facility-wide solitary confinement."[433]

He also disagrees with the majority's position that the absence of particular risk is relevantly material, and he does so for three reasons. The first is that bail hearings are often conducted very quickly after arrests have been made, on a rushed basis, with little or no time to procure and present medical evidence regarding the individual charged.[434] The second is that, in Justice Nordheimer's opinion, it is impractical and prejudicial to impose an evidentiary burden on an accused to provide medical evidence with respect to COVID-19, "given its medical complexity and ever-evolving nature."[435] The third reason builds on the second. It is unrealistic to expect an accused will be able to provide evidence of his or her specific vulnerability to COVID-19 when experts cannot yet explain why some people react horribly badly to the virus while others are asymptomatic: "There is a great deal that we still do not know about this virus, so to require an accused person to provide evidence of the type suggested by the applicant is to impose on him or her an unrealistic, and unachievable, burden."[436]

Justice Nordheimer also notes that the inevitable delays in trials occurring is a clear indication of another material change in circumstances. Based on this, he concludes that

---

[433] *Ibid* at paras 111 – 114.
[434] *Ibid* at para 116.
[435] *Ibid* at para 117.
[436] *Ibid* at para 118.

COVID-19, in *JA*, is a material change.[437] Once having found that the material change existed, Nordheimer JA believes that the second bail judge was fully entitled to conduct a *de novo* hearing.[438]

In Justice Nordheimer's opinion, the majority on the *JA*[439] panel too narrowly interprets the scope of the authority of the second bail judge to the point where "even if a material change in circumstances could be shown, the second bail judge was not entitled to grant a release to the respondent, unless the material change in circumstances itself drove that result.[440] For Nordheimer JA, this narrow interpretation is inconsistent with the general principle "often enunciated but too often not respected"[441] that "release – at the earliest opportunity and in the least onerous matter – is the default presumption in Canadian criminal law."[442] Justice Nordheimer also feels that his opinion is supported by *St-Cloud*: "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."[443]

In individual cases, whether the approach of the majority or the minority of the *JA*[444] panel to the material change issue is invoked may not make much practical difference, especially for bail hearings of first instance. The issue in *JA*[445] can be seen as, for the most part, simply a dispute over how many hurdles must be jumped. Nordheimer JA's decision, that – in and of itself – the simple presence of COVID-19 creates a material change appears to be more realistic and sensible. This would not result in a "get out of jail free" card for everyone. It merely allows the reviewing court to move past this threshold issue and to conduct the *de novo* hearing where the specific issues relevant to the particular defendant can be considered. The majority's approach runs the risk of requiring too much COVID-

---

[437] *Ibid* at para 120.
[438] *Ibid* at para 124.
[439] *Ibid*.
[440] *Ibid* at para 122.
[441] *Ibid* at para 123.
[442] *Myers, supra* note 51 at para 1.
[443] *JA, supra* note 409 at para 125 citing *St-Cloud, supra* note 5 at para 138.
[444] *JA*, *supra* note 409.
[445] *Ibid*.

19 specific medical evidence to be presented by defendants who may well have little ability to provide it to a court.

YOUTH CASES

Reported bail decisions dealing with young persons are rare. Rather than being governed by the provisions of section 515 of the *Criminal Code*,[446] legislative authority for judicial interim release for young persons is found within the *Youth Criminal Justice Act*[447] which originally came into force on April 1, 2003 and which was substantially amended in 2012, with respect to bail for young persons, by the *Safe Streets and Communities Act*.[448] The grounds for detention in custody of young persons,[449] much narrower than those outlined in the *Criminal Code*,[450] are specifically found in section 29 of the *YCJA*.[451] The portions of the *YCJA*[452] that correspond substantially to the primary, secondary and tertiary grounds for detention found in subsection 515(10) of the *Criminal Code*[453] are found in clause 29(2)(b) of the *YCJA*.[454] One important distinction, however, is found in the "secondary" ground in paragraph 29(2)(b)(ii) of the *YCJA*[455] which limits detention based on the substantial likelihood of committing further offences category only to apply where the likelihood is of committing "serious offences" which are defined as indictable offences for which the maximum punishment for an adult convicted of is imprisonment for a minimum of five years.[456] Another distinction is that the "tertiary" ground in paragraph 29(2)(b)(iii) requires "exceptional circumstances" that warrant detention. This proviso is not found in clause 515(10)(c) of the *Criminal Code*.[457]

---

[446] *Criminal Code*, *supra* note 10.
[447] *Youth Criminal Justice Act*, SC 2002, c 1 as amended [*YCJA*].
[448] *Safe Streets and Communities Act*, SC 2012, c 1, ss 167 - 194.
[449] Young persons are defined in s 2(1) of the *YCJA, supra* note 447, as those between the ages of 12 and 17.
[450] *Criminal Code*, *supra* note 10.
[451] *YCJA*, *supra* note 447.
[452] *Ibid.*
[453] *Criminal Code, supra* note 10.
[454] *YCJA*, *supra* note 447.
[455] *Ibid.*
[456] *Ibid*, s 2(1).
[457] *Criminal Code*, *supra* note 10.

But detention of a young person also requires compliance with the requirements set out in clauses 29(2)(a) and (c) of the *YCJA*.[458] Clause 29(2)(a) outlines that detention can only occur if the young person is charged with a serious offence, or, if not charged with a serious offence, has a history that indicates a pattern of either outstanding charges or findings of guilt. Clause 29(2)(c) also requires the judge or justice to be satisfied, on a balance of probabilities, that no condition or combination of conditions or release would first, reduce, to a level below substantial, the likelihood that the young person would not attend court as required, second, offer adequate protection to the public from the risk that the young person would otherwise present, or third, maintain confidence in the administration of justice.

Two other subsections of section 29 of the *YCJA*[459] are also important. Subsection 29(1) limits conditions that a justice or judge can impose on a young person to those that the young person will reasonably be able to comply with, and subsection 29(3) makes it clear that all youth bail hearings, no matter what the charges, are Crown onus. Reverse onus young person bail hearings no longer exist.

One of the very few reported youth bail matters that considers the COVID-19 pandemic is *R v XY,*[460] a decision released by Valentine JP on July 14, 2020. The mandatory publication ban covering the identity of the young person is in effect, pursuant to section 110 of the *YCJA*.[461] Her Worship further protects the identity of the young person by identifying him as X.Y., a pseudonym.[462] Without going deeply into the specifics of the allegations in *XY*, the young person's counsel quickly concedes that the serious offence threshold is met.[463] The magnitude and multitude of the charges, as well as X.Y.'s history of prior dispositions, lead X.Y.'s counsel to propose a very restrictive form of release of house arrest with no exceptions to leave the house unless he is in the company of one of his sureties.[464]

Defence counsel raises the spectre of COVID-19 during the hearing, arguing that the pandemic is causing delays in getting matters to trial. Her Worship responds to this, and

---

[458] *YCJA*, *supra* note 447.
[459] *Ibid*.
[460] *R v XY*, 2020 ONCJ 320 [*XY*].
[461] *YCJA*, *supra* note 447.
[462] *XY, supra* note 460 at para 1.
[463] *Ibid* at para 18.
[464] *Ibid* at para 38.

also clearly considers, as she is required, clause 29(1)(c) of the *YCJA*[465] that a young person be reasonably able to comply with any release conditions:

> I find this to be speculative. Moreover, in-custody matters, and youth matters are given priority. Alternatively, if I accept X.Y.'s argument that X.Y. can be waiting for a very long time until his trial is held, given X.Y.'s antecedents, I do not see the benefit of releasing X.Y. on the most onerous form of release – a house arrest bail – with no exceptions and a condition that he have no access to technology or social media as his aunt has requested. As a young person, such a release would be tantamount to setting him up for a breach of his bail.[466]

Valentine JP finds that X.Y. does not have any specific medical issues that would make more susceptible or vulnerable to COVID-19.

Her Worship then goes through the enumerated factors outlined in paragraph 29(2)(b)(iii) of the *YCJA*,[467] namely the strength of the Crown's case, the gravity of the offence, the circumstances surrounding the offence including whether a firearm was used, and whether the youth is liable to a potentially lengthy custodial sentence. She finds all to be present.[468] As well, Valentine JP finds exceptional circumstances required for detention do exist in this case, even taking into account the Court of Appeal's comments that "the exceptional case gateway can only be utilized in those very rare cases where the circumstances of the crime are so extreme than anything less than custody would fail to reflect societal values. It seems to me that one example of an exceptional case is when the circumstances of the offence are shocking to the community."[469] She orders X.Y.'s detention on both the secondary and tertiary grounds.

DELAYS IN SCHEDULING TRIALS

There is no doubt that since the beginning of the pandemic, a considerable backlog in cases has developed within the case management courts. With most court matters still being conducted remotely, rather than in person, and with all the attendant logistical difficulties

---

[465] *YCJA*, *supra* note 447.
[466] *XY, supra* note 460 at para 44.
[467] *YCJA*, *supra* note 447.
[468] *XY*, *supra* note 460 at para 53.
[469] *Ibid* at para 52, quoting *R v W(RE)* (2006), 79 OR (3d) 1 (CA).

caused thereby, cases are simply not progressing as quickly through the stages of judicial pre-trials and preliminary hearings (where still required) to get to the stage of a trial in either the Ontario Court of Justice or the Superior Court of Justice.[470] Courts considering bail, both initially and on review, have often – but not always – concluded that delay in getting to trial may be a relevant factor under either or both of the secondary and tertiary grounds.

The case of *TL*,[471] a bail review decision of Molloy J released on March 30, 2020, is discussed earlier. In reviewing the tertiary concerns, Molloy J is concerned about the eventual court backlog that the pandemic and resulting court closures would create: "It is very difficult to predict when Mr. L.'s trial will be reached, but we can expect it will be many months from now, probably longer. The additional time that Mr. L. will be in custody pending his trial is a factor to take into account on the tertiary ground."[472] Her Honour expands upon this in a subsequent paragraph:

> Detention prior to trial is difficult at the best of times, which is one of the reasons that, on sentencing, extra credit is provided for pre-trial custody. In the middle of a pandemic, serving that time in an institution is even more difficult. Transmission of the virus would be so much easier within an institution than in a private home….It is in the interests of society as a whole, as well as the inmate population, to release people who can be properly supervised outside the institutions. It better protects those who must be housed in the institutions (because there are no other reasonable options), those who work in the institutions (because they perform an essential service), and our whole community (because we can ill-afford to have breakouts of infection in institutions, requiring increased correctional staffing, increased medical staffing and increased demand on other scarce resources).[473]

On March 26, 2020, as noted earlier, Justice of the Peace Lee releases his decision in *Cotterell*,[474] His Worship concludes that COVID-19 is also relevant to the tertiary ground,

---

[470] Such delays will inevitably lead to s 11(b) *Charter* applications. The earliest of these that have occurred thus far in the pandemic, such as *R v Simmons*, 2020 ONSC 7209, *R v Truong*, 2020 ONCJ 613, *R v Greenidge*, 2021 ONCJ 57 and *R v Gharibi*, 2021 ONCJ 63 have proved unsuccessful, as COVID-19 delays have been categorized as discrete events, reasonably unforeseeable and beyond the Crown's control. In these cases, COVID-19 is therefore held to be an exceptional circumstance that justifies delays beyond the presumptive ceilings set out in *Jordan*, *supra* note 6.
[471] *TL*, *supra* note 79.
[472] *Ibid* at para 34.
[473] *Ibid* at para 36.
[474] *Cotterell*, *supra* note 122.

on the basis that courts must consider the potential delay in getting matters to trial. The next day, March 27, 2020, Lee JP releases another bail decision that considers COVID-19, that of *R v Knott*.[475] Not surprisingly, His Worship views the tertiary ground within the same framework as he did the day before, opining that it may take years before a trial could occur. In the circumstances, Justice of the Peace Lee orders Knott released.

Another section 520 bail review case is *R v Haughton*[476] which was heard on April 23, 2020 with the decision released on May 8, 2020. Given that the trial was already delayed, as it had been set to begin on April 6, 2020,[477] this was clearly considered by the court to be a material change in circumstance.

Another case which considers the application of a COVID-19 related delay in trial scheduling to the secondary ground and in which the court orders release is that of *R v KC*.[478] It was heard on April 28, 2020, and the reasons for judgment were issued on May 4, 2020. While there is a non-publication and non-broadcast order issued by the judge hearing *KC*,[479] and while I cannot confirm that either a preliminary inquiry or trial has yet been held,[480] the judge concludes "having regard to the merit in the plan of supervision, concern about the impact of COVID-19 and the fact that trials will be delayed and backlogs created by the pandemic" that release can occur.[481]

On June 25, 2020, a crown onus bail hearing in *R v McLean*,[482] on serious charges of kidnapping and robbery, is held in front of Justice Chapin of the Ontario Court of Justice, who imposes a publication ban on the case. The accused's specific health issues, a strong surety, and the potential delay in bringing the matter to trial all lead Chapin J to release Mr. McLean.

---

[475] *R v Knott*, 2020 ONCJ 157 [*Knott*].
[476] *R v Haughton*, 2020 ONSC 1890 [*Haughton*].
[477] *Ibid* at para 5.
[478] *R v KC*, 2020 ONCJ 231 [*KC*].
[479] *Ibid*.
[480] As noted earlier, normally, any s 517(1) non-publication and non-production ceases to have effect once the trial has been completed or, even earlier, if the accused is discharged after a preliminary inquiry.
[481] *KC, supra* note 478 at para 24.
[482] *R v McLean*, 2020 ONCJ 298 [*McLean*].

The *HK*[483] decision is another one where the trial delay issue is raised by the defence as a potential material change in circumstance. It does not succeed as the judge, in releasing his decision on January 8, 2021, notes that while there has been some delay, the five-day preliminary hearing was now scheduled to start on February 2, 2021.[484]

In *GP*, Schreck J's decision to release is influenced because of the possible delay of G.P.'s trial date as a result of COVID-19: "In these circumstances, it is likely that the applicant will serve at least several more months in custody."[485]

COVID-19 is only briefly mentioned in *CJ#2*[486] as a likely cause of further delay in getting C.J.'s matters to trial, as Mr. Justice Monahan concludes that he had not yet reached a "time served" situation. His Honour also states: "I further accept the submissions of Crown counsel, which were not disputed by counsel for CJ, that trials on the remaining Toronto matters could be held within the next 90-120 days."[487]

In summary, the issue of a possible COVID-19 induced trial delay is frequently raised by defence counsel in bail hearings during the pandemic. For some judicial officials, as noted, such as those in *TL*,[488] *Cotterell*,[489] *Knott*,[490] *KC*,[491] *McLean*[492] and *GP*,[493] it is a factor that leads them to release. This is not surprising, as courts, since the release of *Jordan*[494] in 2016, have been required by the Supreme Court of Canada to be ever more sensitive about the length of time criminal cases take to get to trial. In other cases, such as *HK*[495] and *CJ#2*,[496] the specific timelines of those cases do not lead the judicial officials to the conclusion that potential time delays are relevant.

---

[483] *HK*, *supra* note 200.
[484] *Ibid* at para 21 – 23.
[485] *GP, supra* note 85 at para 35.
[486] *CJ#2*, *supra* note 210.
[487] *Ibid* at para 27.
[488] *TL*, *supra* note 79.
[489] *Cotterell*, *supra* note 122.
[490] *Knott*, *supra* note 475.
[491] *KC*, *supra* note 478.
[492] *McLean*, *supra* note 482.
[493] *GP*, *supra* note 85.
[494] *Jordan*, *supra* note 6.
[495] *HK*, *supra* note 200.
[496] CJ#2, *supra* note 210.

NEW FACT SITUATIONS TO CONSIDER AS EVIDENCE – INCREASED AVAILABILITY OF SURETIES TO SUPERVISE

Many potential release plans founder as a result of the lack of supervision that proposed sureties could provide. One relevant side effect of the COVID-19 pandemic is that increasing numbers of potential sureties are possibly now either unemployed and at home or are now working from home. In either case, their availability to supervise is now enhanced. An example of such a case where this occurred is *R v AC*,[497] a bail review by Munroe J of the Superior Court. In the initial bail hearing held in front of Auger JP on March 10, 2020, just prior to the outbreak of the pandemic, one of the reasons why detention was ordered was that, according to Mr. Justice Munroe's review of the hearing, His Worship had found that "there would be extended unsupervised periods."[498]

However, by the time of the bail review, a few weeks later, things had changed. As Munroe J outlines:

> Sister works full-time as an insurance advisor. Prior to the COVID-19 shutdown she worked standard business hours: 9 a.m. to 5 p.m., Monday through Friday. Now she works at home and her office hours are reduced to two days each week. She is able to adjust her scheduled, even after the reopening, to ensure supervision of A.C.[499]

Nevertheless, because a significant amount of the supervision of A.C. would still require the use of a second surety who found favour neither with Auger JP nor with Munroe J, His Honour rejects the release plan.[500]

As noted earlier, in *Kinghorn*,[501] defence counsel argues that a change in Delano Kinghorn's release plan and the COVID-19 pandemic are both material changes. Crown counsel, unlike in many other cases, submits that the COVID-19 pandemic does not constitute a material change.

---

[497] *R v AC*, 2020 ONSC 2870 [*AC*].
[498] *Ibid* at para 52.
[499] *Ibid* at para 57.
[500] *Ibid* at para 118.
[501] *Kinghorn*, *supra* note 194.

The proposed change in the release plan is also, indirectly, COVID-19 related. Mr. Kinghorn's brother, the proposed surety, who at the time of the original bail hearing was employed as a chef at a restaurant, is now, as a result of the pandemic, laid off. The proposed surety is now available to keep an eye on his brother at all times: "Accordingly, with the current quarantine, he would always be able to supervise Mr. Kinghorn under strict house arrest."[502] This increased surety availability, however, is not enough to persuade His Honour to release.[503]

In these two cases of *AC*[504] and *Kinghorn*,[505] the increased surety availability, while considered, does not prove to be the tipping point that would lead to release. This makes sense, for if the courts – as in these two cases – feel that a strong degree of available surety supervision is necessary, they would not likely wish to rely on sureties whose availability as a result of their pandemic-induced presence in their homes might only be temporary.

NEW FACT SITUATIONS TO CONSIDER AS EVIDENCE – ELECTRONIC MONITORING

One new development in many of the COVID-19 cases, the use of electronic monitoring, does appear to have made a difference in many cases. While in existence for years, electronic monitoring, usually in the form of an ankle bracelet, has never been particularly widespread in bail releases in Ontario. For many defendants, the added expense of having to pay for such a system was an effective deterrent in them suggesting it to courts as a possible term of their release.

On March 27, 2020, Mr. Justice Conlan conducts a bail review in Superior Court in *CJ#1*.[506] A previous bail review for C.J. in January 2020 had resulted in his continued detention. Notwithstanding his lack of a criminal record, his eleven outstanding charges, which included trafficking offences pursuant to the *CDSA*[507] as well as firearms offences,

---

[502] *Ibid* at paras 12 and 13.
[503] *Ibid* at para 45.
[504] *AC, supra* note 497.
[505] *Kinghorn*, *supra* note 194.
[506] *CJ#1*, *supra* note 210.
[507] *CDSA*, *supra* note 70.

the January 2020 bail review found that C.J.'s proposed terms of release at that time did not sufficiently address the tertiary ground concerns.

Referring back to the January 2020 bail review, the material changes that had occurred by March 2020 were noted by Conlan J at paragraph 5 of his decision: "There was no electronic monitoring proposal at that time, nor was there any wide-sweeping global health crisis that had significantly impacted life in Canada." The proposed electronic monitoring, by way of an ankle bracelet, was to be administered by a company called Recovery Science Corporation [RSC]. Interestingly, a representative from that company participates in the audioconference call by which Conlan J conducts this bail review and clearly makes a good impression on His Honour: "I accept the commentary of the representative from RSC….that the program has a strong and proven deterrent effect."[508] His Honour feels that the combination of the COVID-19 crisis and the electronic monitoring address the tertiary ground concerns and he orders the release of C.J.

In April 2020, in response to the pandemic, the Ministry of the Solicitor General in the province of Ontario introduces the Electronic Supervision Program [ESP] for bail, using GPS monitoring, at no cost to the accused, in cooperation with a company called Safe Tracks GPS Canada Inc., for up to 90 individuals in custody at Maplehurst Correctional Complex, the Vanier Centre for Women, Toronto South Detention Centre and the Toronto West Detention Centre. This results in GPS being considered more frequently,[509] though the limitation on the number of the free GPS monitoring devices meant that many in custody who sought to be released with some form of electronic monitoring still had to pay the cost of it themselves.[510]

---

[508] *CJ#1, supra* note 210 at para 10. A representative from RSC participated in the bail hearing in *Nelson, supra* note 179 but was not cross-examined. Cross-examination did occur of the RSC official whose affidavit outlined the electronic monitoring procedures in *Hoo-Hing, supra* note 160 at paras 20 – 25.

[509] See e.g. *Morris*, *supra* note 62 at para 1iv.

[510] Unfortunately, as of June 7, 2021, the availability of this ESP equipment for bail was suspended by the Ministry. As of August 2021, however, this program is expected to be available for some inmates at the Elgin-Middlesex Detention Centre in London, as well as the Central East Correctional Centre in Lindsay and the Central North Detention Centre in Penetanguishene.

In the case of *R v FD*,[511] Malloy J of the Superior Court holds that electronic monitoring cannot prevent breaches; it merely immediately detects them. A slightly more optimistic opinion as to the worth of the monitoring is given in *BMD*, where Monahan J states: "[O]ne would expect electronic monitoring to have a significant deterrent effect on those individuals who are subject to such monitoring, thereby inducing increased compliance with their conditions of release."[512]

The decision in *Ledinek*[513] is released on August 27, 2020, having been heard by Scarfe JP on August 21, 2020.[514] Mr. Ledinek is charged with several firearms offences[515] as well a charge of breaching an existing recognizance,[516] as a result of which he is in a reverse onus situation. However, in *Ledinek*,[517] Justice of the Peace Scarfe does not conclude that the possibility of a GPS ankle bracelet would be effective, as he finds that the sureties proposed are too weak to supervise Mr. Ledinek properly. His Worship puts it succinctly: "While the presence of a GPS ankle bracelet essentially prevents him from going to the trouble, only the sureties can prevent trouble from coming to him. As we have all learned from the pandemic, much of what we all do can be done remotely."[518] The conclusion in *Ledinek*, on both the secondary and tertiary grounds, is that Ledinek did not discharge his onus and his detention is necessary both for the protection and safety of the public and to maintain public confidence in the administration of justice.[519]

R v Osman[520] is a more recent – January 2021 – bail decision by Justice of the Peace Kellough that considers both the secondary and tertiary grounds, taking into account an

---

[511] *R v FD*, 2020 ONSC 3054.
[512] *BMD, supra* note 91 at para 58.
[513] *Ledinek*, *supra* note 38.
[514] Since most bail decisions in Ontario are rendered by justices of the peace, it is always surprising, at first glance, to note how few of the reported bail decisions are those of justices of the peace. One of the major difficulties in being able to analyze bail hearing decisions, especially those given by justices of the peace, is that almost all such decisions are given orally by the presiding justice, often immediately upon the conclusion of the hearing itself. Few of them are written, and even fewer become reported decisions.
[515] These include offences pursuant to ss 244(1), 95(1), 86(1), 91(1) and 92(1): *Ledinek, supra* note 38 at para 2.
[516] Pursuant to s 145(5)(a) of the *Criminal Code, supra* note 10.
[517] *Ledinek*, *supra* note 38.
[518] *Ibid* at para 113.
[519] *Ibid* at paras 124 and 136.
[520] *R v Osman*, 2021 ONCJ 25 [*Osman*].

offer on the part of the accused to be electronically monitored. Her Worship concludes that electronic monitoring is in itself insufficient to address the public safety concerns in this case, which are strong, as a result of Mr. Osman being charged with firearms offences.

Other cases that consider electronic monitoring as a component of a release order include *R v AF*,[521] *Hastings*,[522] *Fraser*,[523] *Shayan Syed*,[524] *O'Brien*,[525] *Cain*,[526] *Rajan*,[527] *JR*,[528] *Tully*,[529] *Grant*,[530] *R v Carrington*,[531] *Mansour*,[532] *McLean*,[533] *Hoo-Hing*,[534] *Nelson*,[535] *Budlakoti*,[536] *Phuntsok*,[537] *R v Syed*,[538] *DP*,[539] *Sappleton*,[540] *Ali*,[541] *Yusuf*,[542] *HK*,[543] *PK*,[544] *Virag*[545] and *TL*.[546]

NEW FACT SITUATIONS TO CONSIDER AS EVIDENCE – UNDERLYING HEALTH ISSUES OF THE INDIVIDUAL DEFENDANT

In many of the COVID-19 bail cases, defence counsel sought to persuade a judge or a justice of the peace that underlying health concerns raised the risk of their clients

---

[521] *R v AF*, 2020 ONSC 2880 [*AF*] at paras 54 – 56 and 113.
[522] *Hastings, supra* note 91 at paras 43 and 47 – 48.
[523] *Fraser, supra* note 210 at para 21.
[524] *Shayan Syed, supra* note 94 at para 48.
[525] *O'Brien, supra* note 105 at paras 37, 59 and 60.
[526] *Cain, supra* note 210 at paras 14 and 17.
[527] *Rajan, supra* note 125 at paras 31 – 33.
[528] *JR, supra* note 348 at para 9.
[529] *Tully, supra* note 133 at paras 13, 15 and 25.
[530] *Grant, supra* note 63 at paras 10, 22 and 26.
[531] *R v Carrington,* 2020 ONCJ 258 [*Carrington*] at para 18.
[532] *Mansour, supra* note 153 at para 23.
[533] *McLean, supra* note 482 at paras 15 and 28.
[534] *Hoo-Hing, supra* note 160 at para 25: "Electronic monitoring never has and never will replace the role of a responsible surety. It is no news to me that electronic monitoring can be defeated by a negligent or unscrupulous surety."
[535] *Nelson, supra* note 179 at paras 11 – 12.
[536] *Budlakoti, supra* note 180 at para 1.
[537] *Phuntsok, supra* note 210 at para 36.
[538] *R v Syed*, 2020 ONCJ 222 at paras, 3, 5, 11 and 36 – 47 [*Shaw Syed*].
[539] *DP, supra* note 210 at paras 30, 43 and 44.
[540] *Sappleton, supra* note 212 at paras 5 and 28.
[541] *Ali, supra* note 120 at paras 11 – 14, 77 and 81.
[542] *Yusuf, supra* note 233 at paras 4, 24 – 28, 33 – 35 and 38.
[543] *HK, supra* note 200 at para 10.
[544] *PK, supra* note 257 at para 42.
[545] *Virag, supra* note 273 at paras 6, 9, and 57 – 60.
[546] *TL, supra* note 79 at paras 20 to 26.

contracting the virus if they were required to remain in custody. While such evidence almost always was considered during an initial bail hearing, and was frequently found to be a material change of circumstances during a section 520 bail review, release was not always a given. In most of the initial bail cases, this issue is considered within the context of the "all the circumstances" portion of the tertiary ground, set out in clause 515(10)(c) of the *Criminal Code*.[547]

On March 27, 2020, Laliberte J of the Superior Court releases his decision in *Budlakoti*.[548] It is a brief decision, and again deals with the need for specific evidence of an accused's medical conditions. In this case, Mr. Budlakoti suffers from gastroesophageal reflux disease and celiac disease.[549] While acknowledging that "it is likely very challenging for Counsel to get appropriate medical evidence in support of such applications" His Honour feels that he was not provided with enough in this case, and states that "the need for more cogent evidence is reinforced by the significant risks for public safety associated to the accused being released in the community."[550] As Mr. Budlakoti is currently facing 83 outstanding firearms charges, the judge dismisses the application and the accused remained in custody.

In *Haughton*, Mr. Justice Garton considers an affidavit of the defendant:

> In his affidavit, dated April 7, 2020, Mr. Haughton expressed concern about being in custody during the current pandemic particularly since he suffers from asthma. He states that he is 'terrified' that if he contracted COVID-19, his underlying health condition would require that he be put on a ventilator and he worries that one might not be available.[551]

However, the judge goes on to express some doubts regarding this evidence. As His Honour states:

> According to Mr. Haughton, he has been using an inhaler while at the TEDC [Toronto East Detention Centre] because his asthma is aggravated by the stagnant air and humidity from the showers. Yet his asthma is apparently not

---

[547] *Criminal Code*, *supra* note 10.
[548] *Budlakoti*, *supra* note 180.
[549] *Ibid* at para 8.
[550] *Ibid* at para 14.
[551] *Haughton, supra* note 476 at para 35.

> affected by smoking cigarettes. He testified that he 'chooses to smoke' and denied that smoking triggers or aggravates his asthma.[552]

Perhaps not surprisingly, Mr. Haughton's bail review was unsuccessful, as was a subsequent bail review application which added electronic monitoring to the proposed release.

In *MK*,[553] the personal circumstances of M.K., including a medical history of a collapsed lung, satisfy London-Weinstein J that M.K. is at a higher risk of adverse circumstances were he to contract COVID-19,[554] yet release is denied for other reasons. In *Cahill*,[555] Mr. Justice Labrosse of the Superior Court accepts that Ms. Cahill is HIV-positive and has chronic lung disease, but the Crown still wishes more evidence to conclude that she is at greater risk of contracting COVID-19 if she were to remain in detention. His Honour disagrees and concludes:

> I disagree. This is not a circumstance where it is unclear as to how an illness may cause greater risk. I do not find that further medical evidence is required. Clearly, being HIV-positive and having chronic lung disease places Ms. Cahill at a significantly greater risk. While I appreciate that in normal circumstances, a court may have been justified to seek further medical evidence, the scarce availability of medical practitioners leaves the Court with Ms. Cahill's evidence as the best available evidence.[556]

Ms. Cahill is released.

In *Cain*,[557] London-Weinstein J clearly indicates that the pandemic weighs heavily on her as she conducts a section 520 bail review on April 1, 2020. She comments that "the existence of the Covid 19 virus is relevant, but not determinative as to whether an individual plan of bail meets the primary, secondary and tertiary criteria governing release."[558] The specific health concerns of Mr. Cain are that in 2017 he was the victim of a stabbing and sustained an injury to his liver, which results in him being prone to

---

[552] *Haughton, supra* note 476 at para 38.
[553] *MK*, *supra* note 131.
[554] *Ibid* at para 30.
[555] *Cahill*, *supra* note 423.
[556] *Ibid* at para 20.
[557] *Cain*, *supra* note 210.
[558] *Ibid* at para 8.

infections.[559] Her concerns that the pandemic could worsen prompt this interesting comment: "Given that matters at the jail may become rapidly worse, if present events occurring elsewhere are any indication, the time to determine whether Mr. Cain can be released and the public adequately protected, is now, before matters have worsened."[560] She also believes that the pandemic may have resulted in an epiphany for Mr. Cain during the time he has spent in custody awaiting this bail review: "I am satisfied that the possibility of infection has had a salutary effect on the reasoning of Mr. Cain and will have an effect on his conduct."[561] Her Honour also does not feel the need for Cain to satisfy her that he has, as she labels it, "some subjective personal characteristic in order to accept that he is at increased risk of infection by virtue of his incarceration at OCDC [Ottawa Carleton Detention Centre]."[562]

A further interesting point that London-Weinstein J makes is that few, if any, of the other COVID-19 bail cases consider whether the threat posed by the inability of inmates to self-isolate raises any concerns regarding the section 7 *Charter*[563] guarantee of security of the person. Frustratingly, Her Honour does not consider this in any further detail, but merely states that she considers this factor in coming to her conclusion that Cain could be released.[564]

On April 8, 2020, Barnes J releases a bail review decision in the matter of *Phuntsok*[565] which he heard on April 3, 2020. While citing *Jeyakanthan*,[566] *Nelson*[567] and *Budlakoti*[568] with approval, His Honour's decision is not quite as rigid as those in terms of the medical evidence required for COVID-19 to be successful in overcoming tertiary ground concerns:

---

[559] *Ibid* at para 7.
[560] *Ibid* at para 9. See also *R v Husbands*, 2019 ONSC 6824 at para 166 per O'Marra J: "No reasonable person expects detainees in custody to be coddled in luxury. However, people in Canada held in custody by the state have the right to be held in safe and clean surroundings."
[561] *Cain, supra* note 210 at para 10.
[562] *Ibid* at para 11. See, however, her subsequent comments in *MK, supra* note 131 which distinguish this finding in *Cain*.
[563] *Charter*, *supra* note 29.
[564] *Cain, supra* note 210 at para 26.
[565] *Phuntsok*, *supra* note 210.
[566] *Jeyakanthan*, *supra* note 168.
[567] *Nelson*, *supra* note 179.
[568] *Budlakoti*, *supra* note 180.

> The applicant has provided a doctor's note stating that he was recently treated for asthma in the correctional institution. The fact that he was treated for asthma is not in dispute, but the Crown submits that this is insufficient evidence. Ordinarily, I would agree. However, certain pre-existing medical conditions are so notorious for increasing susceptibility to COVID-19 and reducing the survival rate from a COVID-19 infection that judicial notice of its effects can be taken. Asthma is one such condition.[569]

Notwithstanding this willingness to be somewhat flexible, His Honour concludes that, since in this case he finds the surety to be unsuitable and Mr. Phuntsok has a history of not following court orders, his continued detention is necessary to maintain public confidence in the administration of justice.[570]

On April 9, 2020, Justice of the Peace Levita releases his decision in *R v Ellis*.[571] In it, His Worship confirms that he requires some sort of evidence to back up the accused's contention that he suffers from both asthma and pneumonia and that this would make him more susceptible. As well, in these early days of the pandemic, there is as yet no issue of COVID-19 in the specific correctional facility where Mr. Ellis is being held. Detention is ordered.

Another case in which a section 520 application was successful – though not because of the specific medical symptoms of the accused – is *Ali*,[572] a decision released on April 24, 2020. As in many other similar cases, the Crown did concede that in light of the COVID-19 pandemic there has been a material change in circumstances.[573] Spies J, citing *JS*[574] and *Nelson*,[575] agrees. With respect to COVID-19, the accused did file a doctor's note from July 2018 stating that Mr. Ali, at that time, had "symptoms of cough and wheeze with high temperatures which may be asthma or reactive airway disease variant."[576] However, Spies

---

[569] *Phuntsok*, *supra* note 210 at para 42.
[570] *Ibid* at paras 45 and 46.
[571] *R v Ellis*, [2020] OJ No 1636.
[572] *Ali*, *supra* note 120.
[573] *Ibid* at para 4.
[574] *JS*, *supra* note 114.
[575] *Nelson*, *supra* note 179.
[576] *Ali, supra* note 120 at para 48.

J noted that there was no evidence from Mr. Ali himself that he suffered from any respiratory illness.[577]

In *Grant*,[578] discussed briefly earlier in this paper in the context of the primary ground, Justice Edwards gives his decision on May 11, 2020. In this section 520 bail review application, he concludes:

> Nonetheless, on the facts presented by Mr. Grant given his pre-existing health condition, I am satisfied that the fear of reincarceration is a relevant consideration that leads me to conclude that the proposed terms of release substantially lowers the risk that Mr. Grant would reoffend and risk being reincarcerated.[579]

Grant's health issues, primarily a tendency to get infections such as colds and influenza, result from his being stabbed in 2013.[580] It is Grant's health concerns that make the difference in this case, as His Honour concludes by stating: "In the absence of the medical evidence referenced above, given Mr. Grant's propensity demonstrated by his criminal record for the commission of crimes involving firearms, the application of the tertiary ground would have tipped in favour of his continued incarceration."[581]

In *Ibrahim*,[582] without mentioning any reasons as to how she came to these conclusions, including no specific discussion of the concept of judicial notice, Her Honour makes two statements. First, she comments: "Across the province, many accused persons are seeking release on bail because of the risk COVID-19 poses. They rely on the fact that medical experts strongly recommend self-isolation and social distancing to protect against the spread of the virus. These practices are difficult, if not impossible, to accomplish in jail."[583] In the next paragraph, Bird J comes to this second conclusion: "It is accepted that people with underlying health conditions including asthma are more likely to experience serious

---

[577] On this point, Spies J later concludes: "However, in light of the limited evidence I do have and the evidence I have from Dr. Orkin about the nature of COVID-19, as well as the public knowledge that it can impact a person's respiratory system, I have concluded that I should be cautious and presume that Mr. Ali may be at a heightened risk because of his health or at the very least because of the increased risk of infection in detention." *Ibid* at para 90.
[578] *Grant*, *supra* note 63.
[579] *Ibid* at para 28.
[580] *Ibid* at paras 16 and 17.
[581] *Ibid* at para 32.
[582] *Ibrahim*, *supra* note 98.
[583] *Ibid* at para 24.

symptoms of COVID-19 if they contract the virus."[584] During the bail hearing, Mr. Ibrahim's proposed sureties, his mother and sister, both testified that he has had asthma since he was a child.

Some health issues may be more relevant than others. In the case of *Fraser,* the defendant is a leukemia survivor, but, as Madam Justice London-Weinstein states: "I do not have any evidence before me whether persons with a history of cancer, who are not currently receiving cancer therapy and do not have active cancer, are at an increased risk compared to others in their age group." Her Honour goes on to opine generally, in reference to the pandemic, that "fear of contraction may provide motivation to follow conditions by the court."[585] She concludes, however, that in Mr. Fraser's case, he has not met his onus on the secondary ground and his continued detention is ordered.[586]

On June 19, 2020, London-Weinstein J of the Superior Court releases another bail review decision, *BE,*[587] which is a section 520 bail review argued before her on June 16, 2020. While Her Honour does issue a section 517(1) and 520(9) publication ban, I believe that a brief review of some aspects of this case there are some interesting aspects of this case that are worth reviewing, and that I do not believe violate the ban. These include that B.E. is a paranoid schizophrenic and that Her Honour makes a finding of fact that B.E. is therefore at an enhanced risk of contracting COVID-19.[588] But as the release plan "offers no meaningful supervision of B.E."[589] and as Her Honour feels that there was a substantial risk of further offences being committed by him, she orders his continued detention on the secondary ground. However, she also notes that *Myers*[590] does direct her to guard against individuals languishing in pre-trial custody for a longer time than their eventual sentence

---

[584] *Ibid* at para 25.
[585] *Fraser, supra* note 210 at para 30.
[586] *Ibid* at para 34. I will refrain from detailed discussion of *Fraser*, as there is a publication ban pursuant to s 520(9) of the *Criminal Code, supra* note 10.
[587] *BE*, *supra* note 210.
[588] In coming to this conclusion, London-Weinstein J relies on submissions from B.E.'s counsel, not contested by the Crown, including medical evidence: Nicole Kozloff et al, "*The COVID-19 Global Pandemic: Implications for People with Schizophrenia and Related Disorders*" (May 2020) Schizophrenia Bull 1. Online at: https://pubmed.ncbi.nlm.nih.gov/32343342/.
[589] *BE, supra* note 210 at para 13.
[590] *Myers*, *supra* note 51.

might require.[591] But in these early days of the pandemic, she concludes that "that prejudice has not crystallized yet."[592]

In contrast to *BE*,[593] in which schizophrenia, primarily a mental illness, is found to increase the risk of contracting COVID-19, a different conclusion regarding mental disorders is made in *R v Lumley*.[594] While Mr. Lumley clearly has a host of mental health issues, Goldstein J draws a distinction and concludes: "There is no evidence that Mr. Lumley has any physical ailments that would make him more vulnerable to COVID-19."[595]

In *HK*,[596] notwithstanding that the defendant has had cancer, Mr. Justice Quigley concludes that, since H.K. is in remission, is receiving all his medication, and is able to access his oncologist,[597] the health issues do not overcome the other flaws in the release plan:

> The point is simple...He cannot be released when the plan of release is inadequate, as it is in this case, to ensure the safety of the public, and address the secondary and tertiary ground concerns. I accept that the tertiary ground carries less weight in the present pandemic circumstances, but that does not permit all detained persons to get out of jail, pandemic or not, when the safety concerns remain, the surety is not reliable, and the plan is accordingly inadequate, as it is here.[598]

Osman[599] also considers the defendant's vulnerability to COVID-19 due to his asthma. Justice of the Peace Kellough concludes that while his asthma could certainly make him more vulnerable to COVID-19, individual health risks to accused persons must not overcome issues of public safety and traditional bail concerns.

In summary, consideration of an individual's health risks is almost always looked at by the court. But similar to the issue of electronic monitoring, it is most frequently examined within the context of the specific accused person's individual circumstances. The

---

[591] *BE, supra note 210* at paras 14 and 21.
[592] *Ibid* at para 15.
[593] *BE*, *supra* note 210.
[594] *R v Lumley,* 2020 ONSC 6292, [2020] OJ No 4583 [*Lumley*].
[595] *Ibid* at para 26.
[596] *HK*, *supra* note 200.
[597] *Ibid* at para 32.
[598] *Ibid* at para 34.
[599] *Osman*, *supra* note 520.

defendants' health appears to have made the difference in *Cahill*[600] and *Cain*[601] and leads to their release.

NEW FACT SITUATIONS TO CONSIDER AS EVIDENCE – THE RISK OF COVID IN JAIL EVEN FOR HEALTHY DEFENDANTS

Not surprisingly, it was easier for defendants with objectively provable health concerns to persuade courts that being detained in a jail would be an increased risk to them. Even for those whose health concerns might not be as serious, or indeed might be non-existent, some were still able to succeed in gaining release by raising the issue of the increased risk of contracting COVID-19 in a custodial setting.

One such case is *AF*, where the judge held: "Accordingly, I find that the applicant will follow the terms of bail rather than risk being returned to jail where he is more likely to be exposed to COVID-19, whether or not its effects on him are ultimately non life-threatening."[602] Another case where this issue helped lead to a release order is *Carrington*, where Justice Prutschi concludes that "detaining a presumptively innocent person in a high-risk health environment in the midst of a global pandemic should only occur when circumstances absolutely demand it."[603] And, as noted earlier, the court in *Cain*[604] indicates that release would have even occurred even without specific, individual health concerns being raised.

The section 520 bail review of *Nelson*[605] occurs on March 18 and 20, 2020 and the judge's decision is released on March 23, 2020. Nathaniel Nelson had originally been released on bail, but he is in custody as a result of a successful bail review by the Crown in September 2019. Mr. Justice Edwards sets out the issue clearly at the beginning of his decision:

> The material change in circumstances that underlies this bail review is the health crisis we are all facing in the form of the COVID-19 virus. While there

---

[600] *Cahill*, *supra* note 423.
[601] *Cain*, *supra* note 210.
[602] *AF, supra* note 521 at para 95. At para 65 of *AF*, the defendant had given evidence of some health concerns.
[603] *Carrington, supra* note 531 at para 50.
[604] *Cain*, *supra* note 210.
[605] *Nelson*, *supra* note 179.

> is a new plan for release that incorporates electronic monitoring, it was conceded by counsel for Mr. Nelson that the real issue this court must confront is whether Mr. Nelson should be released on bail because of the heightened health risk he faces given his present circumstances as an incarcerated person at the Central East Correctional Centre.[606]

In this case, Nelson has no medical conditions himself,[607] and as the judge put it, "in a refreshing degree of candour", Nelson's counsel admits that "but for the virus, he fully recognized that the new plan of release was not one that had much, if any chance of success."[608] Justice Edwards acknowledges that he can take judicial notice of the existence of the virus but he sets out clear limits for how COVID-19 can be considered by a bail court: "It will be important that future applications proceed with the benefit of at least some rudimentary evidence that could suggest an accused is more susceptible to contract the virus due to underlying health issues."[609] Summing up all the relevant factors, Edwards J concludes:

> This is a case where given the seriousness of the charges; Mr. Nelson's prior criminal record, the weakness of the proposed plan of release, and the absence of medical evidence demonstrating that Mr. Nelson may be more susceptible to contracting the virus and/or a heightened risk of symptomology, I am not satisfied that there would be confidence in the administration of justice if Mr. Nelson was released from jail. The application is dismissed.[610]

One of the first decisions in which COVID-19 was considered but in which release was denied was that of *Hastings*,[611] a detention review decision, pursuant to section 525 of the *Criminal Code*.[612] It was heard by Monahan J of the Superior Court on April 2, 2020 and his decision was released the next day.

As a result of a history of non-compliance with prior court orders, Kyle Hastings had been denied bail by a justice of the peace in October 2019 who "had no confidence that Mr. Hastings would abide by the proposed plan of release and ordered him detained."[613]

---

606 *Ibid* at para 2.
607 *Ibid* at para 10.
608 *Ibid* at para 13.
609 *Ibid* at para 35.
610 *Ibid* at para 42.
611 *Hastings*, *supra* note 91.
612 *Criminal Code*, *supra* note 10.
613 *Hastings, supra* note 91 at para 21.

At the section 525 hearing, the Crown maintains that detention of Mr. Hastings is still warranted under both the primary and secondary ground of subsection 515(10). Defence counsel argues material changes in circumstances, one of which was the COVID-19 pandemic. On the issue of the secondary ground, counsel for Mr. Hastings feels that the existence of the pandemic is specifically relevant, as "the threat of transmission of the virus in a provincial institution is so significant that it will provide an additional deterrent against Mr. Hastings breaching the conditions of his release."[614]

Mr. Justice Monahan quickly rejects this argument in paragraph 52 of his decision:

> The difficulty with this argument is that there is no evidence on the record to support it. Mr. Hastings is 24 years old and in good health. There are no cases of COVID-19 in the correctional institution where he is being detained. Nor has the court heard from Mr. Hastings as to whether his fear of contracting COVID-19 would operate as a deterrent in his case. It is therefore speculative to assume that the existence of COVID-19 would cause Mr. Hastings to alter his behaviour if he were released.

Later in that same paragraph of his decision, His Honour raises the interesting possibility that Mr. Hastings might pose an increased risk to the public because of COVID-19 when he states: "He has previously demonstrated a willingness to evade police capture in order to avoid being returned to custody. A heightened aversion to being in custody as a result of the threat of contracting COVID-19 might well cause him to repeat such behaviour in the future." Monahan J ultimately concludes that, in this case, COVID-19 does not absolve the concerns identified under the secondary ground.[615]

In his consideration of the pandemic in *McArthur*,[616] Quigley J states: "There was no specific evidence presented at the show cause hearing, or before me, of any particular physical or medical disabilities or weaknesses that affect Mr. McArthur, apart from counsel acknowledging that he has the same reduced immune systems any person does who is getting close to 60 years of age."[617] Of course, since the initial bail hearing occurred in

---

[614] *Ibid* at para 51.
[615] *Hastings, supra* note 91 at para 54.
[616] *McArthur*, *supra* note 220.
[617] *Ibid* at para 25.

early February 2020, before the scope of the pandemic was realized, there is no reason why any such health concerns would have been discussed in detail at it.

In *Forbes*, the fact that the defendant has no underlying health issues is one of the reasons that Leibovich J detains her.[618] A similar decision is made in the oral decision of *R v Barry-Charley*[619] released in September 2020, before the serious second wave of COVID-19 cases hits Ontario, including outbreaks in many of the detention centres in the province. The accused has a lengthy criminal record and is facing ten new charges arising out of his alleged possession of a restricted firearm and ammunition, despite being on probation and being the subject of weapons prohibition orders.[620] Bloomenfeld J has serious concerns on both the secondary and tertiary grounds. In conducting her analysis on the tertiary ground, she briefly considers COVID-19: "There are cases in which COVID-19 can compel the release of an accused on either the secondary or the tertiary ground. I appreciate that on both grounds there has been a general imperative to release individuals where a reasonable bail can be fashioned in light of the added stress and risks of COVID-19."[621] However, and similar to the underlying complacency shown by Ghosh J in *R v Kochanska*[622] regarding the possibility of COVID-19 in the detention centres, Her Honour comments in *Barry-Charley* as follows:

> In Mr. Charley's case, there are no particular health concerns that place him at an elevated risk in relation to the virus. Further, the COVID-19 information covering Mr. Charley's time at the Toronto East Detention Center indicates that there were no cases and no transmission. I also have no evidence, or no specific evidence, that Mr. Charley has additional, or in fact any, motivation to stay out of trouble due to fears about susceptibility to COVID-19.[623]

In *PK*, the fact that the defendant has no specific health concerns is a factor in Goodman J's continued detention of him after a section 520 bail review.[624]

---

[618] *Forbes, supra* note 210 at para 32.
[619] *R v Barry-Charley*, [2020] OJ No 4381 (ONCJ) [*Barry-Charley*].
[620] *Ibid* at paras 1, 8 and 9.
[621] *Ibid* at para 41.
[622] *R v Kochanska*, 2020 ONCJ 385 [*Kochanska*].
[623] *Barry-Charley, supra* note 619 at para 42.
[624] *PK, supra* note 257 at para 102.

NEW FORMS OF EVIDENCE – CROWN INFORMATION SHEETS AND DR. ORKIN'S AFFIDAVIT

Evidence regarding the availability of electronic monitoring is not the only new data frequently provided to bail courts in the early days of the COVID-19 pandemic. Very frequently, for example in *Rajan*,[625] the Crown files a document called an "Information Note: Institutional Service Response to COVID-19" which outlines the steps taken against COVID-19 by Ontario's correctional institutions, including reducing the population of jails and limiting the number of people being transported back and forth from jails to courts. The document filed in *Rajan*[626] was dated April 1, 2020. It is updated frequently in the early weeks and months of the pandemic, often with specific data relating to a particular correctional institution. Some judicial officers are somewhat hostile to this document, given that it was not in affidavit form and notes no specific author who would then be able to be cross-examined, while other courts are willing to allow the documents in as evidence. An example of this is *MK*, in which the judge comments that "we are conducting these bail reviews in a time of crisis," that "there are other urgent matters afoot" and that "a more relaxed standard is mandated in regard to the receipt of evidence given this context."[627]

In *Forbes*,[628] evidence filed by the Crown during the bail review including the "Response to COVID-19 Information Note" dated April 6, 2020, indicates that, as of that date, only four inmates in Ontario correctional centres have tested positive for COVID-19, and that "no one had tested positive at the applicant's detention center."[629] This evidence was certainly a factor that Leibovich J took into consideration when deciding not to release Ms. Forbes in her section 520 bail review.

In *Kinghorn*, the Crown relies upon the briefing notes filed by the Ministry of the Solicitor General dated March 26, April 1 and April 6, 2020 as the basis for its insistence that

---

[625] *Rajan, supra* note 125 at para 59.
[626] *Ibid*.
[627] *MK, supra* note 131 at para 34, citing *St-Cloud, supra* note 5 at para 129.
[628] *Forbes*, *supra* note 210.
[629] *Ibid* at para 17.

COVID-19 has not caused a material change in circumstances.[630] Defence counsel submits that the judge should put little weight on those memos, and His Honour agrees:

> While the courts need to be practical with respect to evidence in these circumstances, the memos stretch the limit of the evidentiary principles upon which I can rely. The documents are unsigned. They do not have any name attached to them as an author. They refer to 'risk factors' which suggests some sort of expert opinion. I have put little weight upon these documents.[631]

Other COVID-19 bail cases in which Crown counsel file a COVID-19 Information Note include *KC*,[632] *Morris*,[633] *Ledinek*,[634] *JR*,[635] *Tully*,[636] *Jeyakanthan*,[637] *Shaw Syed*,[638] *DP*,[639] *Ali*,[640] *Dawson*,[641] *PK*,[642] *Baidwan*,[643] *Virag*[644] and, at the Court of Appeal, *Jaser*.[645]

JR,[646] heard on April 15, 2020 with the decision released on April 20, 2020, is a section 525 detention review by Schreck J. J.R. is in custody at the Toronto South Detention Centre and the review hearing proceeds remotely by teleconference.[647] An important factor in Mr. Justice Schreck's analysis of the tertiary ground is an affidavit by Dr. Aaron Orkin filed by the defence.[648] Like the "Information Note" provided by the Crown in many bail hearings, Dr. Orkin's affidavit is updated several times during the early weeks of the pandemic and is offered by defence counsel in many bail hearings. It is a thorough affidavit, the April 7, 2020 version being eight pages long, with his twenty-five page *curriculum vitae* attached as an exhibit. Other exhibits to the affidavit include government COVID-

---

630 *Kinghorn*, *supra* note 194 at para 23.
631 *Ibid* at para 24.
632 *KC, supra* note 478 at paras 16 and 18.
633 *Morris, supra* note 62 at para 22.
634 *Ledinek, supra* note 38 at paras 22 and 23.
635 *JR, supra* note 348 at paras 32 – 36, 41 – 43.
636 *Tully, supra* note 133 at para 40.
637 *Jeyakanthan, supra* note 168 at para 31.
638 *Shaw Syed, supra* note 538 at para 78.
639 *DP, supra* note 210 at para 45.
640 *Ali, supra* note 120 at paras 49 – 54.
641 *Dawson, supra* note 235 at para 50.
642 *PK, supra* note 257 at para 50.
643 *Baidwan, supra* note 263 at para 75.
644 *Virag, supra* note 273 at para 40.
645 *Jaser*, *supra* note 334 at para 102 in which the court specifically noted that, to date, there has not been a single case of COVID-19 in the institution in which Jaser is being held.
646 *JR*, *supra* note 348.
647 *Ibid* at paras 3 and 7.
648 *Ibid* at paras 28 – 43.

19 case projections and various versions of the government's Briefing Note – Institutional Services Response to COVID-19 produced with respect to specific detention centres.

The affidavit clearly makes a big impact on Mr. Justice Schreck in *JR*. As he states:

> Dr. Orkin's credentials are impressive. In addition to a medical degree, he holds a graduate degree in public health and is a doctoral candidate in clinical epidemiology. He practices emergency medicine at two Toronto hospitals and is the Medical Director of the St. Joseph's Health Centre COVID-19 Assessment Centre. He is also responsible for planning a COVID-19 response strategy for Inner City Health Associates, an organization which provides health services to people experiencing homelessness. He has authored and co-authored numerous peer-reviewed publications, including several relating to health are for individuals in prison.[649]

Dr. Orkin's main argument is that preventing outbreaks of COVID-19 in congregate living facilities is a top priority for flattening the curve of cases, but that the degree of physical distancing required to do so is impossible within correctional institutions because of space constraints, referring to it as a "geometry problem, not a policy or strategy problem."[650] Justice Schreck clearly prefers Dr. Orkin's affidavit to the Information Note filed by the Crown. While neither document's author is cross-examined during the detention review,[651] the fact that His Honour does not know the identity of the author of the Information Note is clearly important to him. He uses the same reasoning in preferring the evidence contained in J.R.'s own affidavit – for example, on whether the inmates were currently being provided with soap by the corrections staff – to that of the unauthored Information

---

[649] *Ibid* at para 28.
[650] *Ibid* at paras 29 and 30.
[651] *Ibid* at para 28. Schreck J confirms that Dr Orkin was not cross-examined and his evidence was not challenged by the Crown. With respect to the Information Note, Schreck J states at para 32: "I was advised during submissions that one of the authors of the document is a strategic advisor employed by the MSG [Ministry of the Solicitor General] who does not have a medical background. While the Crown has called this person as a witness during other proceedings, it did not to do before me. The identity and qualifications of the other author or authors was not disclosed to me." Schreck J therefore concludes at para 38: "There is no indication as to what qualifications they have to express an opinion on the adequacy of the measures undertaken by MSG to control the spread of COVID-19 or whether they are justified in being 'confident' in the care we are providing our inmate population.'"

Note.[652] Citing the comments of Harris J in *Rajan*,[653] noted earlier in this paper, Schreck J releases J.R., also relying on *JS*,[654] *Cain*,[655] *TL*,[656] *CJ#1*[657] and *R v King*.[658]

In *Ali*,[659] Spies J considers Dr. Orkin's affidavit at great length, including the doctor's statement that "even reducing the population of individuals who are in good health in correctional facilities is important to protect the health of those who have health problems in those facilities" and that "the health of a particular inmate is irrelevant to this recommendations and that from a public health perspective, during the current pandemic, it would always be in the best interest, not only of the inmate, but of the community at large to release the inmate to a less populated environment such as their own home."[660] Dr. Orkin concludes:

> My position is rooted in my knowledge of public health and COVID-19 only, and I do not purport to weigh or balance the risks of COVID-19 on an individual or population level against the public safety issues associated with the release of individual inmates from custody. I realize fully that some inmates are violent, some are dangerous, and therefore some cannot be safely released into the community. Nevertheless, my opinion is that the collective and congregate gathering of a group of people in correctional facilities together is very dangerous right now. As a society, during these extraordinary circumstances, it is essential that we accurately assess the nature of these safety risks, so that they can be appropriately weighed against one another.[661]

Recent developments arising between the date of the *Ali* hearing and the release of the decision also appear to influence Her Honour's decision. On April 21, 2020, an outbreak of COVID-19 is declared by Peel Region Public Health at the Ontario Correctional Institute, and all its inmates are transferred to the Toronto South Detention Centre.[662] As

---

[652] *Ibid* at paras 36 and 42.
[653] *Rajan*, *supra* note 125 at paras 69 and 70.
[654] *JS, supra* note 114 at paras 18 and 19.
[655] *Cain, supra* note 210 at para 25.
[656] *TL, supra* note 79 at paras 35 and 36.
[657] *CJ#1, supra* note 210 at para 8.
[658] *R v King*, 2020 ONSC 1935, at paras 60 and 61.
[659] *Ali*, *supra* note 120.
[660] *Ibid* at paras 57 and 58.
[661] *Ibid* at para 59.
[662] *Ibid* at para 94.

Her Honour puts it: "It seems then that what Dr. Orkin was concerned about is beginning to appear." She goes on to conclude:

> Furthermore, in my view, in these extraordinary times, although the presence of COVID-19 is not a free pass to 'get out of jail', if the secondary ground is satisfied and a release plan is viable and ensures that a defendant can be adequately supervised to protect the public from further risk, as is the case before me, then release on stringent terms ought to be ordered, notwithstanding the strength of the usual four factors justifying detention on the tertiary ground.[663]

Justice Felix issues a thoroughly researched bail decision in *Shaw Syed*[664] on April 30, 2020. While there is a subsection 517(1) ban in effect, I believe that I can state His Honour's general conclusions regarding the impact of COVID-19 on the tertiary ground without violating the ban. In *Shaw Syed*, Justice Felix, on the topic of Dr. Orkin's affidavit, states that "I generally accept the information provided by Dr. Aaron Orkin in his affidavit as it pertains to the general circumstances in the public at large" and that "defects in Dr. Aaron Orkin's specific knowledge about the current circumstances inside of institutions goes to weight rather than admissibility."[665]

In *XY*,[666] the youth case discussed earlier, X.Y.'s counsel files a copy of Dr. Orkin's affidavit, Her Worship discounts it because X.Y. is held in a youth facility:

> I accept the Crown's submission that Dr. Orkin's report does not apply to the Roy McMurtry Centre where X.Y. is being held because it is operating at less than half of its capacity. There were only 50 young persons there as of June 24th, 2020. To date, there has been no reported cases amongst young persons…Each young person has their own room, and only interact with up to 7 people in an area where physical social distancing can be practiced.[667]

As Ontario amalgamated many youth facilities early in 2021, specifically because of their underutilization, this practical argument against relying on the conclusions of Dr. Orkin's affidavit with respect to young persons may no longer exist.

---

[663] *Ibid* at para 96.
[664] *Shaw Syed*, *supra* note 538.
[665] *Ibid* at para 80.
[666] *XY*, *supra* note 460.
[667] *Ibid* at paras 46 and 47.

Kochanska[668] is a decision that is released at the end of August 2020, worthy of examination because of the judge's strong opposition to, and distaste for, the evidence provided by Dr. Orkin through his affidavits.[669] Ghosh J begins his comments about Dr. Orkin relatively gently: "Much of the medical evidence of Dr. Orkin is accepted within the public realm and I accept it at face value as it related to potential risks to parties residing in 'congregate living facilities' as he described."[670] But His Honour immediately begins to add qualifiers to his acceptance of Dr. Orkin's evidence: "However, the evidence is uncontested from federal and provincial facilities that mitigating steps in compliance with public health directives have been in place and that there have been no outbreaks to date involving locations where Mr. Kochanska will be residing."[671]

Ghosh J gets harsher in the next paragraphs:

> [24] I accord little to no weight to several aspects of Dr. Orkin's opinion, specifically as it related to his observation that it is 'extremely likely that COVID-19 will arrive in nearly every correctional facility in Canada, and therefore extremely likely that almost all inmates in these settings will be exposed in one way or another.'
>
> [25] I find that he has opined, in improperly sweeping terms, a presumption that custodial facilities are incapable of observing public health directives. I am not the first jurist to make such a finding: *R v Osman*, [2020] OJ No 1774 (SCJ), paras 97 – 102; *R v Paramsothy*, 2020 ONSC 2314.
>
> [26] An expert is required to provide opinion evidence that is 'fair, objective, and non-partisan' (*R v White Burgess* at para 30). Were it not for the Crown concession regarding the unfettered admissibility of the expert opinion, I may not have permitted Dr. Orkin to provide much of the evidence captured in the various versions of his affidavits as it related to custodial facilities: *R v White Burgess* at para 32. His evidence on custodial facilities improperly exceeds the bounds of his expertise and experience.
>
> [27] Also, in submitting modifications to three versions of essentially the same expert affidavit, I find Dr. Orkin has embarked on classically impermissible 'tailoring' of his evidence to respond to judicial criticism in order to insulate his opinion. These criticisms focused on his conclusory

---

668 *Kochanska*, *supra* note 622.
669 *Ibid* at paras 22 – 33.
670 *Ibid* at para 23.
671 *Ibid* at para 23.

> observations, without evidence, regarding the inability of essentially any correctional facility to mitigate risk.

Justice Ghosh concludes his remarks about Dr. Orkin's affidavit as follows:

> I afford little to no weight regarding his evidence regarding how the virus will impact detention centres or prisons, either generally or specifically. He is uninformed to opine, particularly as it relates to the Central East Correctional Centre (CECC) and the penitentiary, as to the real and prospective impact of the virus…There is no credible evidence that Dr. Orkin has ever assessed CECC, the penitentiary, or Mr. Kochanska and any associated risk factors presented by the virus. There has been a single, effectively contained case well over a month ago at CECC and certainly no evidence of a minor outbreak to date, nor at the penitentiary for that matter.[672]

With the unfair benefit of hindsight, it is easy to criticize Justice Ghosh's decision in *Kochanska*.[673] It is written, as mentioned earlier, in August 2020, when case levels were very low, before both the second and third waves of COVID-19 swept across Ontario and much of Canada. During those waves, almost all correctional centres in Ontario suffered massive oubreaks of COVID-19 within their walls, thus sadly proving Dr. Orkin's predictions to be quite prescient.

It is particularly concerning that, while criticizing Dr. Orkin for speculating, His Honour is prepared to accept the evidence from the Crown, in the form of the same unauthored memos from non-medical personnel, criticized by many other judges, outlining the supposed safety and appropriateness of the Ministry's attempts to keep the pandemic out of correctional institutions: "I have uncontested evidence of the steps and procedures the provincial and federal government has in place for custodial settings during the public health crisis. It supports that there are no current concerns regarding the prospect of an outbreak."[674] Perhaps not surprisingly, all His Honour's comments lead him to conclude that Mr. Kochanska should not be released pending sentencing.[675]

---

[672] *Ibid* at paras 32 and 33.
[673] *Ibid*.
[674] *Ibid* at para 44.
[675] *Ibid* at para 47.

Other cases in which Dr. Orkin's affidavit is filed by defence counsel include *AF*,[676] *KC*,[677] *Mansour*,[678] *PK*,[679] *Jaser*[680] and *Stone*.[681] It is also filed in the Saskatchewan Court of Appeal case of *R v Shingoose*.[682] In almost all these cases the affidavit is favourably received and considered by the presiding judicial officer. One case where the Orkin affidavit was mentioned by defence counsel in his submissions, but not filed, is *Carrington*.[683] Without the affidavit being filed and without therefore, any meaningful opportunity for the Crown to respond, the judge gives it no weight in *Carrington*.[684]

Like the other new forms of evidence frequently presented in bail hearings during the pandemic, some courts placed more weight than others did on the affidavit of Dr. Orkin. Other data, concerning such issues as the health of individual defendants, required specific evidence to satisfy the court as to its relevance. But other more general facts and data, such as those contained in the Information Notes and Dr. Orkin's affidavit, led many courts to consider the framework in which such potential evidence could be accepted by them. This resulted in discussions, in many of the pandemic-era decisions, of the concept of judicial notice.

COVID-19 AND JUDICIAL NOTICE

Many of the COVID-19 cases in this paper contain some mention of the doctrine of judicial notice. This doctrine allows courts to take note of certain facts without the necessity of hearing evidence in court to prove the existence of those facts: "A court may properly take judicial notice of adjudicative facts that are either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (2) capable of immediate and

---

[676] *AF, supra* note 521 at paras 101 – 102.
[677] *KC, supra* note 478 at paras 17, 19 and 21.
[678] *Mansour, supra* note 153 at paras 33, 43 – 44 and 46.
[679] *PK, supra* note 257 at paras 92 – 95.
[680] *Jaser, supra* note 334 at para 101, where it is described as "thorough, impressive and thought-provoking."
[681] *Stone, supra* note 385 at paras 7 and 8. At para 7, Juriansz JA specifically draws attention to Dr. Orkin's prediction of a second wave of the pandemic.
[682] *R v Shingoose*, 2020 SKCA 45 [*Shingoose*].
[683] *Carrington*, *supra* note 531.
[684] *Ibid* at para 45.

accurate demonstration by resort to readily accessible sources of indisputable accuracy."[685] With respect to COVID-19, the judges deciding many of these cases have been prepared to take judicial notice of certain aspects of the pandemic, often with the goal of achieving more efficiencies in bail hearings.

Examples of this include *Morris*, where Leach J states:

> I also agree with the view that our courts are entitled to take a degree of judicial notice in relation to certain realities and possibilities associated with the COVID-19 pandemic. For example, an applicant seeking interim release on bail should not be obliged, in each and every case, to lead evidence in relation to such matters as the known properties of the COVID-19 virus and its possible transmission, the possible consequences of contracting the virus, and the existence of prevailing restrictions and safety protocols enacted or publicly recommended by our various levels of government and public health agencies.[686]

Another case where judicial notice of COVID-19 occurs is *CJ#1*:

> As to any suggestion that this Court may need 'evidence' that C.J. is, while at the jail, more at risk of contracting COVID-19 than if he was not in jail, I reject that submission….It is incontrovertible that a jail setting is not conducive to the types of physical distancing and other safety measures being recommended by all of the health authorities to help protect oneself against the virus. To demand some 'evidence' in support of that is, with respect to any contrarian view, unnecessary.[687]

Madam Justice London-Weinstein makes findings based on judicial notice in two of her COVID-19 decisions discussed earlier in this paper. In *Cain*, she states: "I take judicial notice of the fact that this virus is contagious before a person demonstrates signs of infection and that persons can be asymptomatic, yet highly contagious."[688] She elaborates further in *MK*:

> I take judicial notice of the following: 1. The virus is respiratory, contagious and outcomes upon infection vary widely. 2. Physical distancing and frequent hand washing are recommended by health professionals to protect against

---

[685] *R v Spence*, 2005 SCC 71, [2005] 3 SCR 458 at para 53, quoting *R v Find*, 2001 SCC 32, [2001] 1 SCR 863 [*Find*] at para 48.
[686] *Morris, supra* note 62 at para 22.
[687] *CJ#1, supra* note 200 at para 9.
[688] *Cain, supra* note 210 at para 6.

> transmission. 3. Physical distancing and frequent hand washing are not available to prisoners at the Ottawa Carleton Detention Centre.[689]

On the topic of judicial notice, Justice Felix makes this interesting comment in *Shaw Syed*: "If evidence of the COVID-19 pandemic is not amenable to doctrine of judicial notice, a Court may have resort to the standard of credible or trustworthy evidence led on the hearing in support of a finding: s. 518(1)(e) of the *Criminal Code*."[690]

In another case, *R v Neverson*,[691] DiLuca J states:

> I accept that keeping people in custody increases their risk of infection, particularly where they may have a pre-existing medical issue. I also accept the public confidence in the administration of justice must be considered from an informed perspective that is aware of the significant risk posed by COVID in the carceral setting. In this regard, I am prepared to take judicial notice that the risk of infection is best managed by reducing the number of people who are kept in jail during the currency of the crisis.

In *Baidwan*,[692] discussed earlier in this paper in the context of determining material changes in circumstances, Skarica J believes that the second category of acceptable sources, what he refers to as the 'readily ascertainable' rule outlined above in *Find*,[693] includes dictionaries, almanacs, texts and related authoritative works, but he excludes newspaper articles from this category.[694] He also excludes expert evidence from the 'readily ascertainable' category based on the Chief Justice's ruling in *Find*: "Expert evidence is neither notorious not capable of immediate and accurate demonstration. That is why it must be proved through an expert whose qualifications are accepted by the court and who is available for cross-examination."[695] He reviews the existing COVID-19 jurisprudence and concludes that "the gist of all the decisions reviewed above is that justices are making liberal use of the doctrine of judicial notice."[696]

---

[689] *MK, supra* note 131 at para 47.
[690] *Shaw Syed, supra* note 538 at para 80. As noted later in this paper in the section dealing with judicial notice and COVID-19, this seems to be ignored by Skarica J in *Baidwan, supra* note 263.
[691] *R v Neverson*, 2020 ONSC 2698 at para 31.
[692] *Baidwan*, *supra* note 263.
[693] *Find*, *supra* note 685.
[694] *Baidwan, supra* note 263 at paras 42 and 43.
[695] *Find, supra* note 685 at para 49.
[696] *Baidwan, supra* note 263 at para 39.

Mr. Justice Skarica concludes, therefore, that "a court must be very cautious in applying the judicial notice doctrine." He notes that since contrary evidence may not be received by a court where matters of fact have been judicially noticed, "improper use of the judicial notice doctrine has the potential of working an injustice on either party as once the judicial notice doctrine is implemented, both parties lose the right of cross examination on the accepted facts and are not capable of producing any contrary evidence."[697]

He further concludes that, since expert opinion and resulting public policy surrounding COVID-19 was very different in January and February 2020 as opposed to April 2020, that this "dramatically illustrates" that courts therefore must rigorously determine that "expert evidence is not capable of being judicially noticed and must be proved through a properly qualified expert who can be cross examined."[698] This seems to be grounded in His Honour's belief that if generally accepted scientific opinions change over time, as has happened frequently in the rapidly evolving new world of COVID-19, they cannot be accepted by courts without testimony and cross-examination.

With respect, His Honour is being quite rigid. While he acknowledges that the rules of hearsay are relaxed for bail hearings, as set out both in common law[699] and in statute,[700] His Honour feels that internet and media articles about COVID-19 are not trustworthy hearsay.[701] Even if they report on opinions formulated by medical experts, they can only be accepted by the courts after cross-examination. Therefore, he determines that "without any evidence of empirical accuracy, health models should be given little weight as they do not meet the test at present of trustworthy hearsay."[702] For Mr. Justice Skarica, only actual data summarizing existing infection and fatality rates for COVID-19 fit within the bounds of trustworthy hearsay evidence.[703] In order for a court to rely on predictive modelling data, such as that presented in Dr. Orkin's affidavit, Skarica J would require, in the midst

---

[697] *Ibid* at para 44.
[698] *Ibid* at paras 51 and 52.
[699] *St-Cloud* at para 136.
[700] *Criminal Code*, *supra* note 10, s 518(1)(e) which permits a justice to "receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case."
[701] *Baidwan*, *supra* note 263 at para 54.
[702] *Ibid* at para 56.
[703] *Ibid* at para 59.

of an exceptional pandemic, with medical facilities and personnel stretched to the limit, *viva voce* testimony from medical professionals subject to cross-examination. This negates both the practical time concerns of those medical personnel and scientists who would be far more useful in the field, as well as recent trends in bail case law and the Bail Hearings Protocol that seek to streamline hearings as much as possible.

Skarica J is not alone, though he is probably the most strident in expressing his concerns on this point. In *Jeyakanthan*,[704] McWatt J is of the opinion that Copeland's conclusion in *JS*[705] that "the ability to practice social distancing and self-isolation is limited, if not impossible" within jails is "based on speculation and not on evidence."[706] One would have thought that Madam Justice Copeland's conclusion was sufficiently self-evident and obvious that expert evidence and cross-examination on that topic would not have been required.

A little over two weeks after Skarica J's decision in *Baidwan*,[707] on May 4, 2020, in *Morgan#2*, discussed in greater detail earlier in this paper, Ontario's Court of Appeal weighs in:

> We do, however, believe that it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current medical knowledge [emphasis added] of the virus, including its mode of transmission and recommended methods to avoid its transmission.[708]

The Court of Appeal thus appears willing to acknowledge that expert opinion may change and judicial notice can be taken of it even as it evolves.

---

[704] *Jeyakanthan*, *supra* note 168.
[705] *JS, supra* note 114 at para 19. See also *Tully*, *supra* note 133 at para 38: "In this regard, I should note that I do not agree with the criticism that has been raised in some cases that the conclusion that there is a heightened risk of contracting the coronavirus infection in a custodial institution."
[706] *Jeyakanthan, supra* note 168 at para 28.
[707] *Baidwan*, *supra* note 263.
[708] *Morgan#2, supra* note 402 at para 8.

THE IMPACT OF *ZORA* AND LEGISLATIVE AMENDMENTS TO BAIL DURING THE TIME OF COVID-19

As noted earlier, the Supreme Court of Canada handed down its decision in *Zora*[709] in June of 2020, just as the first wave of COVID-19 was beginning to subside in Ontario. While it does not directly address the pandemic in any way, it is an extremely significant case for the law of bail, resulting in lower courts seeking – not always successfully – to make decisions in accordance with it while simultaneously considering the impact of COVID-19. I believe it is important in the context to a review of COVID-19 bail cases to consider the influence of *Zora*[710] as well as the new sections 493.1 and 493.2 of the *Criminal Code*[711] on those decisions.

Section 493.1 is a new section of the *Criminal Code*[712] that was enacted in 2019.[713] It reads as follows:

> In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

In effect it codifies the Supreme Court's conclusions in *Antic* that terms of release imposed under subsection 515(4) of the *Criminal Code*[714] 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.[715]

---

[709] *Zora*, *supra* note 8.
[710] *Ibid.*
[711] *Criminal Code*, *supra* note 10.
[712] *Ibid*.
[713] Enacted by *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 210.
[714] *Criminal Code*, *supra* note 10.
[715] *Antic, supra* note 7 at para 67(j).

The Supreme Court in *Zora* specifically refers to this new section[716] within its discussion of the need to minimize conditions that are imposed. Equally important is the new subsection 515(2.03) of the *Criminal Code*[717] which speaks of restraint in requiring sureties. As well, subsection 515(2.01) places an obligation on the Crown to show why any less onerous form of release than that which it is proposing would be inadequate.

One aspect of the *Cotterell*[718] decision is that the justice of the peace specifically concludes that the "ladder principle"[719] – requiring a justice to release on the least restrictive terms possible – applies in reverse onus situations. Notwithstanding some case law that holds that the ladder principle does not apply in reverse onus cases,[720] I would agree with Lee JP and argue that it does, based on a combination of *Zora*[721] and the recent *Criminal Code*[722] amendments.

Zora directly addresses all the main aspects of the ladder principle and the principle of limiting bail conditions to what the bail regime permits.[723] It is important to remember that Mr. Zoa was in a reverse onus bail scenario, as he was initially charged with possession for the purpose of trafficking.[724] It would be bizarre if the Supreme Court of Canada would have written all that it did about these principles if they did not actually mean them to apply to Mr. Zora. Or at the very least one would expect the Supreme Court to have said something about that limitation.

---

[716] *Zora, supra* note 8 at para 26.
[717] *Criminal Code*, *supra* note 10.
[718] *Cotterell*, *supra* note 122.
[719] See *Antic, supra* note 7 at para 44.
[720] There is some ongoing debate as to whether the ladder principle applies in reverse onus situations. Cases such as *R v Mead*, 2016 ONCJ 308, *R v Downey*, [2018] OJ No 6133 (ONSC), and *R v Pascal*, 2018 ONSC 2896 have held that it does apply, while others such as *R v Sakhiyar*, 2018 ONSC 5767, *R v Anderson*, 2018 ONSC 5720, [2018] OJ No 5246, *R v Ishmael*, 2019 ONSC 596, *Forbes, supra* note 210 and *Carrington*, *supra* note 531 have held that the ladder principle does not apply in reverse onus situations.
[721] *Zora*, *supra* note 8.
[722] *Criminal Code*, *supra* note 10.
[723] *Ibid* at paras 21 and 24.
[724] Pursuant to *CDSA*, *supra* note 70, s 5(2). By virtue of the *Criminal Code*, *supra* note 10, s 515(6)(d), Mr. Zora was in a reverse onus situation.

The reverse onus provisions of the *Criminal Code*[725] are in subsection 515(6) which only speaks to detention or release. There is nothing there about conditions or form of release. If an accused satisfies his or her reverse onus and shows why detention is not justified, subsection 515(7) then requires that "the justice shall make a release order under this section". That seems like a clear direction to apply the remaining provisions of section 515 to determine the form and terms of release. I would submit that there is nothing in subsection 515(7) that seeks to modify the balance of section 515, "reverses" anything in subsections 515(2), (2.01) or (2.03) or undermines the principle of restraint in section 493.1.

Notwithstanding the Supreme Court's decisions in *Antic*[726] and *Zora*,[727] and the specific enactment of section 493.1 of the *Criminal Code*,[728] many COVID-19 bail decisions continue to impose onerous release terms with little or no justification as to why the justices imposing them feel they are necessary. Here are some examples.

In *TL*, there is a release term that requires the accused "to present himself at the front door within five minutes of law enforcement attending to ensure that he is in compliance with the bail."[729]

The release terms in *TK*,[730] even though Goodman J indicates no primary ground concerns,[731] include some that frankly do not appear appropriate. Terms imposed in *TK* include requirements that T.K. report in person weekly to the Hamilton Police Service, that he present himself to the police at the front door of his residence upon demand, or respond

---

[725] *Criminal Code*, *supra* note 10.
[726] *Antic*, *supra* note 7.
[727] *Zora*, *supra* note 8.
[728] *Criminal Code*, *supra* note 10.
[729] *TL, supra* note 79 at para 39. Other than a mention earlier in Molloy J's decision, at para 13, that T.L. had dispositions, over a decade earlier as a youth, for failing to comply with recognizances, there is no explanation whatsoever as to why such a draconian term would be required as part of T.L.'s bail plan.
[730] *TK*, *supra* note 69.
[731] *Ibid* at para 45.

to the telephone upon the request of the police in order to ensure compliance with the order, and that he deposit his passport – if he has one – with the Hamilton Police Service.[732]

Similar, however, to *TK*,[733] the release terms in *CJ#1*[734] appear to be overly broad and not fully in compliance with the directives in *Antic*.[735] They include terms that absolutely ban any use of computers or cell phones, as well as requiring him to deposit any passport with the police and remain in Ontario, notwithstanding his complete lack of a criminal record and no indication of any concerns whatsoever with respect to the primary ground of release.[736]

The release terms imposed by London-Weinstein J in *Cain* include one that he keep the peace and be of good behavior.[737] While inclusion of this condition is mandatory in probation orders, pursuant to clause 732.1(2)(a), conditional sentence orders, pursuant to clause 742.3(2)(a), and peace bonds, pursuant to subsection 810(3), all of the *Criminal Code*,[738] the Supreme Court in *Zora* generally frowns upon as a condition in a bail release.[739] Notwithstanding this, a similar term was also imposed in *Cahill.*[740]

In *Ali*,[741] the judge releases the defendant on twenty-four strict terms, again including some terms that do not appear appropriate or relevant. These include that he keep the peace and be of good behaviour, that he remain in the Province of Ontario, that he surrender all travel documents including passports and not apply for any travel documents and that he be amenable to the routine and discipline of the household of the residence where he is to be under house arrest.[742]

---

[732] *Ibid* at para 75(f), (g) and (h).
[733] *TK*, *supra* note 69.
[734] *CJ#1*, *supra* note 210.
[735] *Antic*, *supra* note 7.
[736] *CJ#1*, *supra* note 210 at para 12.
[737] *Cain, supra* note 210 at para 27.
[738] *Criminal Code*, *supra* note 10.
[739] *Zora, supra* note 8 at para 94.
[740] *Cahill, supra* note 423 at para 42n.
[741] *Ali*, *supra* note 120.
[742] *Ali, supra* note 120 at para 100(a), (b), (c) and (u). The terms that he remain in Ontario and surrender all travel documents is particularly baffling, since Spies J states at para 6: "The Crown raised no concerns under the primary ground either before the Justice of the Peace or before me. I also have no such concerns."

"Be amenable clauses" are specifically criticized by the Supreme Court in *Zora*:

> [B]road 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.[743]

Such problematic terms do not only occur in Ontario bail cases. In the Saskatchewan case of *Shingoose*,[744] the defendant's counsel, in its draft form of release which it presents to the court, is willing to agree to some extremely onerous provisions, presented in the context of specifically addressing COVID-19 concerns and the protection of the public, including that Mr. Shingoose "come to the door of your residence when asked to do so by your bail officer or designate or police officer who may be checking the residence and curfew conditions of this order."[745]

As noted earlier, on June 25, 2020, Justice Chapin releases the accused in *McLean*.[746] The release terms include two specific ones that appear to fly in the face of the Supreme Court's instructions in *Antic*[747] and *Zora*.[748] First:

> You should make yourself available either by phone or in person as may be required at any time during house arrest/curfew, and in particular, you shall answer the phone at any time during house arrest/curfew, and present yourself to Ministry staff, Police Services and/or persons who are authorized by the Ministry associated with the Electronic Supervision Program at the door of

---

[743] *Zora, supra* note 8 at para 95. An example of a recent bail case where a court followed the Supreme Court's instructions in *Zora* on this issue is *R v Stevenson*, 2020 ONCJ 291 at para 61.
[744] *Shingoose*, *supra* note 682.
[745] *Ibid* at para 33.
[746] *McLean*, *supra* note 482.
[747] *Antic*, *supra* note 7.
[748] *Zora*, *supra* note 8.

> your residence at any time during house arrest/curfew for the purpose of confirming your presence and compliance.[749]

The second problematic term is as follows: "Obey house rules and take counseling as directed."[750] The Supreme Court in *Zora*, issued on June 18, 2020, exactly one week before Justice Chapin releases her decision in *McLean*,[751] directs that bail courts should be wary of imposing counselling terms on individuals whom they release:

> [O]ther 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.[752]

In *Rajan*, Harris J releases the defendant on strict terms, including one that he "keep a copy of the recognizance on your person at all times."[753]

In *Hoo-Hing*,[754] some of the release terms seem excessive and unconnected to the alleged offences. Notwithstanding that Ms. Hoo-Hing had no criminal record, and there were no primary ground concerns,[755] His Honour imposes a term that she surrender her passport to the police upon release.[756]

Other release terms for Ms. Hoo-Hing include complete bans on using the Internet or a cellphone unless under the direct supervision of one of her sureties. These terms are not unusual, and are traditionally imposed in many bail releases, especially for those involving

---

[749] *McLean*, *supra* note 482 at para 41.8.
[750] *Ibid*, para 41.12.
[751] *Ibid.*
[752] *Zora, supra* note 8 at para 93.
[753] *Rajan*, *supra* note 125 at para 75k. Inclusion of this term is also problematic. See *Zora, supra* note 8 at para 98.
[754] *Hoo-Hing*, *supra* note 160.
[755] *Ibid* at para 28.
[756] *Ibid* at para 43j.

allegations, for example, of drug trafficking or child pornography. They raise an interesting question as, since the beginning of the pandemic, all case management courts in the Ontario Court of Justice, where matters such as retaining counsel and obtaining disclosure are overseen, have been held remotely. Accused persons are strongly encouraged to "attend" these courts by way of Zoom or telephone call. While it is beyond the scope of this paper, it is worth considering whether extremely strict bail terms such as Internet or telephone bans in effect preclude some accused persons from participating in their court appearances without potentially breaching one or more of the terms of their release. A related issue is whether some terms, such as the passport bans in *Hoo-Hing*[757] and *Ali*,[758] are as relevant when, for periods during the pandemic, most international flights from Canada were stopped, and the land border with the United States was closed.

As there is nothing in subsection 515(4) of the *Criminal Code*[759] that requires a justice to explain why any specific terms are included in a release order, it is often difficult to understand why some terms are imposed. This can be frustrating when trying to discern the motivation for such terms. Though it would be very difficult to prove, there may well be a tendency on the part of justices, when releasing defendants in what they believe to be "close call" cases, to seek to manifest – even if it is done subconsciously – that they are not being "soft". They can show their appreciation of the seriousness of these cases by imposing an array of terms and conditions, even if they really cannot be justified according to the Supreme Court's decisions in *Antic*[760] and *Zora*[761] as well as section 493.1 of the *Criminal Code*.[762]

I acknowledge that a review of some of the release terms imposed in some of these bail decisions may seem somewhat tangential to the topic of the relationship of COVID-19 and bail. However, it is important to keep in mind that one of the real concerns expressed by the Supreme Court of Canada in *Antic*[763] and *Zora*[764] is the increased number of

---

[757] *Hoo-Hing*, *supra* note 160.
[758] *Ali*, *supra* note 120.
[759] *Criminal Code*, *supra* note 10.
[760] *Antic*, *supra* note 7.
[761] *Zora*, *supra* note 8.
[762] *Criminal Code*, *supra* note 10.
[763] *Antic*, *supra* note 7 at para 67j.
[764] *Zora, supra* note 8 at paras 6, 53 – 58, 61 – 62, 83 – 98.

administration of justice charges being laid for breach of bail terms. Convictions for such charges impact the availability of the secondary ground for release, as they make it easier for judicial officers to conclude that there is a substantial likelihood that there will be further criminal offences committed. This, in turn, may limit the opportunity for defendants to argue successfully that COVID-19 should lead to their release on the secondary grounds.[765]

Ledinek[766] is one of the few COVID-19 bail decisions that specifically notes section 493.2 of the *Criminal Code*,[767] a relatively new section[768] that requires justices making bail decisions to give particular attention to the circumstances of not only indigenous accused persons, but those "accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release." This section came into force on December 18, 2019.[769] In the context of *Ledinek*,[770] the Crown had sought to file as evidence at the bail hearing a parole assessment that had been conducted on Mr. Ledinek in 2019 that had concluded that "Mr. Ledinek has been assessed as being a High Static Needs/High Dynamic Risk case with a Medium reintegration potential."[771] In this case, His Worship Scarfe, while admitting the document as evidence, assigns it no weight in his consideration of the case,[772] relying on the conclusions of Schreck J of the Superior Court in the case of *R v EB*,[773] in which His Honour states:

> To be clear, I make no finding that the actuarial assessments in this case are invalid. However, in my view, s. 493.2 requires that I take into account the

---

[765] This may have an even greater impact on indigenous bail applicants, discussed in detail later in this paper. See *Zora, supra* note 8 at para 79: "Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges." citing *R v Murphy*, 2017 YKSC 34 at paras 31 – 34; *R v Omeasoo*, 2013 ABPC 328, 94 Alta LR (5th) 244 at para 44; *Set Up to Fail, supra* note 1 at 75 – 79 and *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 at paras 57 – 60.
[766] *Ledinek*, *supra* note 38.
[767] *Criminal Code*, *supra* note 10.
[768] Enacted by *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 210.
[769] By virtue of *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 407, the coming into force of s 210 of that Act, which enacted ss 493.1 and 493.2 of the *Criminal Code*, *supra* note 10, was effective 180 days after Royal Assent which had occurred on June 21, 2019.
[770] *Ledinek*, *supra* note 38.
[771] *Ibid* at para 80.
[772] *Ibid* at para 90.
[773] *R v EB*, 2020 ONSC 4383 [*EB*].

> possibility that the types of actuarial assessments the Crown is relying on to meet its onus on the secondary ground may be affected by cultural bias. In this case, I was provided with the results of the risk assessments without any explanation as to how those results are to be interpreted. I do not say this to be critical of counsel. Calling expert evidence of this nature is inconsistent with the expeditious nature of bail hearings. However, its absence necessarily limits the extent to which this type of evidence may be properly relied upon.[774]

At the end of his decision in *Ledinek*,[775] Justice of the Peace Scarfe returns to the section 493.2 issue:

> [120] As previously mentioned, section 493.2 requires me to consider the fact that Mr. Ledinek is a member of a vulnerable community that is overrepresented in the criminal justice system. He is black. Black persons traditionally have a harder time getting bail and are therefore overrepresented in the remand population as well. This is wholly undesirable.
>
> [121] Gangs represent a widespread cultural challenge, which has existed for a long time. Mr. Ledinek has most likely experienced systemic racism, poverty and all the other disadvantages that come with being in a marginalized group that has experienced multi-generational trauma.
>
> [122] How does one reconcile this with concerns for public safety?

In answering this question, His Worship again returns to the *EB* decision of Mr. Justice Schreck, where His Honour states:

> While s. 493.2 requires the court to consider the circumstances of Indigenous accused and members of vulnerable groups, it does not supersede s. 515(10)….If there is a substantial likelihood that the accused will commit further offences if released and thereby compromise public safety, the fact that systemic or background factors contributed to that substantial likelihood does not change the result. A dangerous person is no less dangerous because he or she is a member of a vulnerable group.[776]

In coming to his conclusions regarding the secondary ground, Scarfe JP reviews bail jurisprudence in detail, including *Morales*[777] and *R v Budge*,[778] before concluding that Mr. Ledinek has not met his onus. In coming to this conclusion, His Worship not only comments that "both sureties failed to convince me through their testimony that I can rely

---

[774] *Ibid* at para 56.
[775] *Ledinek*, *supra* note 38.
[776] *EB, supra* note 773 at para 42. See also *R v Sim* (2005), 78 OR (3d) 183 (CA) at para 18.
[777] *Morales*, *supra* note 25.
[778] *R v Budge*, [2012] OJ No 2538 (ONSC).

on them to enforce the strict terms they are proposing"[779] but he also reviews the worthiness of the defence proposal that GPS electronic monitoring form part of Mr. Ledinek's release.

By no means are all bail decisions subsequent to the enactment of section 493.2 of the *Criminal Code*[780] taking it into account. On October 9, 2020, the decision of Monahan J. in *CJ#2*,[781] a section 525 detention order review, is released. The hearing occurred on October 1 by way of audio conference. At C.J.'s initial bail hearing on May 12, 2020, he had been detained on the secondary ground by the justice of the peace.[782] At the detention review, C.J.'s counsel put forth the identical plan that had been rejected by the justice of the peace, including a referral to an organization called Sound Times, which provides support to those involved in the criminal justice system with mental health issues. Neither the justice of the peace at the initial hearing, nor Mr. Justice Monahan in this review, does any analysis as to whether C.J.'s seemingly apparent mental health issues[783] require the application of section 493.2 of the *Criminal Code*.[784] There is case law indicating that individuals with mental health issues are part of the vulnerable population overrepresented within the criminal justice system.[785] While it may not have made any difference in the result, this lack of consideration of section 493.2 in *CJ#2*[786] is nonetheless concerning. Perhaps not surprisingly, the section 525 application is dismissed on the secondary ground.[787]

A recent case in which section 493.2 was applied by a judge in consideration of the tertiary ground is *R v NY*,[788] a section 525 detention review decision rendered by Schreck JA of the

---

[779] *Ledinek* at para 108.
[780] *Criminal Code*, *supra* note 10.
[781] *CJ#2*, *supra* note 210.
[782] *Ibid* at para 7.
[783] The accused himself denies having any mental health issues. *Ibid* at paras 12 and 24.
[784] *Criminal Code*, *supra* note 10.
[785] "In making bail decisions, a judge must take into account and recognize the circumstances of vulnerable and disadvantaged accused, including racialized populations, the homeless, the poor, or those suffering from mental illness or addiction." *R v Gibbs*, 2019 BCPC 335 at para 20. See also *Zora, supra* note 8 at para 79, *Set Up to Fail, supra* note 1 at 75 and Rankin, Micah B. "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Right-Based Approach" (2018) 65 Crim LQ 280.
[786] *CJ#2*, *supra* note 210.
[787] *Ibid* at para 28. Another case in which mental health concerns also play a large role, but which unfortunately contains no direct reference to s 493.2 of the *Criminal Code*, *supra* note 10, is *Lumley, supra* note 594.
[788] *R v NY*, 2021 ONSC 1398.

Superior Court on February 23, 2021. While there is a publication ban in effect, I believe that I can nonetheless make some general comments about the case. On the tertiary ground, while His Honour believes that all four specific factors outlined in clause in 515(10)(c) of the *Criminal Code*[789] weigh in favour of the accused's continued detention, Schreck JA nonetheless releases, and one fact he considers is that the accused is African-Canadian, part of a vulnerable group overrepresented in the criminal justice system, and therefore entitled to benefit from what he describes as the remedial nature of section 493.2 of the *Criminal Code*.[790]

COVID-19 WITHIN THE CONTEXT OF *GLADUE*

Section 718.2 was added to the *Criminal Code* in 1995.[791] It sets out various principles that a court shall take into consideration when imposing a sentence. Clause 718.2(e) reads as follows:

> *All available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders*.

The cases of *R v Gladue*[792] and *R v Ipeelee*[793] are leading Supreme Court of Canada decisions that consider these principles in the sentencing context. Yet almost immediately after the case was decided, the principles found in *Gladue*[794] began to be applied in non-sentencing situations, including bail. This approach is confirmed as being correct by Winkler CJO in *Robinson*[795] and is now codified in clause 493.2(a) of the *Criminal Code*.[796] In the chapter of *Set Up to Fail* entitled "Systemic Discrimination and Bail", the authors conclude that:

---

[789] *Criminal Code*, *supra* note 10.
[790] *Criminal Code*, *supra* note 10.
[791] *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof,* SC 1995, c 22, s 6. Royal assent was given on July 13, 1995.
[792] *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385 [*Gladue*].
[793] *R v Ipeelee*, [2012] 1 SCR 433, 280 CCC (3d) 265.
[794] *Gladue*, *supra* note 792.
[795] *Robinson*, *supra* note 413.
[796] *Criminal Code*, *supra* note 10.

> There is a general recognition that the bail system operates in a manner that disadvantages individuals living in poverty and those with mental health or addictions issues. Aboriginal people, who are disproportionately impacted by substance abuse issues, poverty, lower educational attainment, social isolation and other forms of marginalization, are being systematically disadvantaged as a result.[797]

These same social concerns, especially those of poverty accompanied by overcrowded housing with limited opportunities for social distancing, as well as widespread health concerns such as diabetes, also make indigenous Canadians much more at risk of contracting COVID-19.[798] One would therefore expect to see secondary and tertiary ground considerations of COVID-19 frequently arising in bail cases involving indigenous Canadians. One would also presume, given the longstanding and shameful overrepresentation of indigenous Canadians in detention centres and prisons, that an acknowledgment of the application of the *Gladue*[799] principles would occur with some regularity in these COVID-19 cases reviewed in this paper. While they certainly do in some cases, especially those from outside Ontario, reported bail cases of indigenous Ontarians during the time of COVID-19 seem suspiciously rare, raising the possibility that the *Gladue*[800] principles are simply being ignored.[801] Those decisions that do identify the accused as an indigenous person oddly do not make much direct mention of the interplay between COVID-19 and indigeneity.

Morris[802] is an example of this. As discussed earlier in this paper in the section dealing with COVID-19 cases in which detention was ordered pursuant to the secondary ground, it is a lengthy decision by Mr. Justice Leach. He outlines one reason why he feels that the

---

[797] *Set Up to Fail, supra* note 1 at 75.
[798] On the issue of the health of Canadian prisoners and how it is generally worse than the general population, see Adam Miller, "Prison Health Care Inequality" (2013) 185:6 CMAJ 249 at 249-250 and Liviana Calzavara et al, "Prevalence of HIV and Hepatitis C Virus Infections among Inmates of Ontario Remand Facilities" (2007) 177:3 CMAJ 257 at 260-261. Specifically with respect to indigenous Canadians, who are much more prone to tuberculosis, see Fiona Kouyoumdjian et al, "Health Status of Prisoners in Canada: Narrative Review" (2016) Can Family Physician 215 at 217.
[799] *Gladue*, *supra* note 792.
[800] *Ibid.*
[801] See Jillian Rogin, "Gladue and Bail: The Pre-Sentencing of Aboriginal People in Canada" (2017) 95 Can Bar Rev 325.
[802] *Morris*, *supra* note 62.

threshold for a *de novo* review under section 520 of the *Criminal Code*[803] of Mr. Morris's continued detention is met:

> In my view, a de novo hearing also was justified by the need, acknowledged by Crown counsel, to consider the Indigenous background of Mr Morris and the overrepresentation of those with Aboriginal heritage in our criminal justice system, in relation to the question of whether or not Mr Morris should be granted bail and judicially ordered interim release. In that regard, I note and acknowledge that the evidence of the Cree heritage of Mr Morris, provided by Ms James in her affidavit included in the application filed in this court, may have been available at the time of the hearing before the Justice of the Peace. However, the reality is that it was not mentioned during that hearing, it accordingly was not considered by the Justice of the Peace, and it obviously is a consideration that must be taken into account in deciding whether continued interim detention of Mr Morris is appropriate.[804]

Despite this reference to the Indigenous background of Mr. Morris, there is little subsequent discussion of any *Gladue*[805] factors in *Morris*.[806] Unfortunately, Leach J only briefly returns to the issue of Mr. Morris's Indigenous status at the end of his ruling, in which he upholds the ongoing detention of Mr. Morris:

> Of course, continued detention of Mr Morris, even on an interim basis, inherently would add to the tragic overrepresentation of those with Aboriginal heritage in our criminal justice system. That is a significant concern. In my view, however, it is outweighed in this particular case by the presence of other significant and serious concerns under the primary and second [*sic*] grounds for detention, noted above, that would not be adequately addressed by the proposed plan of release. While I think that would be true in any event, in the particular circumstances before me, I also note that the possible impacts of the Aboriginal heritage of Mr Morris on his life, past involvement with the criminal law and current situation may be less clear in this case than others; e.g., insofar as the Aboriginal heritage of Mr Morris apparently is derived solely from his father, with whom he apparently has had absolutely no contact since he was a newborn.[807]

There is, therefore, no real investigation in *Morris*[808] of whether the combination of indigenous heritage and the possibility of contracting COVID-19 could provide an even

---

[803] *Criminal Code*, *supra* note 10.
[804] *Morris, supra* note 62 at para 12.
[805] *Gladue*, *supra* note 792.
[806] *Morris, supra* note 62.
[807] *Ibid* at para 22.
[808] *Ibid*.

higher likelihood of tipping the scales towards release of such persons when considering either or both of the secondary and tertiary grounds.

Another case in which the accused is apparently an indigenous person is that of *R v RA*.[809] It is a short and succinct section 525 detention review in which Ramsay J concludes that the initial bail detention was appropriate: "The combination of the previous record, both its length and the number of breaches of bail and the two escapes, with the seriousness of the offence and the high probability of conviction make this an obvious case for detention on the secondary ground."[810] His Honour briefly considers COVID-19: "There have been no cases of COVID-19 in the Niagara Detention Centre so far. Nevertheless, the prospect of infection in the gaol figures into the analysis on the second and third grounds…For my purposes it is enough to say that if detention is for the time being to be imposed even more sparingly than usual, this accused still qualifies."[811]

It is only after these comments that His Honour notes, almost as an aside: "The accused may benefit from the application of *Gladue* principles…on sentence if he is convicted of the present offences. I do not know much about his roots, but at this point it is doubtful whether *Gladue* principles would do more than reduce any potential sentence somewhat."[812] The dismissive air of this statement appears to indicate that, unfortunately, this judge is perhaps unaware either of the applicability of *Gladue*[813] principles to bail matters as developed in case law noted earlier, or of the mandatory applicability of section 493.2 of the *Criminal Code*[814] to this case.

One recent bail case where *Gladue*[815] principles are applied is *R v Papequash*,[816] a decision of Nakatsuru J released on January 28, 2021. I do note that *Papequash*[817] has no mention whatsoever of COVID-19. The justice of the peace was concerned about the lack of a surety and detained Deeandra Papequash at the original bail hearing. Notwithstanding

---

[809] *R v RA*, [2020] OJ No 1416 (ONSC) [*RA*].
[810] *Ibid* at para 9.
[811] *Ibid* at para 7.
[812] *Ibid* at para 8.
[813] *Gladue*, *supra* note 792.
[814] *Criminal Code*, *supra* note 10.
[815] *Gladue*, *supra* note 792.
[816] *R v Papequash*, 2021 ONSC 727 [*Papequash*].
[817] *Ibid*.

having been provided with a previous *Gladue*[818] report that had been written about Deeanadra Papequash, the justice of the peace simply commented: "I understand that you're of Native descent? That's certainly a consideration." His Honour, in his review, makes it clear that "failure to consider *Gladue* principles at a bail hearing is a serious error of law. Just giving lip service to *Gladue* principles is as big an error."[819]

His Honour eloquently reviews the justice of the peace's insistence on a surety through the lens of *Gladue*:[820]

> The unavailability of a surety is not surprising. Deeandra Papequash suffers from a host of afflictions that people of Indigenous background commonly suffer from. These are the products of colonialism and discrimination. Their difficult childhood laid the foundation for their difficult adult life. I have no doubt that intergenerational trauma had a hand in their early abandonment as a child, their suffering of sexual abuse at the hands of relatives, and the poor and abusive parenting by their mother. These in turn have led to their addictions and marginalization. Deeandra Papequash is disconnected from their Saskatchewan community. What ties they have in Toronto have been frayed by their mental illness, their addictions, their lack of education and skills. In turn, this has led to a pattern of impulsive and anti-social behavior. The result? They have few friends or family with means or ability, willing to come forward as a surety. Even when there has been someone, these sureties did not seem to have been very good ones. One surety that the applicant had while on a previous release, is said to have acted badly by trying to extort money from them.[821]

His Honour also notes that he must consider Deeandra Papequash's criminal record in light of *Gladue* as well.[822]

---

[818] *Gladue*, *supra* note 792.
[819] *Papequash, supra* note 816 at para 7.
[820] *Gladue*, *supra* note 792.
[821] *Papequash, supra* note 816 at para 20. In his decision, Nakatsuru J explains that Papequash's preferred pronouns are they/them.
[822] "The criminal record must also be seen through a *Gladue* lens. The record is a bad one. There are breaches. There are similar assaultive offences. Obvious concerns about public safety are raised by the criminal record if the applicant is released on bail. That said, I can see how at least some of the prior convictions are related to the Fetal Alcohol Syndrome and the addictions. These impairments can originate from the dislocation and hardship caused by colonialism and residential schools. While this does not extinguish the secondary ground concerns, it provides an explanation and a context for this criminal record." *Papequash, supra* note 816 at para 22.

Other COVID-19 bail decisions from other provinces also give only a cursory consideration to *Gladue*[823] factors when looking at Indigenous persons and COVID-19. One decision that briefly considers indigeneity in the context of a bail review is the April 14, 2020 Alberta Court of Queen's Bench's decision of *R v CKT*.[824] It is a review, pursuant to section 520 of the *Criminal Code*,[825] of an order from an Alberta Provincial Court judge denying bail to Mr. C.K.T. on the secondary ground. The reviewing justice, Lema J, quotes from the hearing judge as follows:

> Despite your *Gladue* factors, which I have taken into account, I am of the view that the protection of the public requires your continued detention. Given your history of breaching court orders and, in particular, breaching firearms-related court orders, I do not have confidence that you would abide by conditions that would keep the public peace and, therefore, I am denying release on the secondary grounds.[826]

There is no other direct mention of C.K.T.'s Indigenous status anywhere in the review decision of Lema J. His Honour, however, has a lot to say about COVID-19 which, in his opinion, has overly influenced bail decisions. He holds that "while the pandemic is undeniably an unprecedented and globe-shaking phenomenon, it is not a factor in the secondary-ground exercise…with one exception" which is when it bears on an accused's willingness to comply with release conditions.[827] As, in this case, His Honour sees no linkage to public protection, he concludes that "the accused's Covid-19 concerns do not constitute a material change of circumstances."[828] He conducts a thorough review, citing many Ontario cases, of decisions on the relationship between COVID-19 and the secondary ground, going through those which considered the pandemic not to be a factor at all, those which accepted it as a factor a) but with no differential risk perceived, b) requiring medical evidence of extra susceptibility, c) offset by evidence of correctional centre responses, or d) limited to potential impact on compliance with release plans.

---

[823] *Gladue*, *supra* note 792.
[824] *R v CKT*, 2020 ABQB 261 [*CKT*].
[825] *Criminal Code*, *supra* note 10.
[826] *CKT, supra* note 824 at para 11.
[827] *Ibid* at paras 6 and 7.
[828] *Ibid* at para 19.

Once he has completed this review, Lema J provides his thoughts on the secondary ground:

> Reduced to its core, the focus is simply public protection and safety. The choice is between release (on any number and variety of terms) and detention…Detention is ordered if it is necessary to protect the public. The current pandemic and the remand system's response to it are not relevant in making that call. The remand system, as the place of detention, is taken as a given in the 'public protection' inquiry. Its state or condition, from time to time, even during a pandemic, is irrelevant to gauging the necessity of detention for public protection.[829]

His Honour therefore concludes by stating: "Accordingly, I disagree with the cases finding that an actual or perceived heightened risk of Covid-19 infection alone is relevant to the 'secondary ground' analysis, even if bolstered by medical evidence of increased susceptibility, and even where 'institutional response' evidence is provided."[830] As there was no evidence, in this case, of any evidence about a "turned-around 'compliance attitude' on the part of CKT,"[831] the only framework in which Lema J feels that COVID-19 could impact secondary ground considerations, His Honour dismisses the application, and criticizes those decisions such as *Cain*[832] and *TK*[833] where the judges do not specifically outline what details convince them that the accused in those cases now show a greater willingness to comply with terms of their release.[834]

On April 16, 2020, Madam Justice Hildebrandt of the Court of Queen's Bench of Saskatchewann gives her decision in the section 520 bail review of *R v Bear*.[835] Mr. Bear's counsel alleges that, because trials are delayed as a result of the pandemic, this is a material change in circumstances when considering that Bear is a 75 year old diabetic currently in custody awaiting his trial.[836] While Her Honour concludes that the COVID-19 pandemic has raised a material change in circumstances, it does not justify release in the particular

---

[829] *Ibid* at paras 41 – 43.
[830] *Ibid* at para 47.
[831] *Ibid* at para 49.
[832] *Cain*, *supra* note 210.
[833] *TK, supra* note 69.
[834] *CKT, supra* note 824 at paras 53, 54 and 73.
[835] *R v Bear*, 2020 SKQB 109 [*Bear*].
[836] *Ibid* at para 1.

case of Mr. Bear, whom she describes as "somewhat of an infamous character in Saskatchewan jurisprudence."[837]

Bear's counsel files a report, this time not by Dr. Orkin, but instead by two prison health researchers from Hamilton, Ontario, Claire Bodkin and Tim O'Shea, specifically retained on behalf of Mr. Bear. Their report is dated April 10, 2020:

> In general congregate settings of all kinds are very high risk for COVID-19 outbreak. As noted by recent articles in the prestigious medical journals The Lancet Public Health and the New England Journal of Medicine, crowded conditions, limited ability to practice physical distancing, a lack of access to hand sanitizer and other personal and environmental hygiene supplies, a population that has a higher prevalence of chronic disease and infectious disease than the general population, and correctional staff moving between community and correctional settings daily all create a perfect storm for COVID-19 transmission, illness and death.[838]

This report also, unlike most of the other Indigenous COVID-19 cases, does specifically make the link between what I have earlier referred to as the interplay between indigeneity and COVID-19:

> Finally, we understand that Mr. Bear is an Indigenous person. There is significant and we think appropriate concern from Indigenous peoples that COVID-19 will disproportionately affect the health of their peoples and communities. While a full review of the impact of colonization on the health of Indigenous peoples in Canada is beyond the scope of this letter, there is a wealth of medical literature on the ways that colonization has caused poor health status among Indigenous populations in Canada. This has been echoed by Dr Theresa Tam, Canada's Chief Medical Officer of Health, who stated "We must recognize that First Nations, Inuit and Metis are at higher risk of severe outcomes from COVID-19 given health inequities, higher rates of underlying medical conditions and unique health challenges such as those faced by remote and fly-in, fly-out communities.[839]

Nevertheless, despite this thoughtful consideration of Mr. Bear's indigenous status, though the *Gladue*[840] principles themselves are never specifically discussed, Her Honour detains Mr. Bear, noting his long history of non-compliance with prohibition orders. She comments as well that "I similarly have no confidence that he will behave responsibly in

---

[837] *Ibid* at paras 6 and 8.
[838] *Ibid* at para 24.
[839] *Ibid* at para 39.
[840] *Gladue*, *supra* note 792.

relation to health precautions such as distancing or remaining in his residence. This, in turn, would increase the risk for others in Little Pine First Nation and surrounding communities." Hildebrandt J therefore dismisses Mr. Bear's application and confirms the order remanding him in custody until his trial.[841]

The next day, on April 17, 2020, the Saskatchewan Court of Appeal considers a request for judicial interim release pending appeal from a conviction and sentence, pursuant to subsection 679(3) of the *Criminal Code*,[842] in *Shingoose*.[843] In this case, Mr. Shingoose had been sentenced on February 13, 2020, prior to the first reported case of COVID-19 in Saskatchewan, and Jackson JA acknowledges that Mr. Shingoose's health issues were, reasonably, not considered by the sentencing judge:

> Put simply, when he was sentenced, Mr. Shingoose's compromised immune system was not an issue for the purposes of sentencing. The sentencing judge did not mention that aspect of the pre-sentence report that described Mr. Shingoose as diabetic and nor did he need to do so. He did, however, mention the impact that the residential school system has had on Mr. Shingoose and the link between that experience and his alcoholism.[844]

This is the only specific, albeit indirect, mention of Mr. Shingoose's Indigenous status in the decision. With respect to COVID-19, the court takes into account that Mr. Shingoose is 69 years old, is diabetic, and that his condition appears to have deteriorated while in custody.[845] Madam Justice Jackson concludes that, after reflecting on the potential health effects of COVID-19 on Mr. Shingoose, "a reasonable member of the public would agree that his detention pending his appeal is not necessary in the public interest." She grants the application and releases Mr. Shingoose.[846]

Shingoose[847] also provides a very thorough analysis of the "not frivolous" standard in clause 679(3)(a).[848] This analysis is detailed enough that it clearly indicates that the court

---

[841] *Bear, supra* note 835 at paras 41 and 42.
[842] *Criminal Code*, *supra* note 10.
[843] *Shingoose*, *supra* note 682.
[844] *Ibid* at para 43.
[845] *Ibid* at para 7.
[846] *Ibid* at paras 52 and 54.
[847] *Ibid.*
[848] *Ibid* at paras 10 – 23.

had time available to consider *Gladue*[849] factors and the application of section 493.2 of the *Criminal Code*[850] had it chosen to do so.

On April 23, 2020, Martin J of the Manitoba Court of Queen's Bench releases his decision in a section 520 review in *R v Muminawatum*.[851] While apparently section 520 reviews in Manitoba are often straightforward, in this one, Sheldon Muminawatum raises "a few uncommon issues which warranted a deeper analysis" one of which is his assertion that he should be released from custody because of COVID-19.[852] The other reasons that he puts forward as material changes in circumstances include the resulting lengthier amount of time he would now have to spend in custody awaiting his trial and the proclamation of section 493 [*sic*].[853]

While it is exciting to see an appellate court considering the application of section 493.2, in this case His Honour does not give it any real thought. This is because he concludes that it does not amount to a material change in circumstances within the context of section 520 because the transcript of the original bail hearing indicates that both sections 493.1 and 493.2 were raised by defence counsel.[854]

With respect to the COVID-19 issue, Martin J refers to both *Paramsothy*[855] and *CKT*,[856] from Ontario and Alberta respectively, before concluding, after a review of the specific evidence from Mr. Muminawatum's experience in custody, that "the Covid-19 pandemic, at this time, and specific to Manitoba provincial jails, is by itself a material change in circumstances for purposes of a s. 520 bail review application."[857] He further criticizes the decision in *CKT*[858] and other cases that COVID-19 is not relevant to the secondary ground

---

[849] *Gladue*, *supra* note 792.
[850] *Criminal Code*, *supra* note 10.
[851] *R v Muminawatum*, [2020] MJ No 101 (MBQB) [*Muminawatum*].
[852] *Ibid* at para 5. "In Manitoba, the s. 520 review is usually relatively straightforward, with the reviewing judge normally issuing an oral decision on-the-spot."
[853] *Ibid* at para 6. The statutory reference should be to ss 493.1 and 493.2, not s 493.
[854] *Ibid* at para 31.
[855] *R v Paramsothy*, 2020 ONSC 2314.
[856] *CKT*, *supra* note 824.
[857] *Muminawatum, supra* note 851 at para 48.
[858] *CKT*, *supra* note 824.

as being "a view that is overly rigid."[859] In an interesting comment, His Honour notes that logically COVID-19 has to be relevant to both the secondary and tertiary grounds:

> Against all of this, I cannot conclude that Covid-19 is not a relevant factor, even where detention has been ordered on the secondary ground. To find otherwise would, in the unique circumstances of this pandemic, undermine the public's confidence in the administration of justice. Ironically, it would mean that accused persons, detained on the tertiary ground, would be able to rely on Covid-19, as a material change in circumstances, while a bunkmate, denied bail because of the secondary ground, could not. Depending on the circumstances, it could also mean that Covid-19 could be considered in a s. 525 application for an accused denied bail, but could not be considered for that same person on a s. 520 application.[860]

Notwithstanding his conclusion that the material change in circumstances exists, Martin J concludes that it does not assist Mr. Muminawatum as he finds that continued detention is necessary for the protection of the public. In so finding, he relies on the applicant's criminal record, including at least seven breaches of previous bails and four convictions for failing to attend court. His Honour's brief concluding remark with respect to the applicant's indigenous status is simply: "I accept and consider s. 493 [*sic*] and *Gladue* considerations generally." Equally briefly, he concludes that "at this point, Covid-19 is not a factor weighing in favor of release. There are no cases of Covid-19 in Manitoba Provincial jails and there is nothing about Mr. Muminawatum that makes him particularly vulnerable."[861]

CONCLUSION

As this paper shows, many of the COVID-19 bail cases arrived in the courts very soon after the first wave of the pandemic hit Ontario in March 2020. Higher courts, those more likely to provide written reasons, were initially concerned with bail reviews. Some accused, many of whom may not even have attempted to get bail upon first being arrested, sought to use the pandemic as a basis on which to formulate a plan of release that probably would not have been approved by the court prior to COVID-19. Cases decided in the first days

---

[859] *Muminawatum, supra* note 851 at para 51.
[860] *Ibid* at para 58.
[861] *Ibid* at paras 61, 62 and 64.

and weeks of the pandemic, such as *TK*,[862] *JS*,[863] *Cotterell*,[864] *Knott*,[865] *TL*,[866] *Cain*[867] and *Rajan*,[868] all point to the unprecedented and terrifying nature of the pandemic as being a key factor, when considered under either the secondary and tertiary grounds, in leading to accused individuals being released in greater numbers.

Yet, as correctional centres remained COVID-19 free in the early weeks and months of the pandemic, other judges and justices of the peace, perhaps now more confident that the pandemic would not be as apocalyptic as originally thought, begin to look at cases and determine that, for many individuals when considering their specific circumstances, the existence of COVID-19 does not warrant a release from custody that otherwise would not have occurred.

The onset of the second and third waves of COVID-19 in Ontario, at the end of 2020 and in the spring of 2021, likely made courts again more sympathetic to the COVID-19 argument being made on accused persons' behalf. Certainly, by that time, the province's assurances that its safety measures would continue to keep correctional centres pandemic free had proven false and illusory. Unfortunately, Dr. Orkin was correct, and virtually every detention centre in Ontario, at some point in the last few months, has had a wave of COVID-19 cases sweep through its resident and staff population.

Fewer of these cases during the second and third waves have been reported. The initial glut of COVID-19 bail cases – those that argued the issue of the material change in circumstances – dried up as time marched on, and every individual who had been detained pre-COVID who wished to have a bail review had the chance to have one. As discussed earlier, COVID-19 cannot itself be a material change in circumstances on a bail review if it was in existence at the time of the initial bail hearing.

---

[862] *TK*, *supra* note 69.
[863] *JS*, *supra* note 114.
[864] *Cotterell*, *supra* note 122.
[865] *Knott*, *supra* note 475.
[866] *TL*, *supra* note 79.
[867] *Cain*, *supra* note 210.
[868] *Rajan*, *supra* note 125.

The third wave of COVID-19 subsided in Ontario in the late spring and early summer of 2021, and daily case counts were as low then as they have been since the early autumn of 2020. And while case counts begin to rise again in August 2021, perhaps now is the time to consider how the ebb and flow of the pandemic creates opportunities for new arguments to be made in courts on the issue of bail.

On May 12, 2021, Goldstein J of the Superior Court of Justice gives his decision in *R v Patel*.[869] Ismail Patel had been detained by a justice of the peace on 22 criminal charges, some of which involve firearms.[870] At the time of his original bail hearing, Mr. Patel had contracted COVID-19 while in custody at the Toronto South Detention Centre. One of the factors considered by the justice of the peace was that, if Patel was released and infected his sureties, his entire bail plan was at risk of falling apart.[871]

At the bail review, Mr. Patel's counsel argues that, since his client has now recovered from COVID-19, this constitutes a material change in circumstances. His Honour disagrees, relying on the Court of Appeal majority's decision in *JA*,[872] as he must: "The effect of COVID-19 must be 'significant in the sense that when considered along with the other evidence on the bail proceeding, it could reasonably be expected to have affected the result."[873] Goldstein J's review of the justice of the peace's decision satisfies him that Patel's COVID-19 infection was just one of the factors taken into account at the original bail hearing: "When the reasons are read as a whole, it is clear that she detained Mr. Patel not because he might have infected his sureties, but because the public would have been outraged that a man in his position were released. In other words, the justice of the peace would have detained Mr. Patel regardless of his COVID-19 status."[874]

As the population of Ontario gets vaccinated, and as the third wave of COVID-19 subsides but with a fourth wave now looming, what conclusions can be drawn and what lessons can be learned from these COVID-19 bail cases? The Court of Appeal in *JA*,[875] as indicated

---

[869] *R v Patel*, 2021 ONSC 3459, [2021] OJ No 2752 [*Patel*].
[870] *Ibid* at para 1.
[871] *Ibid* at para 17.
[872] *JA*, *supra* note 409.
[873] *Patel, supra* note 869 at para 18, citing *JA, supra* note 409 at para 55.
[874] *Patel, supra* note 869 at para 20.
[875] *JA*, *supra* note 409.

earlier, has set out the framework and the issues that need to be considered in bail reviews. Many of their conclusions are relevant to initial bail hearings as well. The existence of COVID-19, or presumably of any other future pandemic, is always worthy of consideration by a court. In theory, it could be relevant to any of or all the primary, secondary or tertiary grounds. But it is most likely to be looked at within the framework of the tertiary ground in clause 515(10)(c) of the *Criminal Code*,[876] as part of "all the circumstances" though this phrase also appears in clause 515(10)(b) as part of the wording of the secondary ground.

It is also the tertiary ground that fundamentally considers the concept of maintaining public confidence. The Supreme Court's expansion of the use of the tertiary ground in *St-Cloud*[877] is noted earlier in this paper. At the time, it was criticized by some academics who believed that it would result in increased pre-trial detention.[878]

In the early days of the pandemic, some cases were decided – perhaps in an understandable state of panic – on the basis that if the primary and secondary grounds were satisfied, COVID-19 should negate any need for an accused being detained on the tertiary ground. As 2020 unfolded, more of the cases coalesced around the concept that an individual accused, seeking to rely on COVID-19 as a reason that would justify release from custody, would need to present some specific evidence, tailored to that individual, that would likely indicate a greater susceptibility to the pandemic. As is so often the case in many legal decisions, then, there is no formula to be followed, and no list of boxes to be checked, but rather the specific relevant facts regarding COVID-19 that pertain to the specific individual will continue to guide further decisions regarding bail.

At the beginning of this paper, I briefly outlined that bail – even prior to the pandemic – has been a contentious and troubling issue in our criminal courts. COVID-19 has not made things any easier. Figuring out how to provide relevant COVID-19 medical evidence to the courts, and how to do so efficiently within the existing framework of the doctrine of

---

[876] *Criminal Code*, *supra* note 10.
[877] *St-Cloud*, *supra* note 5.
[878] See Don Stuart, "*St-Cloud*: Widening the Public Confidence Ground to Deny Bail Will Worsen Deplorable Detention Realities" (2015) 19 CR (7th) 337 (WL Can) and Davis MacAlister, "*St-Cloud*: Expanding Tertiary Grounds for Denying Judicial Interim Release" (2015) 19 CR (7th) 344 (WL Can).

judicial notice, has not been simple. COVID-19 has added another layer to an already complex and complicated situation that all too often causes individuals to remain in custody, despite the admonitions of the Supreme Court of Canada in *Antic*[879] and *Zora*.[880]

It is interesting that COVID-19, as an ingredient in the recipe for bail, seems most frequently to fit within the tertiary ground, building upon the Supreme Court's conclusion in *St-Cloud* that its previous rare applicability is no longer appropriate.[881] Indeed, in an ever complex society, consideration of any new societal developments – such as the COVID-19 pandemic – within the context of bail will likely occur through expanded use of the tertiary ground. It is an interesting side effect of the pandemic that more frequent use of the tertiary ground may now result in releases becoming more common, rather than rarer, as noted above in some of the post-*St-Cloud*[882] academic papers.

As outlined in a recent academic paper which summarizes some of the COVID-19 case law,[883] there are three ways, resulting from COVID-19, in which public confidence may now be more amenable to bail releases. First, the public would object to denying bail to defendants and exposing them to COVID-19 given the high rate of infections in detention centres.[884] Second, newly detained defendants may import COVID-19 into jails and put fellow inmates as well as prison staff at risk.[885] Third, as those in custody get released, their return to the community risks spreading the pandemic from detention centres into the general public.[886] As Skolnik states: "COVID-19 has forced courts to place greater emphasis on defendants' and inmates' fundamental interests when interpreting the notion of 'public confidence.'"[887]

---

[879] *Antic*, *supra* note 7.
[880] *Zora*, *supra* note 8. See Holly Pelvin, "Remand as a Cross-Institutional System: Examining the Process of Punishment before Conviction" (2018) 61:2 Can J Corr 66 at 67 which notes that roughly 38% of individuals who were remanded into custody in Ontario courts in 2015 were eventually found not guilty.
[881] See *St-Cloud, supra* note 5 at paras 5, 53 and 54.
[882] *Ibid*.
[883] Terry Skolnik, "Criminal Law During (and After) COVID-19" (2020) 43 Man LJ 145 at 167 – 168.
[884] *TK, supra* note 69 at para 60.
[885] *Rajan, supra* note 125 at paras 69 and 70; *Fraser, supra* note 210 at para 16. See also Jenny Carroll, "Pre-Trial Detention in the Time of COVID-19" (2020) 115 NW UL Rev 57 at 78 – 80.
[886] *Kazman, supra* note 284 at para 18.
[887] Skolnik, *supra* note 883 at 170 – 171.

Whether this emphasis on considering the interests of defendants within the context of the tertiary ground will continue post-pandemic remains to be seen. But it is an intriguing possibility. In closing, all justices of the peace and judges considering bail applications, at any stage, should always keep the words of Iacobucci J from *Hall* in mind: "At the heart of a free and democratic society is the liberty of all 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."[888] The COVID-19 pandemic and its direct impact on accused persons may indeed help the judiciary focus on these important words as they consider applications for bail.

[888] *Hall, supra* note 28 at paras 47 – 49.

BIBLIOGRAPHY

LEGISLATION

STATUTES

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*.

Controlled Drugs and Substances Act, SC 1996, c. 19.

Criminal Code, RSC 1985, c C-46.

Criminal Law Improvement Act, 1996, SC 1997, c 18.

Emergency Management and Civil Protection Act, RSO 1990, c E.9.

Health Protection and Promotion Act, RSO 1990, c H.7.

Justices of the Peace Act, RSO 1990, c J.4.

Quarantine Act, SC 2005, c 20.

Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, SC 2020, c. 17.

Safe Streets and Communities Act, SC 2012, c 1.

Tackling Violent Crime Act, SC 2008, c 6.

Youth Criminal Justice Act, SC 2002, c 1.

REGULATIONS

Closure of Establishments, O Reg 51/20.

Closure of Outdoor Recreational Amenities, O Reg 104/20.

Organized Public Events, Certain Gatherings, O Reg 52/20.

Rules for Areas in Shutdown Zone and at Step 1, O Reg 82/20.

JURISPRUDENCE

Ewert v Canada, 2018 SCC 30, [2018] 2 SCR 165.

Palmer v R, [1980] 1 SCR 759.

R v Abdullahi, 2020 ONCA 350.

R v AC, 2020 ONSC 2870.

R v AF, 2020 ONSC 2880.

R v Ali, 2020 ONSC 2374.

R v Anderson, 2018 ONSC 5720, [2018] OJ No 5246.

R v Antic, 2017 SCC 27, [2017] 1 SCR 509.

R v B(A) (2006), 204 CCC (3d) 490 (Ont Sup Ct).

R v Baidwan, 2020 ONSC 2349.

R v Barry-Charley, [2020] OJ No 4381 (ONSC).

R v BE, 2020 ONSC 3830.

R v Bear, 2020 SKQB 109.

R v Bell, 2020 ONSC 3962.

R v BMD, 2020 ONSC 2671.

R v Boast, 2020 ONSC 2684.

R v Bonito, 2015 ONSC 4928, [2015] OJ No 4629.

R v Brown, [2020] OJ No 1432 (ONCJ).

R v Budge, [2012] OJ No 2538 (ONSC).

R v Budlakoti, [2020] OJ No 1352 (ONSC).

R v Cahill, 2020 ONSC 2171.

R v Cain, 2020 ONSC 2018.

R v Carrington, 2020 ONCJ 258.

R v Chaouche, [2020] OJ No 1462 (ONCJ).

R v CJ, 2020 ONSC 1933.

R v CJ, 2020 ONSC 6154, 2020 CarswellOnt 14631.

R v CKT, 2020 ABQB 261.

R v Cole, 2020 ONCA 713.

R v Cotterell, [2020] OJ No 1433 (ONCJ).

R v Dang, 2015 ONSC 4254.

R v Dawson, 2020 ONSC 2481.

R v Downey, [2018] OJ No 6133 (ONSC).

R v DP, 2020 ONSC 3133.

R v D(R), 2010 ONCA 899.

R v Drabinsky, 2011 ONCA 647, 276 CCC (3d) 277.

R v EB, 2020 ONSC 4383.

R v Elliott, 2020 ONSC 2976.

R v Ellis, [2020] OJ No 1636 (ONCJ).

R v Esseghaier, 2015 ONSC 5855.

R v Esseghaier, 2019 ONCA 672.

R v FD, 2020 ONSC 3054.

R v Ferguson, [2002] OJ No 1969 (Sup Ct).

R v Find, 2001 SCC 32, [2001] 1 SCR 863.

R v Forbes, 2020 ONSC 1798.

R v Frantzy, [2020] OJ No 1549 (ONSC).

R v Fraser, 2020 ONSC 2045, [2020] OJ No 1411.

R v Gale, 2011 ONCA 144.

R v Gharibi, 2021 ONCJ 63.

R v Gibbs, 2019 BCPC 335.

R v Gladue, [1999] 1 SCR 688, 133 CCC (3d) 385.

R v GP, 2020 ONSC 3240.

R v Grant, 2020 ONSC 2957, [2020] OJ No 2109.

R v Greenidge, 2021 ONCJ 57.

R v Hall, 2002 SCC 64, [2002] 3 SCR 309, 167 CCC (3d) 449.

R v Halovich, 2020 ONSC 2709.

R v Hassan, 2017 ONCA 1008.

R v Hassan, 2020 ONSC 2265.

R v Hastings, 2020 ONSC 2083.

R v Haughton, 2020 ONSC 1890.

R v HK, 2021 ONSC 182.

R v Hoo-Hing, 2020 ONSC 6343, 2020 CarswellOnt 15248.

R v Hui, 2020 ONSC 3212.

R v Husbands, 2019 ONSC 6824.

R v Ibrahim, 2020 ONSC 2241, [2020] OJ No 1570.

R v Ipeelee, [2012] 1 SCR 433, 280 CCC (3d) 265.

R v Ishmael, 2019 ONSC 596.

R v JA, 2020 ONCA 660.

R v Jaser, 2020 ONCA 606.

R v Jesso, 2020 ONCA 280.

R v Jeyakanthan, 2020 ONSC 1984, [2020] OJ No 1409.

R v JL, 2020 ONSC 2144.

R v Jordan, 2016 SCC 27, [2016] 1 SCR 631, 335 CCC (3d) 403.

R v JR, 2020 ONSC 1938.

R v JS, 2020 ONSC 1710.

R v Kazman, 2020 ONCA 251.

R v KC, 2020 ONCJ 231.

R v King, 2020 ONSC 1935.

R v Kinghorn, 2020 ONSC 2399.

R v Knott, 2020 ONCJ 157.

R v Kochanska, 2020 ONCJ 385.

R v LaFontaine (1973), 13 CCC (2d) 316 (Ont HC).

R v LaFramboise (2005), 203 CCC (3d) 492 (Ont CA).

R v Ledinek, 2020 ONCJ 374, [2020] OJ No 3614.

R v Lumley, 2020 ONSC 6292, [2020] OJ No 4583.

R v Mansour, 2020 ONSC 3478.

R v McArthur, 2020 ONSC 2276.

R v McLean, 2020 ONCJ 298.

R v McRae, 2020 ONCA 498.

R v Mead, 2016 ONCJ 308.

R v MK, 2020 ONSC 2266.

R v Morales, [1992] 3 SCR 711, 77 CCC (3d) 91.

R v Mordue (2006), 223 CCC (3d) 407 (Ont CA).

R v Morgan (31 March 2020), M54170 (C67536) (Ont CA).

R v Morgan, 2020 ONCA 279.

R v Morris, 2020 ONSC 3526, [2020] OJ No 2548.

R v Muminawatum, [2020] MJ No 101 (MBQB).

R v Murphy, 2017 YKSC 34.

R v Mustard, 2020 ONSC 2973.

R v Myers, 2019 SCC 18.

R v Nasogaluak, 2010 SCC 6, [2010] 1 SCR 206.

R v Nelson, 2020 ONSC 1728.

R v Neverson, 2020 ONSC 2698.

R v Newman, 2020 ONSC 4879.

R v NY, 2021 ONSC 1398.

R v Obayendo, 2015 ONSC 6630, [2015] OJ No 5705.

R v O'Brien, [2020] OJ No 2805 (ONCJ).

R v Oland, 2017 SCC 17, [2017] 1 SCR 250.

R v Omeasoo, 2013 ABPC 328, 94 Alta L R (5^{th}) 244.

R v Omitiran, 2020 ONCA 261.

R v Osman, 2020 ONSC 2490.

R v Osman, 2021 ONCJ 25.

R v Papequash, 2021 ONSC 727.

R v Pascal, 2018 ONSC 2896.

R v Patel, 2021 ONSC 3459, [2021] OJ No 2752.

R v Pham, 2013 SCC 15, [2013] 1 SCR 739.

R v Phuntsok, 2020 ONSC 2158.

R v PK, 2020 ONSC 2694.

R v RA, [2020] OJ No 1416 (ONSC).

R v Rajan, 2020 ONSC 2118.

R v Robinson, 2009 ONCA 205, 95 OR (3d) 309.

R v Sakhiyar, 2018 ONSC 5767.

R v Samuel-Barriteau, 2020 ONSC 2108.

R v Samuels, 2015 ONSC 5798.

R v Sangster, 2020 ONCA 332.

R v Sappleton, [2020] OJ No 1531 (ONSC).

R v Shingoose, 2020 SKCA 45.

R v Sim (2005), 78 OR (3d) 183 (CA).

R v Simmons, 2020 ONSC 7209.

R v SM, 2020 ONCA 427.

R v Smith, 2020 ONSC 2668.

R v Spence, 2005 SCC 71, [2005] 3 SCR 458.

R v St-Cloud, 2015 SCC 27, [2015] 2 SCR 328.

R v Stevenson, 2020 ONCJ 291.

R v Stojanovski, 2020 ONCA 285.

R v Stone, 2020 ONCA 448.

R v Syed, 2020 ONSC 2195.

R v Syed, 2020 ONCJ 222.

R v TK, 2020 ONSC 1935.

R v TL, 2020 ONSC 1885.

R v Truong, 2020 ONCJ 613.

R v Tully, 2020 ONSC 2762, [2020] OJ No 1969.

R v Virag, 2020 ONSC 3255.

R v Watts, 2014 ONSC 6246.

R v Whyte, 2014 ONCA 268, 119 OR (3d) 305.

R v Williams, 2020 ONSC 2237.

R v WM, 2020 ONCA 266.

R v W(RE) (2006), 79 OR (3d) 1 (CA).

R v XY, 2020 ONCJ 320.

R v Yusuf, [2020] OJ No 1546 (ONSC).

R v Zora, 2020 SCC 14.

SECONDARY MATERIAL: MONOGRAPHS

Deshman, Abby & Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (Toronto: Canadian Civil Liberties Association and Education Trust, 2014), online: https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf).

Reasonable Bail? (Toronto: John Howard Society of Ontario, 2013).

Trotter, Gary. *The Law of Bail in Canada*, 3rd ed (Toronto: Thomson Reuters Canada, 2017).

Webster, Cheryl Marie. *"Broken Bail" in Canada: How We Might Go About Fixing It.* (Ottawa: Government of Canada, 2015).

SECONDARY MATERIAL: ARTICLES

Berger, Benjamin L and James Stribopoulos. "Risk and the Role of the Judge: Lessons from Bail" in Bernjamin L. Berger, Emma Cunliffe and James Stribopoulos, eds, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters, 2017) 305 – 326.

Carroll, Jenny. "Pre-Trial Detention in the Time of COVID-19" (2020) 115 NW UL Rev 57.

Calzavara et al. "Prevalence of HIV and Hepatitis C Virus Infections among Inmates of Ontario Remand Facilities" (2007) 177:3 CMAJ 257.

Friedland, Martin L. "The *Bail Reform Act* Revisited" (2012) 16 Can Crim LR 315.

Friedland, Martin L. "Reflections on Criminal Justice Reform in Canada" (2017) 64 Crim LQ 274.

Kouyoumdjian, Fiona et al. "Health Status of Prisoners in Canada: Narrative Review" (2016) Can Family Physician 215.

Kozloff, Nicole et al. "The COVID-19 Global Pandemic: Implications for People with Schizophrenia and Related Disorders" (May 2020) Schizophrenia Bull 1.

MacAlister, Davis. "*St-Cloud*: Expanding Tertiary Grounds for Denying Judicial Interim Release" (2015) 19 CR (7th) 344.

Miller, Adam. "Prison Health Care Inequality" (2013) 185:6 CMAJ 249.

Myers, Nicole Marie. "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017) 57 Brit J Crim 664.

Pelvin, Holly. "Remand as a Cross-Institutional System: Examining the Process of Punishment before Conviction" (2018) 61:2 Can J Corr 66.

Rankin, Micah B. "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Right-Based Approach" (2018) Crim LQ 280.

Roach, Kent. "A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?" (2008) 40 SCLR 717.

Rogin, Jillian. "Gladue and Bail: The Pre-Sentencing of Aboriginal People in Canada" (2017) 95 Can Bar Rev 325.

Skolnik, Terry. "Criminal Law During (and After) COVID-19" (2020) 43 Man LJ 145.

Stuart, Don. "*St-Cloud*: Widening the Public Confidence Ground to Deny Bail Will Worsen Deplorable Detention Realities" (2015) 19 CR (7^{th}) 337.

Yule, Carolyn and Rachel Schumann. "Negotiating Release? Analysing Decision Making in Bail Court" (2019) 61 Can J Corr 45.